SHARING GOVERNANCE: FAMILY LAW IN CONGRESS AND THE STATES

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Despite the federalism rhetoric that still marks political debate and judicial opinions, family law in the United States today is a complex mixture of state and federal law. This Article identifies and evaluates three distinct varieties of federalism in family law, each of which presents different pragmatic and constitutional questions. Congress has used its spending power to reconfigure state child support and child welfare laws on a cooperative federalism basis and its powers under the Commerce and Full Faith and Credit Clauses to legislate in areas that pose horizontal federalism problems. National laws may also preempt state family law in areas including civil rights, economic regulation, immigration, and foreign relations. Congress has been primarily responsible for defining the balance of national and state power over families, with the federal courts resisting national family legislation only if it seems likely to shift significant responsibility from the state courts to the federal courts. This Article concludes that, although Congress has substantial authority in family law, there are constitutional and pragmatic federalism reasons for Congress to limit national family legislation to subjects on which there is broad political consensus and strong support from the states.

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INTRODUCTION

Over the past generation, family law in the United States and worldwide has changed enormously, as has the institution of the family itself. The demographic facts are familiar: annual divorce rates in the United States increased dramatically after 1960,[1] and the percentage of births

[1] *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 2007, at 63 tbl.76 (2007). The rate peaked at 5.3 divorces per thousand individuals between 1979 and 1981 and has since dropped to 3.7. *Id.* By some projections, half or more of all marriages today will end in divorce. *See* ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 24 (rev. & enlarged ed. 1992).

out of wedlock has more than tripled since 1970.[2] In 1970, 85 percent of children under age eighteen were living with both of their parents; by 2005, that figure had dropped to 67 percent.[3] A legal transformation accompanied these demographic shifts: marriage regulation is much less strict than it was a generation ago, and the law now recognizes a wider range of informal family relationships.[4] Every state permits divorce based on non-fault grounds,[5] joint custody has become the norm in child custody law, and all states have replaced the discretionary approach to child support determination with formulas or guidelines. The status of children born out of wedlock and the legal position of unmarried fathers have been transformed by a series of new constitutional rules established by the Supreme Court.

These changes are not unique to the United States. Mary Ann Glendon has described the "unparalleled upheaval" in rules governing marriage and divorce throughout Western industrial societies during this period.[6] Although the social and legal changes have been especially dramatic in the United States, she notes "a remarkable coincidence of similar legal developments" at about the same time in different legal and political cultures worldwide.[7]

In the United States, a significant shift in the location of political and legal authority over family life has accompanied the transformation of family law. Until recently, family law was viewed as the province of state governments. In the tradition of dual federalism, states were sovereign in this area, and the national government played a relatively minor

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2 *See* BUREAU OF THE CENSUS, *supra* note 1, at 67 tbl.84; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995, at 77 tbl.94 (1995).

3 *See* BUREAU OF THE CENSUS, *supra* note 1, at 55 tbl.64.

4 *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 38–41, 80–82, 277–84 (1989). On the demographics of cohabitation, see CHERLIN, *supra* note 1, at 11–18.

5 *See* HERBERT JACOB, THE SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 80 (1988).

6 *See* GLENDON, *supra* note 4, at 1.

7 *Id.*; *see also* Tamar Lewin, *Family Decay Global, Study Says*, N.Y. TIMES, May 30, 1995, at A5 (reporting on a major study by the Population Council which indicates that traditional family structure is in a period of profound change worldwide); *Home Sweet Home: National Family Policies and Single Parenthood*, THE ECONOMIST, Sept. 9, 1995, at 25 (discussing the role that government should play in solving the problem of the vanishing two-parent family in both the United States and Europe).

role.[8] Over the past thirty years, however, this aspect of the American federalist tradition has also been transformed.[9]

Particularly in areas that concern children, both Congress and the Supreme Court are deeply involved in constructing and maintaining background norms of family regulation in the United States. Congress has enacted an extensive legislative program in family law since 1974, based on its spending[10] and commerce powers[11] under Article I, its power under the Full Faith and Credit Clause in Article IV,[12] and its enforcement power under Section 5 of the Fourteenth Amendment.[13] Congress also effectuates family policy with legislation based on its powers in areas such as taxation, bankruptcy, immigration, and foreign relations[14]. These laws cannot be dismissed as exceptions, nor easily reconciled with the traditional view that family law belongs to the states. Given this evolution, it is remarkable that the Supreme Court still continues to articulate a dual federalism approach to family law.[15]

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8 *See generally* Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950) (detailing the shift to a consolidated national power structure); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139, 142–50 (2001) (discussing dual federalism). In this respect, the United States was different from other federal nations, in which family law has been primarily a national subject. *See, e.g.*, Williams v. North Carolina, 317 U.S. 287, 304 (1942) (Frankfurter, J., concurring) (noting that the national legislatures in Canada and Australia have express authority to legislate concerning marriage and divorce); JULIEN D. PAYNE & MARILYN A. PAYNE, INTRODUCTION TO CANADIAN FAMILY LAW 8–12 (1994) (noting that the Canadian national Parliament has exclusive legislative jurisdiction over marriage and divorce).

9 *See generally* Linda Henry Elrod, *The Federalization of Child Support Guidelines*, 6 J. AMER. ACAD. MATRIM. LAWYERS 103 (1990) (discussing legislation in the 1980s that federalized child support enforcement); Ann Laquer Estin, *Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541 (1998) (investigating federalism issues in national child support enforcement); Judith Resnik, *"Naturally" Without Jurisdiction: Women, Jurisdiction and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1721–29 (1991) (explaining the role that gender plays in the allocation of work between state and federal courts); Robert G. Spector, *The Nationalization of Family Law: Introduction to the Manual for the Coming Age*, 27 FAM. L.Q. 1 (1993) (describing major changes to the federal role in family law matters). For further reading on federalism and family law, see *infra* note 21. For an early discussion of this legislation, see KENNETH R. REDDEN, FEDERAL REGULATION OF FAMILY LAW (1982).

10 U.S. CONST. art. I, § 8, cl. 1.

11 U.S. CONST. art. I, § 8, cl. 3.

12 U.S. CONST. art. IV, § 1.

13 U.S. CONST. amend. XIV, § 5.

14 Writing in 1992, Congresswoman Patricia Schroeder of Colorado made the case for greater involvement of the federal government on behalf of children and families, arguing specifically that economic and demographic changes had compromised families' capacity to provide. Congresswoman Patricia Schroeder, *Toward Effective and Family Friendly National Policies for U.S. Children and Their Families*, 69 DENV. U. L. REV. 303, 304–08 (1992).

15 *See infra* notes 193–99, 209–11 and accompanying text (discussing United States v. Morrison, 529 U.S. 598 (2000) and United States v. Lopez, 514 U.S. 549 (1995)); *see also* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619 (2001) (discussing harms of categorical federalism). Ironically, the Court itself has played a central role in the nationalization of family law. *See infra* notes 49–54 and accompanying text.

Family regulation in the United States has become a shared project of the state and federal governments. But shared regulation in family law is different in many respects from cooperative federalism in other spheres.[16] National family policy, developed against the background of a strong tradition allocating family governance to the states, is reflected in a patchwork of statutes and programs under the jurisdiction of multiple executive agencies and congressional committees. These diverse enactments pull into a single frame all three branches of both the national government and state governments. As Judith Resnik suggested in another context, the realms of national and state government are interdependent in family law, and the boundaries between them are shifting and permeable.[17] In light of these developments, the most interesting and important federalism questions are pragmatic and prudential, but the federalism tropes that pervade our political and judicial discourse have tended to obscure that reality.

This Article surveys this new world and maps its contours, which the literature has not systematically explored. Based on this survey, this Article draws conclusions about the interaction of national and state power in family law. There are at least three different federalisms in family law, with no centralized or coordinated policy or theory that applies across these distinct legislative contexts. Despite the Supreme Court's continued reliance on dual federalism arguments, the federal courts have long deferred to Congress's activity in most of these settings, leaving the political branches with primary responsibility for setting the balance of federalism in family law.

Part I introduces the problem of federalism and family law. Part II considers legislation premised on the spending authority of the national government, which implements a cooperative federalism approach to children's welfare. These programs can be understood as a policy response to broad demographic changes, constructed as Congress recognized that states required significant federal help to respond to these changes. Although Congress did not frame the programs in terms of children's rights, the central normative pillar of this system is the formulation of children's interests as sufficiently important to justify significant national expenditures. The challenge of building this legislation lies in balancing a strong national role in making funding decisions and setting policy parameters with substantial state responsibility for imple-

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16 *See, e.g.*, New York v. United States, 500 U.S. 144, 167 (1992) (considering legislation based on commerce power regulating nuclear waste); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264, 289 (1980) (referring to conditional preemption scheme in environmental regulation); King v. Smith, 392 U.S. 309, 316 (1968) (referring to conditional federal spending for AFDC grant program).

17 Symposium, *Afterword: Federalism's Options*, 14 YALE L. & POL. REV. 465, 479–85 (1996).

menting those policies. This balance has been regulated primarily through the political process, rather than by the federal courts.

Part III analyzes horizontal federalism issues addressed by Congress's family legislation under the Commerce Clause and the Full Faith and Credit Clause. These enactments address conflicts that result from the borders between states, the differences in state laws, and the difficulty of assigning responsibility for a family to a single state. Although the federal government is uniquely situated to address these problems, it has often proved reluctant to take on this role. Congress, the federal courts, and federal law enforcement officials have avoided legislation that would define a substantial role for the federal courts in interstate family disputes. In this context, the legacy of dual federalism impedes national solutions to important interstate problems. Paradoxically, despite its historical reluctance to take on this mediating role, Congress acted preemptively in 1996 by passing the Defense of Marriage Act,[18] a departure from the national government's traditional policy of deference to state marriage law.

Part IV examines the family law implications of federal legislation in areas such as civil rights, economic regulation, immigration, and foreign relations. Congress has unquestioned constitutional authority to act in these areas. Under the Supremacy Clause in Article IV, Section 2 of the Constitution, this federal legislation preempts inconsistent state laws.[19] In some circumstances in which the federal courts have found such preemption, Congress has responded with legislation that harmonizes federal and state family policy. The Supreme Court has left the federalism questions in these areas to Congress, which determines whether and when national uniformity is important enough to override diverse state family policies.

Part V returns to the broad federalism question, observing that the Supreme Court has left most of these questions to Congress, the Executive Branch, and the political process, intervening only to resist legislation that would shift family-related litigation to the federal courts. Focusing on Congress, this Article concludes by suggesting factors that Congress should consider before legislating family law matters.[20]

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18 Pub. L. No. 104-199, 110 Stat. 2419 (1996).

19 U.S. CONST. art. IV, § 2.

20 This Article conceptualizes family law to include a wide range of legal interventions that serve to shape, support, and regulate family life. On the importance of this broad approach, see Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004). Although broad, the analysis here does not extend to some subjects such as inheritance law or education law that also shape or significantly affect families.

I. FEDERALISM AND FAMILY LAW

Within the immense literature on federalism, a small subset centers on federalism questions concerning the family and family law.[21] In an article exploring the treatment of women in the federal courts, Professor Judith Resnik describes the significant impact of federal law on families, and contrasts this complex reality with the categorical arguments made for federal court abstention from cases involving domestic relations.[22] Professor Resnik argues that the involvement of both federal and state governments in family law is unavoidable, and suggests that joint governance presents important opportunities for the development and elaboration of norms.[23]

In an article based in political theory, Professor Anne Dailey uses a communitarian approach to defend traditional state authority over families.[24] Although she argues that states are a better location for normative political debate about the family,[25] she also conceives of a substantial role for the national government. Professor Dailey sees federal government as essential for three purposes: protecting constitutional rights to equality, individual privacy, and parental authority;[26] establishing national rules to settle interstate jurisdictional disputes;[27] and allocating national resources to the states.[28] But these uses of national power challenge the primacy of state authority and significantly alter the terms on which state and local communities carry on their own normative debates.

While the Constitution does not indicate where authority for family matters lies,[29] the Supreme Court established a tradition of abstention from family law questions during the nineteenth century that remains

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21 *See, e.g.*, Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994) (examining the traditional unwillingness of federal courts to handle family law cases); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787 (1995) (explaining the fundamental role of localism in the federal system, and arguing for state sovereignty over family law matters); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (examining the historical development of "localism" from the time of Reconstruction and the role it plays in the current debate over family law's place in the federal system); Sylvia Law, *Families and Federalism*, 4 J.L. & POL'Y 175 (2000) (exploring how federal family law has been exercised); Resnik, *supra* note 9.

22 *See* Resnik, *supra* note 9, at 1721–29, 1739–50; *see also* Resnik, *supra* note 15. Naomi Cahn has argued that federal court jurisdiction in domestic relations diversity cases would be appropriate and useful in situations in which there is a risk of state court bias against an out-of-state litigant. *See* Cahn, *supra* note 21, at 1116–20.

23 Resnik, *supra* note 9, at 1750–59.

24 Dailey, *supra* note 21, at 1861–71; *see also* Resnik, *supra* note 9, at 1751–52.

25 Dailey, *supra* note 21, at 1791.

26 *Id.* at 1881–85.

27 *Id.* at 1885–87.

28 *Id.*

29 Historians and other scholars have elaborated the connection between the Civil War amendments and family law questions. *E.g.*, NANCY F. COTT, PUBLIC VOWS: A HISTORY OF

largely unchanged.[30] The Court grounded its decisions in the tradition of dual federalism, in which areas of authority, including family law, were understood to belong exclusively to either the state or national government.[31] These early opinions are still cited for the proposition that states bear exclusive authority for family law matters, but these cases concerned federal judicial authority, not legislative power.

The assertion that family law belongs to the states seriously oversimplifies the matter. For over a century, the Supreme Court has set ground rules for conflict of laws problems that arise when family litigation stretches across state borders. Supreme Court decisions define the extent to which state courts can exercise jurisdiction over out-of-state parties[32] and the extent to which other states must recognize and enforce family law decrees.[33] The Court's willingness during the past century to strike down aspects of state laws concerning marriage, divorce, legitimacy, parental rights, and reproductive conduct on a variety of constitutional grounds also contradicts the assertion that family law questions belong to the states.

On the legislative side, Congress has used its commerce and spending powers to reform or regulate family life for many years. The Comstock Act of 1873 outlawed the transportation of contraceptives across state lines,[34] and the Mann Act of 1910 prohibited the transportation of women across state lines for prostitution or any other immoral purpose.[35] The Maternity Act of 1921 provided for appropriations to the states for a

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MARRIAGE AND THE NATION 77–104 (2000); PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 5 (1997); Hasday, *supra* note 21, at 1319–57.

30 *In re* Burrus, 136 U.S. 586, 594 (1890); Barber v. Barber, 62 U.S. 582, 583 (1859); Barry v. Mercein, 46 U.S. 103, 116–18 (1847).

31 *See* Dailey, *supra* note 21, at 1796–805.

32 *E.g.*, Kulko v. Superior Court of Cal., 436 U.S. 84, 85 (1978) (holding that in personam jurisdiction required to litigate child support); *cf.* May v. Anderson, 345 U.S. 528, 528–29 (1953) (holding that no full faith and credit required for custody order entered without in personam jurisdiction).

33 *E.g.*, Williams v. North Carolina, 317 U.S. 287 (1942) (overruling Haddock v. Haddock, 201 U.S. 562 (1906)). *See generally* Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381 (2007) (detailing how the *Williams* decision fundamentally changed the balance of power in divorce law by shifting the focus from a balancing of state interests to a balancing of the interests of the parties directly involved).

34 Comstock Act, ch. 258, § 1, 17 Stat. 598 (1873), *amended by* Pub. L. 91-662, 84 Stat. 1973 (1971) (codified as amended at 18 U.S.C. §§ 1461, 1465); *see also* COTT, *supra* note 29, at 124–26.

35 White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421–2424); *see also* Cleveland v. United States, 329 U.S. 14, 16–18 (1946); Caminetti v. United States, 242 U.S. 470, 489–99 (1917). *See generally* COTT, *supra* note 29, at 146, 194.

program designed to reduce maternal and infant mortality.[36] Congress has also directly legislated family law matters by enacting laws governing income taxes, social security benefits, military retirement pay, bankruptcy, and immigration.[37]

Beyond these specific legislative programs, there are other close connections between national policy and politics and marriage and family issues. Nancy Cott writes: "From the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy, sprouting repeatedly as the nation took over the continent and established terms for the inclusions and exclusion of new citizens."[38] Cott's work details the ways national authorities used marriage and family roles to shape the entitlements and obligations of male and female citizens and define the membership rights of groups, including freed slaves, Native Americans, and Asian immigrants. This history has important federalism dimensions, reflected in the debates over adoption of the Civil War amendments to the Constitution[39] and in the conflict over Mormon polygamy in the Utah Territory.[40]

Following its first ventures into family policy in the nineteenth and early twentieth centuries, Congress claimed a more significant role with the Aid to Dependent Children program, enacted as Title IV of the Social Security Act of 1935.[41] Initially, the program followed the tradition of English poor law,[42] but this narrow focus began to widen in 1974 when Congress instituted a series of new programs to improve child support

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36 Sheppard-Towner (Maternity) Act, Pub. L. No. 67-97, 42 Stat. 224 (1921); *see also* Massachusetts v. Mellon, 262 U.S. 447, 488–89 (1923) (sustaining legislation against a Tenth Amendment challenge).

37 For a demonstration of the broad scope of this type of national family law, see Office of the GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, REPORT TO THE HONORABLE HENRY J. HYDE, CHAIRMAN, COMMITTEE ON THE JUDICIARY, HOUSE OF REPRESENTATIVES, GAO/OCG 97-16 (1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf (identifying over 1,000 sections of the U.S. Code in which marital status is a factor in determining benefits, rights, or privileges).

38 COTT, *supra* note 29, at 2.

39 Cott describes the strong parallels between marriage and slavery in the law of "domestic relations" and in debates over states' rights and traces these themes through the Congressional debates over the Fourteenth Amendment and the Civil Rights Act. COTT, *supra* note 29, at 94–103; *see also* DAVIS, *supra* note 29, at 66–77; Hasday, *supra* note 21, at 115–17.

40 COTT, *supra* note 29, at 111–15, 118–20.

41 Social Security Act of 1935, tit. IV, Pub. L. No. 74-271, 49 Stat. 620 (1935). *See generally* Deborah Maranville, *Welfare and Federalism*, 36 LOY. L. REV. 1, 13–27 (1990).

42 *See generally* Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status Part I*, 16 STAN. L. REV. 257 (1964); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status Part II*, 16 STAN. L. REV. 900 (1964); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status Part III*, 17 STAN. L. REV. 614 (1965) [hereinafter tenBroek, *Part III*].

enforcement and paternity determination,[43] protect children from neglect and abuse,[44] and increase delinquency prevention efforts and improve state juvenile justice systems.[45] Since 1974, these programs have expanded significantly, with Congress frequently drawing on sources of authority beyond its spending power to legislate in a range of family law contexts.

Historically, the Supreme Court, not Congress, presided over the most sweeping nationalization of family law. Since the 1960s, the Court's due process and equal protection decisions have mandated significant shifts in state laws governing marriage,[46] reproduction,[47] legitimacy,[48] and the rights of unwed fathers.[49] The Court did not always seem to have intended or anticipated the broad impacts of its rulings, and many sweeping decisions were followed by attempts to modify or narrow the constitutional principles established.[50] During the 1980s and 1990s, several decisions hinted that the Court would treat constitutional claims concerning private life more cautiously,[51] but it has not repudiated its broader role.[52] The Court's legacy also persists in areas of family law that remain unsettled because of the mixed signals sent by these deci-

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43 Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975). *See generally* HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 307–53 (1981) (discussing congressional debate in the late 1940s on the "Runaway Pappy Act," a predecessor to this effort); Resnik, *supra* note 15 (examining federal child support enforcement program).

44 Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (1974). *See generally* LELA B. COSTIN ET AL., THE POLITICS OF CHILD ABUSE IN AMERICA 112–17 (1996).

45 Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended principally at 42 U.S.C. §§ 5601–5672).

46 *See*, *e.g.*, Turner v. Safley, 482 U.S. 78 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967); Griswold v. Connecticut, 381 U.S. 479 (1965).

47 *See*, *e.g.*, Carey v. Population Serv. Int'l, 431 U.S. 678 (1977); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972).

48 *See*, *e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Gomez v. Perez, 409 U.S. 535 (1973); Levy v. Louisiana, 391 U.S. 68 (1968).

49 *See*, *e.g.*, Caban v. Mohammed, 441 U.S. 380 (1979); Stanley v. Illinois, 405 U.S. 645 (1972).

50 *See generally* Homer H. Clark, Jr., *The Supreme Court Faces the Family*, 5 FAM. ADVOC. 20, 21 (1982) (discussing the broad impacts of these rulings).

51 *E.g.*, Planned Parenthood v. Casey, 505 U.S. 833 (1992); Michael H. v. Gerald D., 491 U.S. 110 (1989); Bowers v. Hardwick, 478 U.S. 186 (1986).

52 *See* Lawrence v. Texas, 539 U.S. 558 (2003) (protecting right to engage in private consensual homosexual relations); Troxel v. Granville, 530 U.S. 57 (2000) (reaffirming parental liberty interest as an aspect of due process).

sions.[53] This history conflicts with the Court's continuing articulation of the view that authority over family law matters belongs to the states.[54]

Although both Congress and the Supreme Court played significant roles in the nationalization of family law, the two institutions have done so largely in isolation from each other. Congress has not responded directly to most of the Court's constitutional decisions concerning individual and family rights in private life,[55] and the Court has only rarely considered direct challenges to the validity of federal family legislation.[56] After federal family law statutes are construed by the Court, Congress sometimes amends these statutes to accomplish its purposes.[57] Some recent legislation has involved the federal courts more extensively in family regulation,[58] and Congress has edged closer to revisiting constitutional questions previously addressed by the Court.[59]

In current usage, "federalism" has strong political overtones, implying a normative commitment to decentralization and local control.[60] As various writers have noted, however, both liberals and conservatives in the United States have been eager to harness the power of national legis-

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53 *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 155–72 (2d ed. 1988) (regarding protection for illegitimate children); *id.* at 855–62 (regarding the constitutional position of a nonmarital father).

54 *E.g.*, Elk Grove Unified Sch. Dist. v. Nedow, 542 U.S. 1, 12–18 (2004) (invoking state responsibility for domestic relations as a factor in making a prudential standing determination); United States v. Lopez, 514 U.S. 549, 564–65 (1995); Ankenbrandt v. Richards, 504 U.S. 689 (1992) (reaffirming a "domestic relations exception" to diversity jurisdiction).

55 The most significant exception is the continuing effort to overturn *Roe v. Wade* by constitutional amendment. *See generally* Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 614 n.9 (2004).

56 *Cf.* United States v. Morrison, 529 U.S. 598 (2000) (presenting one of the rare cases in which the Supreme Court considered a challenge to federal family legislation).

57 *See, e.g.*, Suter v. Artist M., 503 U.S. 347 (1992); Thompson v. Thompson, 484 U.S. 174 (1986). For more discussion on these cases, see *infra* notes 127–30, 254–56 and accompanying text. Other cases construing these statutes include Blessing v. Freestone, 520 U.S. 329 (1997), and Sullivan v. Stroop, 496 U.S. 478 (1990). *See* discussion *infra* note 106 and accompanying text.

58 For example, new federal criminal statutes, enforced by prosecutions in the federal courts, are discussed *infra* in Part III.A, and the Hague Convention on Child Abduction, which allows individuals to bring an action for return of a child in state or federal court, is discussed *infra* in Part IV.D.

59 As part of its 1996 welfare reform legislation, Congress mandated that states pass the Uniform Interstate Family Support Act, which includes long-arm jurisdictional provisions that may conflict with the Court's approach to the minimum contacts requirement in *Kulko v. Superior Court*, 436 U.S. 84 (1978). *See* Carol S. Bruch, *Statutory Reform of Constitutional Doctrine: Fitting* International Shoe *to Family Law*, 28 U.C. DAVIS L. REV. 1047 (1995) (arguing that the Court would likely defer to Congress if Congress reformed the existing constitutional rules on jurisdiction in custody and support disputes).

60 On the difference between decentralization and federalism, see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910–14 (1994).

lation to secure their social and political goals.[61] Aside from the immediate politics of these measures, federalism raises a series of governance questions that arise in the context of any union or combination of governmental units, and even in the context of international law.[62]

Working with the example of American family law, federalism poses three types of difficulties. First, when Congress and the Executive Branch legislate and regulate in areas that overlap with areas of state authority, there may be vertical conflicts between national and state authority that are mediated by the federal courts under the Constitution. Most of the literature on federalism focuses on these structural questions concerning the scope and limits of federal power. As national law has grown in scope and importance, so has the likelihood that it will conflict with state law.

Second, even with respect to family law matters regulated exclusively by the states, there may be horizontal or interstate conflicts, and a corresponding need for mechanisms to address coordination problems arising from variations among state and local laws and the limits to jurisdiction in any one place.[63] In the United States, the constitutional guarantee of full faith and credit recognizes the importance of this problem, although the law of conflicts teaches that this provision is neither self-explanatory nor self-enforcing.[64]

Third, there are direct conflicts between state and national law that are not typically analyzed as federalism problems. The Constitution, as interpreted by the federal courts, constrains state governmental authority over family law.[65] In addition, national legislation may significantly impact state family law. When state and national interests collide, national interests prevail, and the courts address these conflicts in terms of preemption or abstention.[66]

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61 *See, e.g.*, Todd E. Pettys, *The Mobility Paradox*, 92 GEO. L.J. 481, 493–96 (2004) ("To a remarkable extent, however, Americans of all political persuasions—conservatives, moderates, and liberals alike . . . are unwilling to forgo the opportunity to establish federal standards on issues they regard as significant.").

62 *See* George A. Berman, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 331, 403–55 (1994).

63 *E.g.*, Williams v. North Carolina, 317 U.S. 287 (1942). *See generally* Estin, *supra* note 33 (discussing how the Court fundamentally altered state power over the family by extending to individuals greater control of their marital status).

64 The European Union has addressed analogous challenges through regulations. *See* Council Regulation 2201/2003, Concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, 2003 O.J. (L 338) 1 (EC). This is also known as the "Brussels Ilbis Regulation."

65 *See supra* notes 46–49 and accompanying text. In Europe, the European Court of Human Rights performs a similar function.

66 For example, cases involving federal retirement benefits invoke preemption. *See* discussion *infra* Part IV.B.2. Abstention has been an issue in recent cases under the Hague child abduction convention. *See* discussion *infra* Part IV.D.1. *See also* Joseph A. *ex rel.* Wolfe v.

The consensus favoring national power is strongest when there are either horizontal or vertical conflicts between governments caused or aggravated by the boundaries between states or the separation of state and national governments. Enforcement of child support orders, recognition of divorce decrees across state lines, and the definition of "spouse" or "child" for purposes of federal income tax or Social Security benefits fall into this category. Under a weak view of national power in family law, national legislation is only appropriate to remedy these federal problems. It follows that Congress should avoid enacting other legislation that concerns families, particularly legislation affecting the core areas of family regulation (usually defined as marriage, divorce, and child custody).[67]

In contrast, if one takes a strong view of national authority, a much wider range of legislation seems appropriate. The expansive conception of national power that emerged during the New Deal and Civil Rights eras reflects a strong view. The wide-ranging and comprehensive national family legislation described in the sections that follow demonstrates the power of this approach. As key national institutions, Congress and the Court play a critical role in addressing national problems. Under the strong view, the principal limits on the nationalization of family law are the resources that Congress is willing to commit, and the capabilities of the federal agencies and courts called on to implement these new systems or legal rights. Even under the strong view of national power, however, state courts, legislatures, and local administrative and law enforcement agencies continue to do most of the daily work of family law. This reality suggests the importance of mechanisms to balance the authority and coordinate the efforts of these separate sovereigns.

II. COOPERATIVE FEDERALISM AND CHILD WELFARE

Congress has used spending programs as a lever to shift the fundamental direction of state family policy. State laws governing paternity, adoption, foster care, child support, and child protection now evolve based on a federal design, as do laws regulating the family behavior of individuals who receive federally supported welfare benefits. The cost of these programs to the national government shows a substantial federal commitment to family policy and children's welfare. For fiscal year 2008, the budget of the Administration for Children and Families in the Department of Health and Human Services included more than $2 billion for child support enforcement programs, more than $6.8 billion for foster care and adoption assistance, and more than $17 billion in block grant funding to cover Temporary Assistance to Needy Families and child wel-

Ingram, 275 F.3d 1253 (10th Cir. 2002) (holding that abstention was warranted in case challenging operation of state child welfare system).

67 *See* Dailey, *supra* note 21.

fare services.[68] All state governments participate in these grant programs, which establish a cooperative relationship between the states and the national government. These programs are coordinated through a process of policy direction and oversight directed by the Department of Health and Human Services and enforced by a complicated overlay of fiscal incentives, performance reviews, and penalties.[69]

There is little question that Congress's extensive involvement in family policy is constitutional under the Spending Clause. Under Article I, Section 8 of the Constitution, Congress has authority "to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States."[70] The Supreme Court has consistently held that Congress may use its spending power to achieve ends it could not reach under its other enumerated powers, so long as the legislation is in pursuit of the general welfare.[71] Although these decisions articulate limits on the spending power, the Court has sustained every bill passed pursuant to the spending power that it has considered since 1937, and has never invalidated a conditional federal spending program for state or local governments.[72]

In *South Dakota v. Dole*, the Court enumerated several restrictions on Congress's spending power.[73] First, "the exercise of the spending power must be in pursuit of 'the general welfare,'" and on this question, "courts should defer substantially to the judgment of Congress."[74] Second, Congress must impose any conditions unambiguously, so that the

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68 OFFICE OF LEGISLATIVE AFFAIRS AND BUDGET, BUDGET INFORMATION FOR ADMINISTRATION FOR CHILDREN AND FAMILIES, FISCAL YEARS 2006–2008 (2008), *available at* http://www.acf.hhs.gov/programs/olab/budget/2008/fy2008apt.htm (last visited Oct. 13, 2008).

69 *See generally* General Temporary Assistance for Needy Families Provisions, 45 C.F.R. § 260 (2006) (regulating family assistance programs); State Plan Approval and Grant Procedures, 45 C.F.R. § 301 (2006) (regulating child support enforcement programs); Requirements Applicable to Title IV-E, 45 C.F.R. § 1356 (2007) (regulating foster care assistance programs). The House Ways and Means Committee publishes detailed background information and data on all these programs. *See* STAFF OF H.R. COMM. ON WAYS AND MEANS, 108TH CONG. 2D SESS., GREEN BOOK (Comm. Print 2004), *available at* http://www.gpoaccess.gov/wmprints/green/index.html (last visited Oct. 13, 2008).

70 U.S. CONST. art. I, § 8. This provision became a much more important source of national power with the passage of the national income tax in 1916. The Supreme Court considered the scope of this authority in a family law context when it upheld the Maternity Act in *Massachusetts v. Mellon*, 262 U.S. 447 (1923). *See generally* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995); David E. Engdahl, *The Spending Power*, 44 DUKE L.J. 1 (1994); Albert J. Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987).

71 *See* Helvering v. Davis, 301 U.S. 619 (1937); Chas. C. Steward Mach. Co. v. Davis, 301 U.S. 548 (1937); United States v. Butler, 297 U.S. 1 (1936). *See generally* Engdahl, *supra* note 70.

72 *See* Rosenthal, *supra* note 70, at 1110, 1130.

73 South Dakota v. Dole, 483 U.S. 203 (1987); *see also* New York v. United States, 505 U.S. 144 (1992).

74 *Dole*, 483 U.S. at 207.

states are able "to exercise their choice knowingly, cognizant of the consequences of their participation."[75] Conditions on federal grants must be related "to the federal interest in particular national projects or programs."[76] Finally, the particular conditions must not violate other constitutional provisions.[77]

Cases such as *Dole* establish that Congress does not impose conditions for grants of federal funds on the states when states choose to participate in federal programs. The state's decision to participate is sufficient consent to Congress's terms to defeat any constitutional objections.[78] This interpretation gives Congress free rein to design and mandate national family programs, provided it is willing to appropriate a sufficient amount to induce the states to participate.

A. Public Welfare Programs

Much of the national legislation concerning children is tied to the Social Security Act. One component of the original 1935 legislation was Aid to Dependent Children,[79] which made federal matching funds available to states that created programs to aid children with a dead, disabled, or absent parent. At first a minor part of the legislation, the program became more prominent—and more controversial—as the numbers of recipients increased and states began to find grounds to deny or terminate assistance.[80] In 1968 the program was renamed Aid to Families with Dependent Children (AFDC), and the Supreme Court began to strike down additional eligibility restrictions imposed by states, such as "man-in-the-house" rules[81] and residency requirements.[82]

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75 *Id.* (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

76 *Id.*

77 *Id.* at 207–08. In *Dole*, Justices Brennan and O'Connor dissented on the basis that the legislation at issue—conditioning federal highway funds on states adoption of a drinking age of twenty-one—fell within the powers reserved to the states under the Twenty-first Amendment. Justice O'Connor also concluded, "[E]stablishment of a minimum drinking age of 21 is not sufficiently related to interstate highway construction to justify so conditioning funds appropriated for that purpose." *Id.* at 213–14.

78 *See, e.g.*, *Pennhurst State Sch. & Hosp.*, 451 U.S. at 2.

79 *See* Social Security Act of 1935, Pub. L. No. 271, tit. IV, 49 Stat. 620, 627–29 (1935).

80 *See* Maranville, *supra* note 41, at 15–20.

81 *See, e.g.*, Lewis v. Martin, 397 U.S. 552 (1970) (holding that without proof of actual contribution the state may not consider the child's resources to include the income of a nonadopting stepfather or a man assuming the role of spouse); King v. Smith, 392 U.S. 309 (1968) (holding that having a substitute father in the house did not disqualify the defendant from receiving ADFC).

82 *See* Shapiro v. Thompson, 394 U.S. 618 (1969) (holding that states may not limit eligibility for welfare benefits to persons who have resided in the state for at least one year). In addition, the Court struck down state rules prohibiting college students or military dependents from receiving benefits. *See* Carleson v. Remillard, 406 U.S. 598 (1972); Townsend v. Swank, 404 U.S. 282 (1971). The Court also held that welfare recipients have a property

As the AFDC program expanded and national politics shifted,[83] Congress began to search for ways to contain or reduce costs.[84] After extensive modifications in 1981[85] and 1988,[86] welfare reform legislation in 1996 replaced AFDC with a new block grant system called Temporary Assistance for Needy Families (TANF).[87] The new law expanded the range of decisions left to the states, but it also set important ground rules for state family policy.[88]

Welfare law is often excluded from the scope of "family law," but incorporates a great deal of family policy.[89] Congress explicitly made this link in its findings accompanying the 1996 welfare reform legislation.[90] The linkage is also manifest in federal laws requiring that states obtain cooperation from aid recipients in establishing paternity and child support orders,[91] limits on the circumstances in which teenaged parents can receive assistance,[92] and funding for grants to promote access and

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interest in their benefits, and therefore notice and a hearing were constitutionally required to terminate benefits. Goldberg v. Kelly, 397 U.S. 254 (1970).

Other aspects of the welfare rights litigation campaign proved unsuccessful. *See, e.g.*, Wyman v. James, 400 U.S. 309 (1971) (holding that welfare officer's entry into a recipient's home did not violate Fourth Amendment); Dandridge v. Williams, 397 U.S. 471 (1970) (upholding state regulation placing monthly maximum on AFDC grants).

83 *See* Maranville, *supra* note 41, at 15–20.

84 *See id.* at 21–27.

85 *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. XXIII, 95 Stat. 357, 843–74 (1981). *See generally* Sylvia A. Law, *Women, Work, Welfare and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249, 1271–79 (1983) (critiquing the 1981 revisions to the Social Security Act).

86 *See* Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343, 2343–2428 (1988).

87 *See* Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105, 2105–2278 (1996).

88 *See*, *e.g.*, 42 U.S.C. § 602–619 (2000). *See generally* Estin, *supra* note 9, at 550, 585–86. For criticisms of the substantive family policies implicit in PRWORA, see Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287 (1996); Law, *supra* note 21; Arlene Skolnik, *The Politics of Family Structure*, 36 SANTA CLARA L. REV. 417 (1996). *Contra* David Blankenhorn, *The State of the Family and the Family Policy Debate*, 36 SANTA CLARA L. REV. 431 (1996). Some data suggest that the increased pressure to work under PRWORA may discourage marriage. *See* Nina Bernstein, *Strict Limits on Welfare Benefits Discourage Marriage, Studies Say*, N.Y. TIMES, June 3, 2002, at A1.

89 *See* Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002); Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229 (1999). *See generally* tenBroek, *Part III*, *supra* note 42, at 614–38.

90 *See* PRWORA § 101.

91 *See* 42 U.S.C. § 608(a)(2) (2000).

92 *See id.* § 608(a)(4)–(5). The PRWORA did not require a "family cap," which was one of the most controversial proposals, but it authorized states to implement such a restriction. For litigation challenging these family caps, see, e.g., *Williams v. Martin*, 283 F. Supp. 2d 1286 (N.D. Ga. 2003), and *Williams v. Humphreys*, 125 F. Supp. 2d 881 (S.D. Ind. 2000).

visitation by non-custodial parents.[93] Congress's family policy goals became more explicit with the Deficit Reduction Act of 2005, in which Congress reauthorized TANF and allocated $150 million for grants available to state and local governments, non-profits, and faith- and community-based organizations for programs designed to promote healthy marriage and responsible fatherhood.[94]

Beyond these family law dimensions, block grant funding for TANF was tied to programs for child support enforcement under Title IV-D of the Social Security Act, and programs for foster care and adoption assistance under Title IV-E. Rules that condition states' receipt of full TANF funding on their operation of support enforcement and foster care programs in compliance with the federal law maintain the link between these programs and TANF. States failing to conform to these rules therefore risk losing not only funding for those specific programs but a portion of the much larger block grant funding as well.

B. Child Support Enforcement

Congress added Title IV-D to the Social Security Act in 1974,[95] declaring that the problem of welfare was, "to a considerable extent, a problem of the non-support of children by their absent parents."[96] The legislation established the federal Office of Child Support Enforcement and provided that states must establish support enforcement programs to continue receiving full AFDC funding. Aid recipients were required to assign their child support rights to the states and to cooperate in efforts to establish paternity and secure support orders.[97] Although the new program was linked to the welfare system, it was also designed to operate independently of it. Pursuant to Title IV-D, Congress required the states to establish child support enforcement programs outside state welfare agencies and to provide services both for AFDC recipients and families that were not on the welfare rolls.[98]

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93 *See* 42 U.S.C. § 669(b) (2000). The legislation also added a penalty against the Title IV-A program if states failed to enforce cooperation under Title IV-D.

94 *See* Deficit Reduction Act of 2005, Pub. L. No. 109-171 (2005) (codified at 42 U.S.C. § 603(a)(2)). On these initiatives, see also FRAGILE FAMILIES AND THE MARRIAGE AGENDA (Lori Kowaleski-Jones & Nicholas H. Wolfinger eds., 2006). Other provisions of this law reduced federal matching payments to states for child support enforcement. *See generally* VICKI TURETSKY, CTR. FOR L. & SOC. POL'Y, CHILD SUPPORT PROVISIONS IN THE DEFICIT REDUCTION ACT (2006), *available at* http://www.clasp.org/publications/childsupport_budgetsum_updt_0606.pdf. The legislation also tightened TANF work requirements.

95 Social Services Amendments of 1974, Pub. L. No. 93-647, 88 Stat. 2337 (1975).

96 S. REP. NO. 93-1356 (1974), *reprinted in* 1974 U.S.C.C.A.N 8133, 8145. *See generally* KRAUSE, *supra* note 43, at 281–85.

97 *See* KRAUSE, *supra* note 43, at 318–53.

98 Krause notes that President Gerald Ford signed the Act somewhat reluctantly, objecting that certain provisions of the law brought the federal government too far into the sphere of domestic relations. *See id.* at 286.

Since 1974, Congress has returned repeatedly to this subject, passing new legislation and adding requirements to improve the IV-D program.[99] These amendments have required states to develop quantitative guidelines as a basis for determining child support and to implement new methods of support enforcement. Particular concerns with interstate child support enforcement led to a federal statute criminalizing failure to pay support across state lines in 1992,[100] and a requirement that all states enact the Uniform Interstate Family Support Act in 1996.[101] The 1996 legislation also mandated extensive administrative changes, including automated state data processing systems, administrative rather than judicial proceedings in certain support enforcement contexts, and procedures to revoke occupational, professional, recreational, and driver's licenses for noncompliant support obligors.[102] The legislation extended substantial funding to states to implement these new systems. More substantively, the 1996 law required states to adopt measures facilitating paternity establishment[103] as well as rules tightening the requirement that mothers of non-marital children cooperate with the paternity determination process in order to receive benefits.[104]

In the early years of the Title IV-D program, its track record was not outstanding. Although every state participated in the program, many routinely failed audits by the Department of Health and Human Services.[105] Litigation over state failures to carry out their support enforcement responsibilities reached the U.S. Supreme Court, which acknowledged serious problems with Arizona's program in *Blessing v.*

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99 *See, e.g.*, Family Support Act of 1988, Pub. L. No. 100-485, 102 Stat. 2343 (1988) (establishing new federal standards for paternity determination, making use of child support guidelines mandatory, and extending wage withholding to all child support orders); Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984) (requiring states to adopt advisory child support guidelines and new support enforcement procedures).

100 *See infra* Part III.B.2.

101 42 U.S.C. § 666(f) (2000); *see infra* Part III.B.2.

102 Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996). *See generally* Estin, *supra* note 9; Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519 (1996). Further refinements to the federal child support enforcement program were made with the Child Support Performance and Incentive Act of 1998, Pub. L. No. 105-200, 112 Stat. 645 (1998).

103 § 666(a)(5); *see also* Legler, *supra* note 102, at 527–33.

104 States have some flexibility in determining what constitutes "cooperation" and what penalties may be imposed for failure to cooperate. *See* Legler, *supra* note 102, at 535–38. *See generally* Walton v. Hammons, 192 F.3d 590 (6th Cir. 1999) (affirming disqualification when household member failed to cooperate).

105 *See, e.g.*, U.S. DEPT. OF HEALTH AND HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, EIGHTEENTH ANNUAL REPORT TO CONGRESS (1993), *available at* http://www.acf.hhs.gov/programs/cse/pubs/1994/reports/18th_annual_report_congress (last visited Oct. 13, 2008). *See generally* Estin, *supra* note 9, at 584 (stating that the failure of audits made some states miss the deadline of establishing a monitoring system by 1995, as mandated by the Family Support Act).

Freestone.[106] In the decade after Congress enacted the 1996 reforms, the performance of all states improved dramatically.[107]

Several states have challenged the constitutionality of federal child support legislation. Kansas argued unsuccessfully that Congress coerced its participation in the program because "a decision otherwise would result in the loss of all funds for child support enforcement services and aid to children and families in need."[108] South Carolina challenged the requirement that states develop automated data processing and information retrieval systems as a condition for receiving full federal funding for TANF and child support enforcement.[109] In the latter case, the courts upheld the constitutionality of the program, concluding that the financial penalties imposed on South Carolina for its failure to comply with these requirements were appropriate under the statute.[110]

Other states embraced the federal child support program enthusiastically, with state agencies becoming deeply involved in the process of developing the national policies and regulations.[111] Many of the innovations incorporated into the federal legislation came from ideas previously

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106 Blessing v. Freestone, 520 U.S. 329 (1997) (suggesting that Title IV-D might be a basis for federal civil rights claim under § 1983). *But see* Arrington v. Helms, 438 F.3d 1336 (11th Cir. 2006) (finding no enforceable private right to support enforcement services); Salahuddin v. Alaji, 232 F.3d 305 (2d Cir. 2000) (finding no enforceable private right under Child Support Recovery Act). (For a discussion of the Child Support Recovery Act, see discussion *infra* Part III.A.2.)

107 *See generally* ELAINE SORENSEN & ARIEL HALPERN, URBAN INST., CHILD SUPPORT IS WORKING BETTER THAN WE THINK 3–5 (1999), *available at* http://www.urban.org/uploaded pdf/anf31.pdf. Current data are available from U.S. DEPT. OF HEALTH AND HUMAN SERVS., OFFICE OF CHILD SUPPORT ENFORCEMENT, CHILD SUPPORT ENFORCEMENT, FISCAL YEAR 2007 PRELIMINARY REPORT (2007) [hereinafter FISCAL YEAR 2007 PRELIMINARY REPORT], *available at* http://www.acf.hhs.gov/programs/cse/pubs/2008/preliminary_report_fy2007 (last visited Oct. 13, 2008).

108 Kansas v. United States, 24 F. Supp. 2d 1192, 1195 (D. Kan. 1998), *aff'd*, 214 F.3d 1196 (10th Cir. 2000). The court concluded that "the coercion theory is unclear, suspect, and has little precedent to support its application" and held that the statutory requirements "represent a reasoned attempt by Congress to ensure that its grant money is used to further the state and federal interest in assisting needy families, in part through child support enforcement." *Id.* at 1202–04. The court also rejected an argument under *Printz v. United States*, 505 U.S. 144 (1992), that Kansas state employees had been conscripted to administer what amounted to a federal child support enforcement policy. *Kansas*, 25 F. Supp. 2d at 1203.

109 Hodges v. Thompson, 311 F.3d 316 (4th Cir. 2002).

110 In other litigation, support creditors have sought to require states to provide the services mandated by federal legislation. *See supra* note 106; *see also* Clark v. Portage County, 281 F.3d 602 (6th Cir. 2002); Arrington v. Fuller, 237 F. Supp. 2d 1307 (M.D. Ala. 2002). Support obligors have challenged many aspects of the program. *See, e.g.*, Eunique v. Powell, 302 F.3d 971 (9th Cir. 2002) (sustaining denial of passport to support obligor with substantial unpaid arrearages); Weinstein v. Albright, 261 F.3d 127 (2d Cir. 2001); Children & Parents Rights Ass'n of Ohio v. Sullivan, 787 F. Supp. 724 (N.D. Ohio 1991) (finding that there was no improper delegation of legislative authority to the Department of Health and Human Services); Amunrud v. Bd. of Appeals, 143 P.3d 571 (Wash. 2006).

111 *See* Legler, *supra* note 102, at 525.

implemented by various states.[112] Important features of the system have been privatized, including development of automated case processing systems and support collections,[113] with a substantial network of public and private players now working in child support enforcement at the state and local level.[114]

Child support enforcement rules affect many more American families than welfare laws do. Irwin Garfinkel noted in 1992 that the welfare system reached less than one quarter of all children in the United States, while child support questions affect half of all children.[115] There has been remarkably strong bipartisan support in Congress for the program, despite the extraordinary demands it puts on state governments and a price tag of more than $3 billion a year.[116]

C. Child Welfare, Foster Care, and Adoption

Another important federal initiative was the Child Abuse Prevention and Treatment Act of 1974 (CAPTA), which established the National Center on Child Abuse and Neglect in the Department of Health, Education, and Welfare.[117] The statute set forth a model child protection law that mandated reporting and investigation of abuse.[118] CAPTA offered states funding for child abuse programs, provided they enacted such laws. CAPTA was based on a medicalized model of child abuse, in a conscious effort to prevent the law from being characterized as a poverty

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112 For a sample of innovative state policy ideas, see CAROLYN ROYCE KASTNER, A GUIDE TO STATE CHILD SUPPORT AND PATERNITY LAW 1–56 (1981). Thanks to Bob Keith for pointing me to this source.

113 *See generally* U.S. GEN. ACCOUNTING OFFICE, CHILD SUPPORT ENFORCEMENT: STATES' EXPERIENCE WITH PRIVATE AGENCIES' COLLECTION OF SUPPORT PAYMENTS, GAO/HEHS 97-11 (1996), *available at* http://www.gao.gov/cgi-bin/getrpt?HEHS-97-11 (last visited Oct. 13, 2008); Legler, *supra* note 102, at 538–51.

114 *E.g.*, The National Child Support Enforcement Association, www.ncsea.org (last visited Nov. 16, 2008); *see also* FISCAL YEAR 2007 PRELIMINARY REPORT, *supra* note 107 (noting over 60,000 FTE staff in state case programs).

115 *See* IRWIN GARFINKEL, ASSURING CHILD SUPPORT: AN EXTENSION OF SOCIAL SECURITY 7, 18, 38 n.1 (1992). During fiscal year 2006, there were 15.8 million child support enforcement cases. Of these, 2.3 million involved current public assistance cases, 7.3 million involved former assistance cases, and 6.2 million involved families that had never received public assistance. *See* FISCAL YEAR 2007 PRELIMINARY REPORT, *supra* note 107.

116 *See* Estin, *supra* note 9, at 581–95. The total cost of the program is offset by almost $2 billion in TANF costs recovered by the federal and state governments each year. FISCAL YEAR 2007 PRELIMINARY REPORT, *supra* note 107, at Table 1.

117 Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247, 88 Stat. 4 (1974).

118 *Id.* § 4(b)(2).

program, and as a result, it was enacted with strong and bipartisan support.[119] The law has been amended and reauthorized many times.[120]

Critics of CAPTA argued that although child welfare advocates presented compelling evidence of an epidemic of child abuse and were persuasive on the importance of protecting children, they left unanswered the central question of what interventions or remedies might effectively address the problem.[121] Under the new system, reported cases of child abuse skyrocketed,[122] resulting in a spike in the number of children in foster care. Subsequent legislative efforts began to emphasize preserving families, rather than removing children from their homes.[123]

In 1980, Congress passed the Adoption Assistance and Child Welfare Act, which added Titles IV-B and IV-E to the Social Security Act.[124] The Act established a federal reimbursement program for states for foster care and adoption services, including funding for adoption subsidies for children with special needs that have discouraged their adoption.[125] To qualify for funding, the Act required each state to develop plans for child welfare services, foster care, and adoption assistance and obtain Department of Health and Human Services approval.[126]

The Adoption Assistance Act required that states make "reasonable efforts" to prevent or eliminate the need to remove children from their

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119 *See* Martin Guggenheim, *Child Welfare Policy and Practice in the United States 1950–2000*, *in* CROSS CURRENTS: FAMILY LAW AND POLICY IN THE UNITED STATES AND ENGLAND 547, 553 (Sanford N. Katz et al. eds., 2000). The legislation was cosponsored by more than 100 members of the House. *See* H. R. REP. NO. 93-685 (1974), *reprinted in* 1974 U.S.C.C.A.N 2763, 2764. The Report reflects the dissenting view of Earl F. Landgrebe, who objected that if child abuse is a significant problem, states should devise a solution. *Id.* at 2771. Landgrebe called the bill totalitarian, complaining that the definitions contained in the statute were too vague, and argued that it eliminated parents' rights. *Id.* at 2772.

120 *See, e.g.*, Keeping Children and Families Safe Act, Pub. L. No. 108-36, 117 Stat. 800 (2003) (codified at 42 U.S.C. § 5101). *See generally* CHILD WELFARE INFORMATION GATEWAY, ABOUT CAPTA: A LEGISLATIVE HISTORY (2004), *available at* http://www.childwelfare.gov/pubs/factsheets/about.pdf.

121 COSTIN ET AL., *supra* note 44, at 115–16.

122 *Id.* at 116–17. As federal funding for social services decreased, this created new conflicts for state agencies charged with child protection. *Id.* at 110, 117–18.

123 This approach had wide support, appealing to "pro-family" conservatives and parent groups as well as child welfare workers and the Children's Defense Fund. *See id.* at 117–22.

124 Adoption Assistance and Child Welfare Act, Pub. L. No. 96-272, title I, 94 Stat. 501 (1980) (codified at 42 U.S.C. §§ 621–628b, 670–679b). The history of federal foster care legislation is reviewed in Naomi R. Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care and Adoption*, 60 OHIO ST. L.J. 1189, 1195 (1999).

125 Under the new program, a child was eligible for adoption subsidies if the child would have been receiving AFDC but for being removed from his or her home. Congress hoped this legislation would address the crisis represented by growing numbers of children in foster care. *See* S. REP. 96-336, at 1 (1980). State statutes implementing this program are cited in CLARK, *supra* note 53, at 853.

126 *See* 42 U.S.C. §§ 622, 671 (2000).

homes.[127] In *Suter v. Artist M.*,[128] the Supreme Court decided that there was no private right of action under the statute or federal civil rights laws for a state's failure to live up to this requirement.[129] Congress responded to *Suter* with an amendment to the statute that left the door open for other claims, and courts in subsequent federal litigation have recognized private rights of action under the foster care statutes.[130]

Experience under the Adoption Assistance Act led to criticism that family preservation programs left abused children without adequate protection from their abusers.[131] The "reasonable efforts" policy seemed to sacrifice child protection and undermine CAPTA and other federal programs, in favor of reducing the burden on state foster care programs.[132] Regardless, the numbers of children in foster care continued to increase dramatically, along with the costs of the IV-E program,[133] and inadequate foster care systems operated under consent decrees in many states.[134] In response to these concerns, Congress adopted the Adoption and Safe Families Act (ASFA) in 1997, substantially revising the Title IV-E system.[135] Under ASFA, the law no longer requires reasonable efforts to preserve and reunify families in all cases; when such efforts are not required states must move quickly to hold permanency hearings and

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127 § 671(a)(15).

128 503 U.S. 347 (1992).

129 Noting that the statute includes other enforcement mechanisms, Chief Justice Rehnquist stated in his opinion that the reasonable efforts provision imposes "only a rather generalized duty on the State." *Id.* at 363. State courts routinely consider whether reasonable efforts have been made before terminating parental rights. *E.g.*, *In re* James G., 943 A.2d 53 (Md. App. 2008).

130 *See, e.g.*, ASW v. Oregon, 424 F.3d 970 (9th Cir. 2005) (addressing rights of parents who adopt special needs children under the Act to individualized payment determinations); 31 Foster Children v. Bush, 329 F.3d 1255 (11th Cir. 2003); Mo. Child Care Ass'n v. Martin, 241 F. Supp. 2d 1032 (W.D. Mo. 2003) (considering factors to be considered in setting state reimbursement rates). *See generally* Eric E. Thompson, *The Adoption and Safe Families Act: A New Private Right of Action for Children in Foster Care Pursuant to Section 1983*, 6 U.C. DAVIS J. JUV. L. & POL'Y 123 (2002).

131 *See* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 113–40 (1999); RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES 141–43 (1996). *But see* Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999).

132 In June 1996, Senator Dewine addressed this problem in remarks on the Senate floor. *See* 142 CONG. REC. S5710-01 (daily ed. June 4, 1996) (statement of Sen. Dewine). The 1996 welfare reform legislation consolidated federal child protection programs under Title IV-B into the new block grants, but it did not change the foster care and adoption system in place under Title IV-E. *See* Personal Responsibility and Work Opportunity Act of 1996, Pub. L. No.104-93 §§ 501–505, 110 Stat. 2105 (1996).

133 Barbara Bennett Woodhouse, *Ecogenerism: An Environmentalist Approach to Protecting Endangered Children*, 12 VA. J. SOC. POL'Y & L. 409, 415–17 (2005).

134 *Id.* at 416 n.40.

135 Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

terminate parental rights.[136] Some child welfare advocates supported ASFA, but the legislation faced strong opposition from advocates for the poor and minority families who were largely the subjects of these interventions.[137]

Child welfare programs are marked by significant tension between family preservation and child protection policies. These programs operate against a background of constitutional parental rights established in Supreme Court decisions that date from the 1920s.[138] The expedited timelines of ASFA may conflict with these constitutional norms, and the courts have wrestled with this conflict since Congress passed the legislation.[139] Federal funding is much greater for foster care and adoption expenses than for family preservation services, and this factor may tip the balance toward termination of parental rights.[140]

Since ASFA, the national foster care system has remained beleaguered and controversial, and states still have difficulty meeting the goals set by federal legislation.[141] Federal oversight is complex and expensive,[142] and the standing and abstention doctrines often block private litigation to enforce the federal statutes and regulations.[143] Although the child welfare system and the TANF program overlap significantly, the two are not coordinated and may create conflicting expectations for recipients.[144] The expense of the IV-E program has grown, with wide variation among the states in financing patterns and decisions.[145] The legislation authorizes waivers for state demonstration projects, which

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136 *See* 42 U.S.C. § 671(a)(15) (2000).

137 *See* Woodhouse, *supra* note 133, at 417–18.

138 Most important in this context is *Santosky v. Kramer*, 455 U.S. 745 (1982), which held that states must establish grounds for termination of parental rights by clear and convincing evidence.

139 *E.g.*, *In re* H.G., 757 N.E.2d 864 (Ill. 2001) (finding that a section of state law adopted in response to ASFA was unconstitutional). *See generally* Kurtis A. Kemper, *Construction and Application by State Courts of the Federal Adoption and Safe Families Act and Its Implementing Statutes*, 10 A.L.R.6th 173 (2006).

140 Maxine Eichner, *Children, Parents and the State: Rethinking Relationships in the Child Welfare System*, 12 VA. J. SOC. POL'Y & L. 448, 450–51 (2005).

141 Richard P. Barth et al., *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371 (2005) (surveying empirical research).

142 *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, CHILD AND FAMILY SERVICES REVIEWS: BETTER USE OF DATA AND IMPROVED GUIDANCE COULD ENHANCE HHS'S OVERSIGHT OF STATE PERFORMANCE, GOA-04-33 (2004).

143 *E.g.*, Wolfe v. Ingram, 275 F.3d 1253 (10th Cir. 2002) (citing *Younger v. Harris*, 401 U.S. 37 (1971), and noting that the "*Younger* abstention" barred at least some claims).

144 Morgan B. Ward Doran & Dorothy E. Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 389 (2002).

145 PAMELA WINSTON & ROSA MARIA CASTAÑEDA, URBAN INSTITUTE, ASSESSING FEDERALISM: ANF AND THE RECENT EVOLUTION OF AMERICAN SOCIAL POLICY FEDERALISM 35–36 (2007).

have shown some success.[146] Evidence also suggests that states have blunted the effects of strict timelines for termination of parental rights, especially in cases involving older children who are less likely to be adopted.[147]

Another contested policy issue embedded within the IV-E program is the question of transracial adoption. Congress enacted the Multiethnic Placement Act of 1994 (MEPA), amending Title IV-E to provide that states could not delay or deny an adoptive placement on the basis of race.[148] This marked a significant shift in direction: the program for adoption subsidies had encouraged same-race placements, and several states had statutes that permitted or required consideration of race in making placements.[149] In 1996, Congress amended MEPA, prohibiting states from using race as a factor in making placements and making noncompliance a violation of the federal civil-rights laws.[150] In addition, the law is enforced under regulations that prohibit discrimination in programs administered by the Department of Health and Human Services.[151]

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146 *Id.* at 35–36. ("State and local child-welfare program standards and accountability requirements and financing arrangements have tended to be highly decentralized, arising from a mix of federal and state statutes, regulations, and judicial decrees. Child-welfare policy has been particularly driven by state or local crises, such as high-profile child deaths, leading to periodic efforts to improve the quality and capacity of child-welfare services and to provide funding to support it. In recent years, the major federal initiatives reflected in ASFA . . . have brought somewhat greater consistency in standards and reporting requirements to state child-welfare systems . . . .").

147 *See* Barth et al., *supra* note 141, at 392–99; Woodhouse, *supra* note 133, at 421–22.

148 Howard W. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (1994) (codified at 42 U.S.C. § 5115a). *See generally* ALICE BUSSIERE & THE ABA CENTER ON CHILDREN AND THE LAW, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 (1995); Howard W. Metzenbaum, *S. 1224: In Support of the Multiethnic Placement Act of 1994*, 2 DUKE J. GENDER L. & POL'Y 165 (1995).

149 *See* CLARK, *supra* note 53, at 853–54, 912–13.

150 Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903–04. *See generally* S. REP. No. 104-279 (1996). The bill also granted a $500 tax credit for adoption expenses. *See* Recent Legislation, *Congress Forbids Use of Race as a Factor in Adoptive Placement Decisions*, 110 HARV. L. REV. 1352, 1354–57 (1997); *see also infra* Part IV.A.2.

In addition to its spending authority and the IV-E program, Congress based this legislation on its enforcement power over civil rights under Section 5 of the Fourteenth Amendment. *See infra* Part IV.A.3; *see also* Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21, 29–31 (2005); Roberts, *supra* note 131, at 132–38 ("The passage of ASFA corresponded with the growing disparagement of mothers receiving public assistance and welfare reform's retraction of the federal safety net for poor children. . . . The Act also corresponded with new federal policy on trans-racial adoption, which removes barriers to white-middle class couples' ability to adopt children of color.").

151 States that violate these provisions are subject to enforcement proceedings and penalties under Title IV-E. *See generally* 45 C.F.R. § 80.3 (1999). For an overview of compliance actions undertaken by the HHS Office of Civil Rights under MEPA, see U.S. Dep't of Health & Human Servs., Office of Civil Rights, Adoption Foster Care Case Summaries: Summary of

D. Other Children's Programs

In addition to the major grant programs described above, which are all managed by the Administration for Children and Families, Congress has established many other federal spending programs for child welfare. These include programs for child care, health care, education, nutrition, and juvenile justice, which are administered by other agencies within Health and Human Services as well as other departments, including the Agriculture Department and the Justice Department. These programs shape many aspects of family life, but they have fewer direct interactions with state family policy and family law than the programs described above. Without attempting to be comprehensive, this section describes other major initiatives concerning juvenile justice and pregnancy, maternity, and children's health.

1. Juvenile Justice

Following early national legislation in 1961 and 1968, which addressed juvenile delinquency,[152] Congress passed the Juvenile Justice and Delinquency Prevention Act of 1974.[153] The Department of Justice has primary responsibility for these programs, which provide block grant funding to state and local governments for programs to prevent delinquency, to divert juveniles from the juvenile justice system, and to develop community-based alternatives to traditional detention and correctional facilities. States qualified for grants by establishing juvenile justice plans that met baseline requirements, including ensuring that juveniles who committed or were charged with status offenses were placed in shelter facilities rather than correctional or detention facilities, and ensuring that juveniles adjudicated delinquent were not detained in any institution in which they had regular contact with adult offenders.[154]

The basic framework of this program has remained intact, with periodic modifications as policies and priorities have shifted. After violent juvenile crime increased during the mid-1980s, many states enacted new legislation to increase penalties and lower the ages at which courts could

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Selected OCR Compliance Activities, http://www.hhs.gov/ocr/civilrights/activities/examples/Adoption%20Foster%20Care/adoption_case_summaries.html (last visited Oct. 13, 2008).

152 *See* Juvenile Delinquency Prevention and Control Act of 1968, Pub. L. 90-445, 82 Stat. 572 (1968); Juvenile Delinquency and Youth Offenses Control Act of 1961, Pub. L. No. 87-274, 75 Stat. 462 (1961) (authorizing a three-year, $30 million demonstration grant program).

153 Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended at 42 U.S.C. § 5601).

154 *See generally* S. REP. NO. 93-1011 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5283, 5324–25 (describing the requirements for state plans to receive formula grants).

try juveniles as adults.[155] By 1997, although juvenile crime rates had begun to decline,[156] Congress began debating federal juvenile crime legislation that would have dramatically increased the funding available for prosecution of juvenile offenders, with the new funds available only to those states that enacted stringent new policies.[157] In addition, the law would have federalized prosecution of some juvenile crimes, a proposal that Chief Justice Rehnquist criticized directly in his year-end report on the federal judiciary.[158] Congress never enacted the legislation.[159]

2. Pregnancy, Maternal Health, and Children's Health

Congress first used its spending power to promote family welfare by supporting maternal and infant health, through the Sheppard-Towner Act

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155 *See* Elizabeth S. Scott & Laurence Steinberg, *Blaming Youth*, 81 TEX. L. REV. 799, 805–07 (2003); *see also* Franklin E. Zimring, *The Youth Violence Epidemic: Myth or Reality?*, 33 WAKE FOREST L. REV. 727 (1998) (examining trends in juvenile violence between 1980 and 1990).

156 Scott & Steinberg, *supra* note 155, at 808; Eric Lichtbau, *Juvenile Arrests in U.S. Decline, Belying Fears*, L.A. TIMES, Oct. 18, 1999, at A1 (stating juvenile crime rate dropped steadily from 1993 to 1999).

157 *See, e.g.*, Juvenile Accountability Block Grants Act of 1997, H.R. 3, 105th Cong. (1997). *See generally* Violent and Repeat Juvenile Offender Act of 1997, S. 10, 105th Cong., at 162–53 (1997) (authorizing appropriation of $100 million annually from 1998 through 2002); H.R. REP. NO. 105-86, at 31 (1997) ("[The Juvenile Crime Control Act of 1997] would authorize appropriations of $500 million for each of fiscal years 1998 through 2000 for juvenile accountability block grants."); S. REP. NO. 105-108 (1997) (listing the conditions for receipt of block grants). Scott and Steinberg described juvenile justice policy during this period as "a moral panic, in which the media, politicians, and the public reinforce each other in an escalating pattern of alarmed reaction to a perceived social threat." Scott & Steinberg, *supra* note 155, at 807–08 (citing ERICH GOODE & NACHMAN BEN-YEHUDA, MORAL PANICS: THE SOCIAL CONSTRUCTION OF DEVIANCE (1994)).

158 *See Rehnquist Sees Threat to Judicial System*, WASH. POST, Jan. 2, 1998, at A21. The report said:

> Should Congress . . . consider expanding the jurisdiction of the federal judiciary it should do so cautiously and only after it has considered all the alternatives and the incremental impact the increase will have on both the need for additional judicial resources and the traditional role of the federal judiciary.
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> In particular, the Judicial Conference of the United States has raised concerns about legislation pending in Congress to "federalize" certain juvenile crimes, maintaining its long-standing position that federal prosecutions should be limited to those offenses that cannot or should not be prosecuted in state courts. This desire to federalize new crimes or civil causes shows that the federal judiciary has become a victim of its own success.

Id.

159 Both houses of Congress passed juvenile crime legislation after the shootings at Columbine High School in Colorado, but the bills were bogged down in debates over gun control, violence in the media, and posting the Ten Commandments in school classrooms. *See, e.g.*, Michael Grunwald, *Culture Wars Erupt in Debate on Hill; Display of Ten Commandments Backed*, WASH. POST, June 18, 1999, at A1 (describing the political factors that derailed efforts to pass the Consequences for Juvenile Offenders Act of 1999).

in 1921.[160] In 1935, Title V of the Social Security Act established the federal Children's Bureau (known today as the Maternal and Child Health Bureau), which administers a block grant program for the states as well as a range of discretionary grant programs.[161] Since 1998, the block grant program has included funding for abstinence education, intended to prevent teenage pregnancies.[162]

The federal Medicaid program, established in 1965 under Title XIX of the Social Security Act,[163] provides financial assistance to states to reimburse costs of medical treatment for different categories of needy persons. Medicaid laws provide coverage for pregnancy-related medical services for individuals who would not otherwise qualify for coverage,[164] but Congress has prohibited the use of these funds to reimburse the cost of an abortion in most circumstances.[165]

Congress addressed reproductive issues more directly in legislation establishing grant programs for providers of family planning services, such as Title X of the Public Health Service Act[166] and the Adolescent Family Life Act of 1982.[167] From 1988 until 1993, the Department of Health and Human Services imposed a "gag rule," preventing Title X funding recipients from providing patients with information, counseling, or referrals concerning abortion.[168] Congress passed the Newborns' and Mothers' Health Protection Act in 1996, conditioning the Employee Re-

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160 *See* Sheppard-Towner (Maternity) Act, Pub. L. No. 67-97, 42 Stat. 224 (1921). Congress repealed the Sheppard-Towner Act within a few years. *See generally* J. Stanley Lemons, *The Sheppard-Towner Act: Progressivism in the 1920s*, 55 J. AM. HIST. 776 (1969) (describing the opposition to the Act, which included the fear that the Act was "communist"); Susan L. Waysdorf, *Fighting for Their Lives: Women, Poverty, and the Historical Role of United States Law in Shaping Access to Women's Health Care*, 84 KY. L.J. 745 (1996) (stating that the Act was repealed June 30, 1929).

161 42 U.S.C. § 701–710 (2000); *see also* U.S. Dep't of Health & Human Servs., Health Resources and Services Administration, About the HRSA Maternal Child Health Bureau, http://mchb.hrsa.gov/about/default.htm (last visited Oct. 13, 2008).

162 *See* 42 U.S.C. § 710 (2000).

163 Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 343 (1965) (codified as amended at 42 U.S.C. § 1396).

164 *See* 42 U.S.C. § 1396a(a)(10)(A)(i)(III), 1396d(n) (2000).

165 *See* Harris v. McRae, 448 U.S. 297, 302–03 (1980) (upholding Hyde Amendment, which enacted this prohibition).

166 Family Planning Services and Population Research Act of 1970, Pub. L. No. 91-572, 84 Stat. 1504 (1970) (codified as 42 U.S.C. §§ 300 to 300a-7). Courts later found that regulations requiring that providers notify parents or guardians when prescribing contraceptives for unemancipated minors exceeded the authority Congress delegated by the statute. New York v. Heckler, 719 F.2d 1191, 1196 (2d Cir. 1983); Planned Parenthood v. Heckler, 712 F.2d 650, 663 (D.C. Cir. 1983).

167 Omnibus Budget Reconciliation Act, Pub. L. No. 97-35, 95 Stat. 578 (1981) (codified as 42 U.S.C. §§ 300z to 300z-10). *See generally* Bowen v. Kendrick, 487 U.S. 589 (1988) (upholding the Adolescent Family Life Act against Establishment Clause challenge).

168 *See generally* Rust v. Sullivan, 500 U.S. 173, 178 (1991) (sustaining "gag rule" limitation); Memorandum: Title X "Gag Rule," 58 Fed. Reg. 7,455 (Feb. 5, 1993) (directing the Secretary of Health and Human Services to suspend the gag rule and develop new regulations).

tirement and Income Security Act (ERISA) qualification of private health insurance plans on the plan's provision for minimum childbirth-related hospital stays for mothers and newborns of at least forty-eight hours following a normal vaginal delivery or ninety-six hours after a cesarean section.[169]

Over the past decade, Congress has significantly expanded the federal government's commitment to children's health through the State Children's Health Insurance Program (SCHIP), established in 1997 to provide federal matching funds to help states expand health care coverage to uninsured children.[170] States have flexibility to design programs within federal guidelines administered through the Centers for Medicare and Medicaid Services in the Department of Health and Human Services. Despite strong political support for reauthorization of the program after its initial ten years, the President vetoed new legislation enacted in 2007, and the program was extended only until 2009.[171]

E. Conclusions

Many of the children's programs Congress has established under the Social Security Act are highly centralized, with important policies established at the national level and implemented by the states. This approach reflects Congress's judgment that these policies are too important to be left to the vagaries of state law and politics. By insisting on a unified national approach to public assistance, child welfare, foster care, child support enforcement, and children's health, Congress has defined a minimum standard of public care and support to which every child in the nation is entitled.

Because the legislation surveyed in this section is based on Congress's spending power, there is little question that Congress has authority to enact these measures.[172] But this approach raises many pragmatic concerns. The programs and their attendant regulations are extremely complex. Given the multiplicity of actors involved at different levels of government, the tasks of coordination, accounting, and monitoring, as well as program-related litigation, absorb a great deal of time and

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169 Newborns' and Mothers' Health Protection Act of 1996, Pub. L. No. 104-204, Title VII, 110 Stat. 2935 (1996) (codified at 29 U.S.C. § 1185); *see also* §§ 300gg-4, 300gg-51 (2000). For a discussion of other aspects of ERISA, see *infra* Part IV.B.2.

170 Balanced Budget Act of 1997, Pub. L. No. 105-33, subtit. J, ch. 1, § 2101, 111 Stat. 251, 552 (1997).

171 Medicare, Medicaid, and SCHIP Extension Act of 2007, Pub. L. No. 110-173, 121 Stat. 2492 (2007); *see also* Michael Abramowitz & Jonathan Weisman, *Bush Signs Bill to Extend SCHIP Until March '09*, SAN JOSE MERCURY NEWS, Dec. 30, 2007, at 10A; *Bush Vetoes Health Measure*, WASH. POST, Oct. 4, 2007, at A1.

172 See *supra* notes 68–78 and accompanying text.

money.[173] Because these programs are expensive, financial considerations strongly influence policy decisions at the national level.

In Congress, the House Ways and Means Committee has primary responsibility for this legislation, indicating the centrality of fiscal concerns to these programs.[174] In the executive branch, the Administration for Children & Families (ACF) in the Department of Health and Human Services administers these programs. At times, ACF officials have taken strong policy positions, allocating funds and pursuing national legislation to further these objectives.[175]

In the states, compliance with the requirements of federal spending programs has demanded significant action by state legislatures and executive agencies, even to the extent of amending state constitutions.[176] Within the broad structure outlined in federal law, states have freedom to take different approaches to a problem, and each state has developed its own statutes and regulations to implement the federal mandate.[177] State courts routinely construe and apply these enactments, addressing constitutional and other challenges under both state and federal law.[178] For states, the challenges of implementation are evidently justified by the billions of dollars they receive through these programs, which provide vital support for many vulnerable individuals and families.

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173 *See, e.g.*, Mo. Dep't of Soc. Serv. v. Leavitt, 448 F.3d 997 (8th Cir. 2006) (challenging denial of reimbursement); Hodges v. Thompson, 311 F.3d 316, 321 (4th Cir. 2002) (challenging conditions on receipt of TANF funds).

174 STAFF OF H.R. COMM. ON WAYS AND MEANS, *supra* note 69, at iv.

175 For example, Wade F. Horn, who served as Assistant Secretary for Children and Families from 2001 to 2007, was a strong advocate for marriage promotion and fatherhood programs. *See generally* LINDA C. MCCLAIN, THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 121–31 (2006) (discussing marriage promotion policies under Horn).

176 42 U.S.C. § 666(a)(5)(I) (2006) (requiring elimination of jury trials in paternity cases). Prior to the legislation that added this requirement, a number of states recognized a constitutional right to a jury trial in paternity proceedings. *See, e.g.*, B.J.Y. v. M.A., 617 So. 2d 1061 (Fla. 1993) (holding state statute that abolished jury trials in paternity cases was unconstitutional). *See generally* David M. Holliday, *Paternity Proceedings: Right to Jury Trial*, 51 A.L.R. 4th 565 (1987).

177 A number of studies by the Urban Institute have charted policy and financing differences between the states in implementation of these federal laws. *See, e.g.*, ROB GEEN ET AL., THE COST OF PROTECTING VULNERABLE CHILDREN: UNDERSTANDING FEDERAL, STATE AND LOCAL CHILD WELFARE SPENDING 7–11, 19 (1999) (demonstrating that states use different levels of funding based on internal decisions); CYNTHIA ANDREWS SCARCELLA ET AL., THE COST OF PROTECTING VULNERABLE CHILDREN V: UNDERSTANDING STATE VARIATION IN CHILD WELFARE FINANCING 10 (2006) (explaining that eligibility standards are adopted by states).

178 *See*, *e.g.*, *In re* H.G., 757 N.E.2d 864 (Ill. 2001) (striking aspect of state law on federal constitutional grounds).

One classic argument for preferring that state or localities establish policy is the vision of the states as laboratories.[179] From this perspective, the large scale and centralized nature of these federal programs is a substantial concern. Once a federal experiment is underway, an act of Congress is required to adjust policies significantly, and each new enactment has enormous consequences. To preserve opportunities for experimentation, Congress sometimes permits state waivers or provides special funding for demonstration projects.[180]

In light of the important state interests and the substantial funding at stake, state legislatures and governors participate in shaping federal legislation, lobbying through associations such as the National Conference of State Legislatures or the National Governors Association.[181] National associations of child support enforcement and child welfare professionals also play an active role in the development of new legislation and other policy initiatives.[182] This political process, rather than constitutional adjudication, establishes the balance of state and federal responsibility.

Among these programs, cooperative federalism has been most successful in child support enforcement, where goals and performance are quantifiable, and policy debates unfold at the margins rather than with the fundamentals of the program. Administrative cooperation between state and federal governments, as well as the use of new methods and technologies to address the enforcement problem, has generated substantial benefits.[183]

In comparison, child protection and foster care policies are vastly more complex. The challenges of developing and administering state child-welfare systems, and the difficulties faced by poor and minority families caught up in them, cannot be readily quantified or systematized. This work requires intensive direct services with families and children at the local level. Federal resources are vital to states in addressing these problems, and the fact that much greater funding is available for termina-

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179 *See* New State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.")

180 Many successful national policies began as experiments by states. *See* KASTNER, *supra* note 112 (describing innovative approaches to child support enforcement).

181 The states are particularly interested in protecting against reduction or elimination of federal funding as priorities and politics change at the national level. *See* Erik Eckholm, *States Take Child Support, Leaving Mothers to Scrimp*, N.Y. TIMES, Dec. 1, 2007, at 11 (noting that the federal government reduced child support enforcement funding for states by 20 percent after the 2006 Deficit Reduction Act).

182 This is particularly evident in the context of child support enforcement. *See generally* Legler, *supra* note 102, at 524–27, 539–40.

183 SORENSEN & HALPERN, *supra* note 107, at 5.

tion and foster care than for prevention and reunification services has fundamentally shaped and constrained state policies.[184]

Congress has not framed the national legislative program in family law in terms of children's rights, but the central normative pillar of this system is the formulation that children's interests are sufficiently important to merit substantial federal spending. This aspect of national family policy can be understood as a response to broad social and demographic changes of the past forty years.[185] States once relied on the family to address the needs of children and the elderly, and the scope of family law was correspondingly more limited than it is today. The tradition of federal deference to the states on family law issues corresponds to this parallel tradition of state deference to family privacy and autonomy.[186] With contemporary changes in family life, in a context of fragile and impermanent families, both of these traditions have shifted. Federal intervention in state family law is clearest and most forceful at exactly those points where private autonomous families cannot assure the well-being of children.

Thirty–five years after these programs were introduced, it is too late for Congress to withdraw federal support for children's needs. All fifty states and millions of families rely on this funding for essential services. On the whole, the system functions largely in the cooperative manner that Congress envisioned. Because the national government implemented these comprehensive programs to protect children, it cannot simply turn over billions of dollars to the states without exercising oversight. Federal agencies administering these programs are also managing the interaction of national and state family policies. And, when necessary, the federal courts adjudicate conflicts that arise between families, the states, and the federal government.

III. HORIZONTAL FEDERALISM AND INTERSTATE CONFLICTS

In a federal system that assigns responsibility for family law to the states, the movement of families and family members across state borders gives rise to persistent conflicts of law and jurisdiction. Because these horizontal federalism problems are beyond the capacity of any single state to resolve, they have required national solutions. Congress uses two sources of authority to regulate interstate family law disputes: the Commerce Clause and the Full Faith and Credit Clause. In this context, however, the Supreme Court has resisted legislation that would assign

184 *See* Eichner, *supra* note 140, at 450–51.

185 *See supra* notes 1–3 and accompanying text; *see also* Schroeder, *supra* note 14, at 307–08.

186 *E.g.*, Estin, *supra* note 9, at 283; Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2197–206 (1996).

responsibility to the federal courts to help manage these perennial interstate conflicts.

A. Commerce Power

Under the Commerce Clause, Congress has authority to "regulate Commerce . . . among the several states."[187] Congress began using this power to enact criminal statutes regulating family law such as the Comstock Law and the Mann Act more than a century ago.[188] In the mid-1990s, Congress began to draw upon this power more extensively, with new legislation addressing child support enforcement, domestic violence, and abortion.[189]

Functionally, these laws differ from the spending power statutes, which create obligations primarily for state governments and federal executive branch agencies. Commerce Clause-based statutes supplement the judicial and law enforcement resources of the states, requiring active participation of the federal courts as well as the Attorney General, U.S. Attorneys' offices, and Federal Public Defenders. The additional responsibilities created by these statutes have often been unwelcome, prompting objections based on over-federalizing of criminal law[190] and the traditional responsibility of the states for family law matters.[191] Resistance by these national actors has tended to limit Congress's consideration of national solutions to interstate family problems.

In the dominant contemporary understanding, established by the Supreme Court following the New Deal, Congress may use its commerce power to regulate uses of the channels of interstate commerce, the instrumentalities of interstate commerce, persons or things in interstate commerce, and activities having a substantial relation to interstate commerce.[192] With its decisions in *United States v. Lopez*[193] and *United*

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187 U.S. CONST. art. I, § 8, cl. 3.

188 *See supra* notes 34–35 and accompanying text.

189 Congress has also enacted labor and employment legislation with significant family policy dimensions under its commerce power. *See infra* Part IV.A.2.

190 *See*, *e.g.*, United States v. Morrison, 529 U.S. 598, 628 n.10 (2000) (Souter, J., dissenting) (citing references to testimony in congressional hearings by Justices Kennedy and Souter); Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1 (1996); Sanford H. Kadish, Comment, *The Folly of Overfederalization*, 46 HASTINGS L.J. 1247 (1995).

191 As several writers have suggested, this resistance may also come from the view that family law matters are not sufficiently important to justify such use of significant federal resources. *See e.g.*, Cahn, *supra* note 21; Resnik, *supra* note 9.

192 *E.g.*, Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Darby, 312 U.S. 100 (1941); NLRB v. Jones & Laughlin, 301 U.S. 1 (1937). *See generally* United States v. Lopez, 514 U.S. 549 (1995).

193 514 U.S. 549.

States v. Morrison,[194] the Supreme Court announced a more restrictive reading of the third category. The Court made clear that it was seeking to preserve the principle of enumerated powers by enforcing new limits on Congress's authority.[195] Although these decisions maintained the three categories of commerce power legislation identified in the Court's prior opinions,[196] they redefined the test applied to federal legislation when Congress claims authority to regulate activities that substantially affect interstate commerce.[197]

In *Lopez,* the majority opinion pointed specifically to family law in explaining its reasons for narrowing the substantial effects test. The Court asserted that a broad approach was not acceptable because it would allow Congress to "regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example."[198] In *Morrison*, the Court reiterated this point, repeating the language from *Lopez* that marked family law as a subject outside the federal commerce power.[199]

Lopez and *Morrison* have erected a substantial doctrinal barrier to federal commerce power legislation addressing family issues. Although the Court acknowledged that families serve key economic functions,[200] its dicta in these cases suggest that anything related to marriage, divorce, and childrearing lies beyond the scope of the commerce power. Moreover, as discussed below, the Court's opinion in *Morrison* treated the entire subject of gendered violence as if it were exclusively an aspect of

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194 529 U.S. 598 (reversing Brzonkala v. Va. Polytechnic Inst., 132 F.3d 949 (4th Cir. 1997)).

195 *Lopez*, 514 U.S. at 567 ("To uphold the Government's contentions here, we would have to . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. . . . To do so would require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there will never be a distinction between what is truly national and what is truly local." (citations omitted)).

196 Congress may "regulate the use of the channels of interstate commerce," "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce," and "regulate those activities having a substantial relation to interstate commerce". *Id.* at 559–60 (citations omitted).

197 *Id.* at 559–67.

198 *Id.* at 564. *But see id.* at 624 (Breyer, J., dissenting).

199 *See Morrison*, 529 U.S. at 613, 615–16. The Court stated that "[g]ender-motivated crimes of violence are not . . . economic activity" and rejected "the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce." *Id.* at 598, 616; *see also* Elizabeth S. Saylor, *Federalism and the Family After* Morrison*: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 HARV. WOMEN'S L.J. 57 (2002).

200 *Morrison*, 529 U.S. at 616 ("[T]he aggregate effect of marriage, divorce and childrearing on the national economy is undoubtedly significant."). *See generally* Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 991–1022 (1995).

domestic relations law, effectively placing it outside the commerce power.[201] As a matter of constitutional law, the Court's conclusions have been debated, but as a matter of legislative practice, these opinions clearly limit the strategies that are available to Congress.[202] After *Lopez* and *Morrison*, the commerce power is useful primarily for interstate criminal statutes.

1. Domestic Violence

Congress enacted the Violence Against Women Act (VAWA) in 1994.[203] The legislative history, based on years of hearings and debate, included extensive findings that violent crime based on gender "restricts movement, reduces employment opportunities, increases health expenditures, and reduces consumer spending, all of which affect interstate commerce and the national economy."[204] VAWA made significant changes to federal law, but its most controversial provision was a civil rights remedy for victims of crimes of violence motivated by gender.[205] Congress based this new remedy both on its commerce power and its enforcement power under Section 5 of the Fourteenth Amendment.[206]

In the VAWA debates, some members of Congress expressed concern about the potential overlap between the statute and state family law.

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201 *See* Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57, 110–15 (2002); Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After* Morrison *and* Kimmel, 110 YALE L.J. 441, 524–25 (2000).

202 Following *Lopez* and *Morrison*, the federal courts have sustained interstate criminal statutes that incorporate an explicit jurisdictional element. Because these statutes are enforced through prosecution in the federal courts, they avoid the "commandeering" problem created by commerce-based legislation that imposes regulatory duties on the states. *See* Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). *See generally* Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180 (1998).

203 Violent Crime Control and Law Enforcement Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1903 (1994). Congress began enacting conditional spending programs to address domestic violence with the Family Violence Prevention and Services Act of 1984, Pub. L. No. 98-457, 98 Stat. 1757 (1984) (codified as amended at 42 U.S.C. §§ 10401–10421).

204 S. REP. NO. 103-138 (1993).

205 *See* Subtitle C of VAWA, § 40302, 108 Stat. at 1941 (codified at 42 U.S.C. § 13981). This section provided a cause of action in federal or state court for recovery of compensatory and punitive damages, injunctive and declaratory relief, and other relief, for any person injured by a "crime of violence motivated by gender." § 40302(c). Congress defined this as "a crime of violence committed because of gender or on the basis of gender; and due, at least in part, to an animus based on the victim's gender." § 40302(d)(1).
Subtitle A of VAWA, §§ 40101–40156, addressed sexual assault prosecution and sentencing in federal courts, and Subtitle B, §§ 40201–40295, created new federal crimes where interstate domestic violence occurs. *See infra* notes 212–13 and accompanying text. Subtitle B also required all states to recognize and enforce protective orders entered in other states. *See infra* Part III.B.3. Subtitle D, §§ 40401–40422, provided funding for state law enforcement and rape prevention and education programs.

206 The Section 5 issues are discussed *infra* Part IV.A.1.

The Conference of Chief Justices raised objections, concerned that the civil rights claim might complicate divorce cases in the state courts. The Judicial Conference of the United States also objected that the statute might burden federal courts.[207] As Reva Siegel has described, Congress addressed these objections by adding language to the statute that specifically disclaimed federal court jurisdiction over claims for divorce, alimony, property division, or child support.[208]

Litigants disputed the constitutionality of the VAWA civil rights provision almost immediately. Judges in the lower federal courts disagreed about whether it was a valid exercise of the commerce power under *Lopez*; ultimately the Supreme Court concluded in *Morrison* that it was not.[209] Writing for the Court, Chief Justice Rehnquist characterized the statute as "noneconomic," concluding that Congress's findings about the economic effects of domestic violence were based on reasoning that would allow Congress to "completely obliterate the Constitution's distinction between national and local authority."[210] While noting that Congress had tailored VAWA to avoid a conflict with state family law, the Court rejected the argument that this was sufficient to address concerns about whether the law was within Congress's commerce power.[211]

During the congressional debates, Chief Justice Rehnquist also indicated his opposition to the criminal law aspects of VAWA.[212] Federal courts have upheld these provisions, including new criminal statutes with explicit interstate jurisdictional elements. These statutes authorize fed-

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207 *See generally* Siegel, *supra* note 186, at 2198–99.

208 *See* 42 U.S.C. § 13981(e)(4) (2000); Siegel, *supra* note 186, at 2196–200; Goldfarb, *supra* note 201, at 67–68.

209 Early cases upholding the statute include *Doe v. Hartz*, 970 F. Supp. 1375, 1409–23 (N.D. Iowa 1997), *rev'd on other grounds*, 134 F.3d 1339 (8th Cir. 1998); *Anisimov v. Lake*, 982 F. Supp. 531 (N.D. Ill. 1997); *Seaton v. Seaton*, 971 F. Supp. 1188 (E.D. Tenn. 1997); and *Doe v. Doe*, 929 F. Supp. 608 (D. Conn. 1996).

210 United States v. Morrison, 529 U.S. 598, 615 (2000). Professor Resnik describes this approach as "categorical federalism." *See* Resnik, *supra* note 15, at 626–29 (critiquing *Morrison*).

211 *Morrison*, 529 U.S. at 615–16 ("Petitioners' reasoning . . . may . . . be applied equally as well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant. Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. . . . Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.").
The dissenting justices rejected the majority's categorical distinction between federal and state powers and noted that there was strong support for VAWA from the states both in Congress and in amicus briefs filed with the Court in *Morrison*. *See* 529 U.S. at 662 (Breyer, J., dissenting) ("[T]he law before us seems to represent an instance, not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem."); *see also id.* at 639 (Souter, J., dissenting).

212 *See* Emily J. Sack, *Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 Nw. U. L. REV. 827, 887 (2004).

eral prosecution of any person who crosses a state line with intent to contact his or her spouse or intimate partner and in the course of that contact, commits a violent crime that injures the spouse or partner.[213] Congress also made interstate violation of a protective order a federal offense.[214]

2. Interstate Child Support

While Congress was making improvements to the federal child support enforcement program under Title IV-D of the Social Security Act, it identified interstate support enforcement as especially problematic. Based on one of the recommendations from the U.S. Commission on Interstate Child Support,[215] Congress enacted the Child Support Recovery Act (CSRA) shortly before the 1992 presidential election.[216] The CSRA established a new federal crime for willful failure to pay amounts due under a child support order for a child in another state.[217] In 1998, Congress returned to this subject with legislation that added a felony aspect to the statute and new provisions that criminalized interstate flight to avoid paying child support.[218]

The CSRA is enforced by prosecutions in federal court. Attorney General Janet Reno released guidelines and procedures for prosecution of these cases in July 1993, and the first cases were prosecuted several years later.[219] Defendants have challenged the statute based on *Lopez*

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213 18 U.S.C. § 2261 (2000); *see also, e.g.*, United States v. Barnette, 211 F.3d 803 (4th Cir. 2000); United States v. Lankford, 196 F.3d 563 (5th Cir. 1999); United States v. Page, 167 F.3d 325 (6th Cir. 1999); United States v. Gluzman, 154 F.3d 49 (2d Cir. 1998); United States v. Bailey, 112 F.3d 758 (4th Cir. 1997) (sustaining constitutionality of the statute).

214 18 U.S.C. § 2262 (2000); *see also, e.g.*, United States v. Von Foelkel, 136 F.3d 339 (2d Cir. 1998); United States v. Wright, 128 F.3d 1274 (8th Cir. 1997); United States v. Casciano, 124 F.3d 106 (2d Cir. 1997).

215 U.S. COMM'N ON INTERSTATE CHILD SUPPORT, SUPPORTING OUR CHILDREN: A BLUEPRINT FOR REFORM (1992). *See generally* Margaret Campbell Haynes, *Supporting Our Children: A Blueprint for Reform*, 27 FAM. L.Q. 7 (1993) (discussing the history, purpose, and effect of the commission's report).

216 Child Support Recovery Act of 1992, Pub. L. No. 102-521, 106 Stat. 3403 (1992) (codified at 18 U.S.C. § 228) (implementing recommendation number 73b); *see also* Estin, *supra* note 9, at 565–72.

217 18 U.S.C. § 228 (2000). Congress relied on estimates developed by the General Accounting Office that one third of noncustodial fathers lived in a different state than their children, and that more than half of these fathers did not pay child support regularly. *See* H.R. REP. NO. 102-771, at 5 (1992) (citing U.S. GEN. ACCOUNTING OFFICE, INTERSTATE CHILD SUPPORT: MOTHERS RECEIVING LESS SUPPORT FROM OUT-OF-STATE FATHERS, GAO/HRD-92-39 FS (1992)).

218 Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (1998) (codified at 18 U.S.C. § 228).

219 *See* 140 CONG. REC. S9380–82, S9425–26 (1994) (letter from Rep. Henry Hyde and Sen. Richard Shelby to Att'y Gen. Janet Reno, urging Justice Department to initiate prosecutions).

and *Morrison*, but the federal courts have repeatedly sustained it.[220] Courts typically conclude that the obligation to pay child support across state lines is within the scope of interstate commerce,[221] and their opinions stress the fact that this statute addresses an enforcement problem that would not exist except for state boundaries.[222]

3. Abortion Legislation

Congress enacted the Freedom of Access to Clinic Entrances Act (FACE) in 1994, identifying both the Commerce Clause and Section 5 of the Fourteenth Amendment as sources of its authority.[223] The law established criminal penalties for individuals who use force, threat of force, or physical obstruction to injure, intimidate, or interfere with persons attempting to obtain or provide reproductive health services.[224] A number of federal courts of appeals have upheld FACE against challenges asserting that Congress exceeded its commerce power, despite the fact that the statute has no express interstate jurisdictional element.[225]

With a change in focus that reflects a shift in the prevailing political winds, Congress enacted the Partial-Birth Abortion Ban Act of 2003[226] after two failed attempts to pass similar legislation during the Clinton Administration.[227] The law provides that "any physician who, in or af-

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220 Cases decided after *Morrison* include *United States v. King*, 276 F.3d 109, 111–13 (2d Cir. 2002); *United States v. Monts*, 311 F.3d 993, 996–97 (10th Cir. 2002); *United States v. Faasse*, 265 F.3d 475 (6th Cir. 2001) (en banc), *aff'g* 227 F.3d 660 (6th Cir. 2000); and *United States v. Lewko*, 269 F.3d 64, 65 (1st Cir. 2001). The earlier cases are reviewed in Estin, *supra* note 9, at 565–72.

221 *See*, *e.g.*, United States v. Mussari, 95 F.3d 787, 790 (9th Cir. 1996).

222 *See*, *e.g.*, United States v. Sage, 92 F.3d 101, 105 (2d Cir. 1996) *see also* Saylor, *supra* note 199, at 92–111 (discussing CSRA cases).

223 Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103-259, 108 Stat. 694 (1994) (codified at 18 U.S.C. § 248).

224 18 U.S.C. § 248(a)(1) (2000).

225 *See, e.g.*, United States v. Gregg, 226 F.3d 253, 261–67 (3d Cir. 2000); Hoffman v. Hunt, 126 F.3d 575, 582–88 (4th Cir. 1997); United States v. Wilson, 73 F.3d 675, 679–88 (7th Cir. 1995); Cheffer v. Reno, 55 F.3d 1517, 1519–22 (11th Cir. 1995); Am. Life League, Inc. v. Reno, 47 F.3d 642 (4th Cir. 1995).
A number of District Court opinions concluded that the law exceeded Congress's Commerce Clause powers. *E.g.*, Hoffman v. Hunt, 923 F. Supp. 791 (W.D. N.C. 1996); United States v. Wilson, 880 F. Supp. 621 (E.D. Wis. 1995). *See generally* Saylor, *supra* note 199, at 111–23 (discussing FACE cases); Benjamin W. Roberson, Note, *Abortion as Commerce: The Impact of* United States v. Lopez *on the Freedom of Access to Clinic Entrances Act of 1994*, 50 VAND. L. REV. 239 (1997). Although other federal criminal legislation has in the past been sustained under the commerce power without such an element, the importance of an explicit jurisdictional provision is clearer after *United States v. Jones*, 529 U.S. 848 (2000) (construing federal arson statute to avoid constitutional question under *Lopez*).

226 Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (codified at 18 U.S.C. § 1531).

227 Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong. (1997); Partial-Birth Abortion Ban Act of 1995, H.R. 1833, 104th Cong.; *see also* Associated Press, *Senate Override Fails on Abortion Measure*, WASH. POST, Sept. 19, 1998, at A8.

fecting interstate or foreign commerce, knowingly performs a partial birth abortion" is subject to criminal penalties and may be sued for damages by the pregnant woman's husband or by her parents, if she was under 18 at the time and did not obtain their consent. The Act also has no express interstate jurisdictional element, and does not include findings on the connection between an abortion procedure and interstate commerce.[228] In *Gonzales v. Carhart*,[229] the Supreme Court relied on its prior abortion decisions to reject a facial challenge to the constitutionality of the statute, but the Court never addressed the question of whether the statute fell within Congress's commerce power.[230]

4. Parental Kidnapping

Kidnapping has been a federal crime since the infamous Lindbergh kidnapping case in the early 1930s.[231] The statute has clear interstate jurisdictional elements: for example, it applies when an abducted person was "willfully transported in interstate or foreign commerce."[232] The federal statute has an exception for abduction "of a minor by the parent."[233] Under this parental exemption, if one parent violates a court order by taking a child across state boundaries without legal authority, the parent violates only state laws.[234]

Members of Congress have proposed modifying the parental exemption in the kidnapping statute. Early versions of the Parental Kidnapping Prevention Act (PKPA) included a new statutory provision criminalizing interstate parental kidnapping.[235] The Department of Jus-

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228 Partial-Birth Abortion Ban Act of 2003 § 2; *see also* Allan Ides, *The Partial-Birth Abortion Ban Act of 2003 and the Commerce Clause*, 20 CONST. COMMENT. 441 (2004); David B. Kopel & Glenn H. Reynolds, *Taking Federalism Seriously:* Lopez *and the Partial-Birth Abortion Ban*, 30 CONN. L. REV. 59, 104–11 (1997).

229 Gonzales v. Carhart, 550 U.S. 124 (2007).

230 In 2006, the House and Senate each approved legislation to establish civil and criminal penalties against any person who transports a minor across state lines to obtain an abortion without the permission of one of the minor's parents. *See* Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1470, 1536–41 (2007). Differences between the House and Senate bills were not resolved before the end of the legislative session. *See* Charles Babington, *Interstate Abortion Bill Clears Senate*, WASH. POST, July 26, 2006, at A1; *see also* Joanna S. Liebman, *The Underage, the "Unborn," and the Unconstitutional: An Analysis of the Child Custody Protection Act*, 11 COLUM. J. GENDER & L. 407 (2002).

231 18 U.S.C. § 1201 (2000); United States v. Boettcher, 780 F.2d 435, 436–37 (4th Cir. 1985).

232 18 U.S.C. § 1201(a); *see also* Chatwin v. United States, 326 U.S. 455 (1946) (discussing the commerce power basis of the kidnapping statute); United States v. Toledo, 985 F.2d 1462 (10th Cir. 1993).

233 § 1201(a); *see also* United States v. Floyd, 81 F.3d 1517, 1523 (10th Cir. 1996) (construing the parental exemption); United States v. Sheek, 990 F.2d 150, 151 (4th Cir. 1993).

234 *See*, *e.g.*, COLO. REV. STAT. § 18-3-304 (2007).

235 *E.g.*, S. 105, 96th Cong. § 3 (1979). *See generally* Russell M. Coombs, *The "Snatched" Child Is Halfway Home in Congress*, 11 FAM. L.Q. 407 (1978) (discussing a legislative proposal to deal with the "child-snatching" problem).

tice opposed those provisions, arguing that they would strain the resources of the Federal Bureau of Investigation and burden the federal courts.[236] Congress heeded these objections and the final PKPA included only provisions based on the Full Faith and Credit Clause.[237] Subsequent legislation made international parental kidnapping a federal crime, but the parental exemption still applies in interstate kidnapping cases.[238]

B. Full Faith and Credit

In contrast to legislation premised on the Commerce Clause, which uses federal authority to extend the reach of state courts and law enforcement, legislation based on the Full Faith and Credit Clause mediates jurisdictional and conflict of laws questions between states. Congress has explicit authority to act in this area under Article IV, Section 1 of the Constitution.[239] Congress has rarely invoked this power; beyond the initial legislation implementing the Clause,[240] the principal uses of this power have been recent family law legislation.[241] The Supreme Court has not addressed the scope of Congress's legislative authority under the Clause,[242] but it has considered the application of the Clause in many interstate family law disputes appealed from the state courts since the mid-nineteenth century.[243]

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236 *See* Letter from Patricia M. Wald, Assistant Attorney General, to Peter W. Rodino, Chair of the House Committee on Judiciary (Sept. 20, 1978), *reprinted in* Reform of the Federal Criminal Laws, Hearings on S. 1722 and S. 1723 Before the S. Comm. on the Judiciary, 96th Cong. 10628 (1979).

237 Pub. L. No. 96-611, 94 Stat. 3566 (1980). *See generally infra* Part III.B.1. (discussing PKPA).

238 International Parental Kidnapping Crime Act, Pub. L. No. 103-173, 107 Stat. 1998 (1993) (codified at 18 U.S.C. § 1204). Prosecutions under this statute take place in the federal courts. *See* United States v. Cummings, 281 F.3d 993 (10th Cir. 2002); United States v. Alahmad, 211 F.3d 538 (10th Cir. 2000); United States v. Amer, 110 F.3d 873 (2d Cir. 1997); *see also infra* Part IV.D.1 (discussing remedies for a parent or custodian in the event a child is wrongfully removed to or retained in a country other than the child's habitual residence).

239 "Full Faith and Credit shall be given in each State to the public Acts, Records and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records, and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1. *See generally* Metzger, *supra* note 230, at 1493–98 (describing express support for broad congressional power in other constitutional interstate relations provisions).

240 Judiciary Act of 1789, 1 Stat. 73 (1789) (codified at 28 U.S.C. §§ 1738, 1739).

241 *See* Sack, *supra* note 212, at 874–905.

242 *See id.*

243 *E.g.*, Williams v. North Carolina, 317 U.S. 287 (1942); Sistare v. Sistare, 218 U.S. 1 (1910). *See generally* Estin, *supra* note 33 (discussing the Court's treatment of interstate family law disputes).

1. Child Custody and Adoption

Traditionally, courts determined jurisdiction in child custody cases on the basis of the child's domicile.[244] Between 1940 and 1970, state courts changed their approach, holding that any state with a sufficient connection to the child could litigate custody questions.[245] Because this approach often gave rise to concurrent jurisdiction in more than one state, it encouraged "seize and run" tactics by parents seeking a more favorable forum for their claims. The Supreme Court was largely unsuccessful in developing rules to manage these conflicts, and by the early 1970s, states were attempting to regulate the problem with the Uniform Child Custody Jurisdiction Act (UCCJA).[246] The UCCJA recognized several appropriate grounds for subject matter jurisdiction in custody cases,[247] and attempted to constrain forum shopping by limiting the circumstances in which one state could modify an order from another state.[248]

A decade after states began enacting the UCCJA, Congress passed the Parental Kidnapping Prevention Act (PKPA)[249] to address the large and growing number of interstate custody disputes in which there were inconsistent decisions by courts in different states. Congress found that the diversity of laws and practices among states and "the limits imposed by a federal system on the authority of each such jurisdiction" motivated parties to take their children across state boundaries to relitigate custody.[250] The PKPA identified when one state must enforce another state's child custody determination, in terms largely similar to the UCCJA.[251] As noted above, early versions of the legislation also in-

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244 *See* RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 117 (1934); CLARK, *supra* note 53, at 457–58.

245 Sampsell v. Super. Ct. in & for L.A. County, 197 P.2d 739 (Cal. 1948). *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971) (describing state jurisdiction to determine custody); CLARK, *supra* note 53, at 457–58 (tracing history of custody jurisdiction). Regarding the personal jurisdiction problem, see *May v. Anderson*, 345 U.S. 528 (1953), which held that custody decrees were not entitled to full faith and credit unless they were entered upon good personal jurisdiction over both parents. *See* CLARK, *supra* note 53, at 460–63.

246 UNIF. CHILD CUSTODY JURISDICTION ACT [9 pt. I.A.] U.L.A. 261 (1999); *see also* Brigitte M. Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207 (1969).

247 UNIF. CHILD CUSTODY JURISDICTION ACT § 3.

248 *Id.* § 14.

249 Pub. L. No. 96-611 §§ 6–10, 94 Stat. 3568 (1980) (codified at 28 U.S.C. § 1738A).

250 *Id.* § 7.

251 *Id.* § 8(a). In addition, Congress provided for the use of the federal Parent Locator Service to assist in making or enforcing child custody orders and in enforcement of state and federal laws against parental kidnapping. *Id.* § 9.

cluded a federal criminal statute to address parental kidnapping, but Congress eliminated this from the final version of the statute.[252]

The UCCJA and the PKPA only partly succeeded in regulating custody jurisdiction.[253] Courts in two different states, applying the same statute, could each conclude that their own state was the appropriate one to take jurisdiction in a particular case. Neither the UCCJA nor the PKPA provided any means of resolving such a conflict, and in *Thompson v. Thompson*,[254] the Supreme Court concluded that Congress did not intend that the PKPA would make the federal courts available to resolve jurisdictional deadlocks and conflicting state custody decrees.[255] The Court cited several reasons for this conclusion: the proposal would increase federal court caseloads, involve the courts in an area in which they lacked expertise, and bring the courts into an area that has traditionally been the province of the states.[256] Despite its long history of deciding full faith and credit issues in interstate family law cases, the court found no basis outside the PKPA to resolve the dispute.

With the PKPA, Congress created a system in which an inconsistent federal statute was superimposed on a comprehensive, uniform state law. Although the federal PKPA should have preempted inconsistent provisions of the UCCJA, lawyers and judges encountered enormous difficulties in applying the two statutes.[257] After almost twenty years of

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252 *See supra* Part III.A.4. At the time the PKPA was passed, thirty-nine states had enacted the UCCJA and the remaining states did so soon after. While the two statutes are very similar, there are a few important differences. *Compare* Uniform Child Custody Jurisdiction Act § 3(a)(1)–(2), *with* Parental Kidnapping Prevention Act § 1738A(c). *See generally* Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition and Enforcement*, 66 MINN. L. REV. 711 (1982); Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act*, 25 U.C. DAVIS L. REV. 845, 919 (1992); Sheldon A. Vincenti, *The Parental Kidnapping Prevention Act: Time to Reassess*, 33 IDAHO L. REV. 351, 368 (1997).

253 Goldstein argued that the statutes could not succeed because there is an irreconcilable conflict between the goals of "preventing or punishing 'child-snatching' and promoting well-informed decisions." Goldstein, *supra* note 252, at 851. She concluded that the statutes "have been spectacularly unsuccessful, and have exacerbated the problem of the interstate child instead of resolving it." *Id.* at 938–39.

254 484 U.S. 174 (1988); *see also* California v. Superior Court, 482 U.S. 400 (1987).

255 The Court relied on legislative history indicating that Congress considered and rejected a proposal that would have extended the federal courts' diversity jurisdiction to actions for enforcement of state custody orders. *Thompson*, 484 U.S. at 184–85. Some members of Congress still support this approach. *See, e.g.*, Bring Our Children Home Act, H.R. 3941, 108th Cong., 2d Sess. (2004) (giving federal district courts jurisdiction over competing custody determinations and having more than 100 sponsors).

256 *Thompson*, 484 U.S. at 184–85. The Court also concluded that to recognize a federal cause of action would be to ask federal district courts to exercise appellate review of state court judgments, rejecting the argument that the federal courts could resolve conflicts over state court jurisdiction without addressing the merits of custody cases. *Id.* at 184 n.4, 185 n.5.

257 CLARK, *supra* note 53, at 463–94 (suggesting that analysis of UCCJA and PKPA was a problem "technical enough to delight a medieval property lawyer"). *See also* Vincenti, *supra* note 252 (arguing that the PKPA should be repealed).

difficulty, the states achieved a better solution with the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), a new uniform law drafted to dovetail more closely with the PKPA and to eliminate most of the circumstances in which two states might claim concurrent jurisdiction.[258]

Jurisdictional issues also posed problems in interstate adoption cases under the UCCJA and the PKPA,[259] but the UCCJEA has reduced these difficulties.[260] Beyond the UCCJA and the PKPA, interstate adoption cases have been regulated by the states through the Interstate Compact on Placement of Children (ICPC), which was drafted in 1960 and in effect in all of the states by 1990.[261] The Compact has not functioned well in the context of foster care placements, however, and these problems have been addressed both with a proposed new compact and a federal law designed to speed up the completion of home studies in interstate foster care cases.[262]

2. Child Support Enforcement

Acting on a recommendation of the U.S. Commission on Interstate Child Support,[263] Congress passed the Full Faith and Credit for Child Support Orders Act (FFCCSOA)[264] in 1994. The FFCCSOA follows the PKPA model, and mandates interstate recognition and enforcement of support orders. The Commission also recommended that Congress require states to enact the Uniform Interstate Family Support Act (UIFSA),[265] and in its 1996 welfare reform legislation, Congress made

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258 UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, [9 pt. I.A.] U.L.A. 649 (1999). The UCCJEA improved the law by assigning a jurisdictional priority to the child's "home state," and giving continuing, exclusive jurisdiction to a court once it entered custody orders. *See generally* Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child Custody Practice Under the New Act*, 32 FAM. L.Q. 267 (1998) (explaining UCCJEA changes to custody jurisdiction rules). Most states and the District of Columbia have now adopted the UCCJEA. *See* National Conference of Commissioners on Uniform State Laws, UCCJEA Adoptions, http://www.nccusl.org/Update/docs/UCCJEAadoptions.pdf.

259 *See generally* Herma Hill Kay, *Adoption in the Conflict of Laws: The UAA, Not the UCCJA, Is the Answer*, 84 CAL. L. REV. 703 (1996) (arguing the UCCJA was not intended to apply to adoption cases).

260 *See* Robert G. Spector & Cara N. Rodriguez, *Jurisdiction Over Children in Interstate Placement: The UCCJEA, Not the ICPC, Is the Answer*, 41 FAM. L.Q. 145 (2007).

261 *See* Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292 (1989); Vivek Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L.Q. 435, 444 (2006).

262 Sankaran, *supra* note 261, at 450–53 (discussing the Safe and Timely Interstate Placement of Foster Children Act of 2006, enacted as part of the IV-E foster care program).

263 *See* H.R. REP. NO. 102-771 (1992).

264 Pub. L. No. 103-383, 108 Stat. 4064 (1994) (codified at 28 U.S.C. § 1738B).

265 *See* UNIF. INTERSTATE FAMILY SUPPORT ACT, [9 pt. I.B.] U.L.A. 235 (2001). At the time, all states had enacted some version of a prior uniform law, the Uniform Reciprocal Enforcement of Support Act.

state adoption of UIFSA a condition of receiving TANF block grants and Title IV-D funding.[266] Congress drafted the FFCCSOA to harmonize with UIFSA, which largely eliminated the problem of conflicting statutes that plagued custody jurisdiction.[267] State courts have held the FFCCSOA constitutional under both the Commerce Clause and the Full Faith and Credit Clause.[268]

3. Domestic Violence Protection Orders

Under VAWA, all states and Indian tribes must enforce protection orders issued by other states or tribes, so long as the court that issued the order had jurisdiction to do so under its own law and the person against whom the order was issued was given notice and an opportunity to be heard.[269] In its report on the bill, the Senate Judiciary Committee described this provision as closing "a major loophole,"[270] and reported that Congress modeled this section on the PKPA in an attempt to remedy problems of interstate domestic violence that "transcend the abilities of State law enforcement agencies."[271]

Implementing this law has proven difficult, however.[272] Various complexities caused by differences between state and federal law in the context of custody orders were reproduced in this setting, with the development of a Uniform Interstate Enforcement of Domestic Violence Protection Orders Act in 2000 that is not fully consistent with federal law under VAWA.[273] Congress amended the federal law in 2000 to help

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266 *See supra* Part II.B. Cooperative efforts of state Title IV-D agencies have also greatly facilitated interstate child support enforcement.

267 *But see* Draper v. Burke, 881 N.E.2d 122 (Mass. 2008) (holding that FFCCSOA preempted UIFSA provision restricting modification of support order); Baasileh v. Alghusain, 890 N.E.2d 779 (Ind. Ct. App. 2008) (holding the same).

268 *See, e.g.*, Harding v. Harding, 121 Cal. Rptr. 2d 450 (Cal. Ct. App. 2002) (holding the FFCCSOA constitutional under the Commerce Clause as well as the Full Faith and Credit Clause); Paton v. Brill, 663 N.E.2d 421 (Ohio Ct. App. 1995).

269 Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1902, 1930 (1994) (codified at 18 U.S.C. § 2265). *See generally* Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAM. L.Q. 253 (1995). Courts have encountered jurisdictional difficulties in entering new protection orders in interstate cases. *E.g.*, Caplan v. Donovan, 879 N.E.2d 117 (Mass. 2008); Bartsch v. Bartsch, 636 N.W.2d 3 (Iowa 2001); T.L. v. W.L., 820 A.2d 506 (Del. Fam. Ct. 2003).

270 S. REP. NO. 103-138, at 55 (1993).

271 *Id.* at 70.

272 *See generally* Sack, *supra* note 212.

273 *See* UNIF. INTERSTATE ENFORCEMENT OF DOMESTIC VIOLENCE PROTECTION ORDERS ACT § 3, 9 U.L.A. 28 (2005). *See generally* Sack, *supra* note 212, at 840–48. The uniform law was subsequently amended in 2002. *Id.* at 847. As of this writing, nineteen U.S. jurisdictions have adopted the Act. *See* National Conference of Commissioners on Uniform State Law, A Few Facts about the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (2000) (2002), http://www.nccusl.org/Update/uniformact_factsheets/uniformactsfs-uiedvpoa.asp (last visited Oct. 13, 2008).

courts improve enforcement of these orders, but problems with state compliance have continued.[274]

4. Marriage Recognition

Under traditional conflict of laws principles, the validity of a marriage is based on the law of the place of celebration.[275] In the United States, states follow this principle, subject to limited public policy exceptions.[276] In 1993, when it appeared that Hawaii might become the first state to recognize the validity of same-sex marriages, traditional principles became a matter of intense debate in legislatures across the country.[277] Although marriage recognition was not traditionally understood to be a full faith and credit question, Congress weighed in on the debate by passing the Defense of Marriage Act (DOMA) in 1996.[278]

Congress enacted DOMA based on its power under the Full Faith and Credit Clause, but DOMA went significantly beyond Congress's prior exercise of this authority. Section 2 of DOMA allows states to refuse to recognize same-sex marriages formalized in other states,[279] and Section 3 denies same-sex marriages any federal recognition.[280] Schol-

274 *See* Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (amending 18 U.S.C. § 2265). *See generally* Sack, *supra* note 212, at 848–50.

275 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971).

276 *See* CLARK, *supra* note 53, at 41–43, 85–88; Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921, 934–43 (1998); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

277 *See generally* Jennifer Gerrarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriages*, 68 S. CAL. L. REV. 745 (1995); Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WIS. L. REV. 1033 (1994); Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450 (1994).

278 *See* Pub. L. No. 104-199, 110 Stat. 2419 (1996).

279 *See* 28 U.S.C. § 1738C (2000) ("No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.").

280 *See* 1 U.S.C. § 7 (2000) ("In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word 'marriage' means only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or wife.").

ars and politicians have disputed whether Section 2 exceeds Congress's power,[281] and a few cases have tested these arguments.[282]

Aside from full faith and credit issues, Section 3 of DOMA poses an additional federalism problem. By denying federal recognition to same-sex marriages that a state legally recognizes,[283] DOMA denies same-sex spouses the opportunity to file joint tax returns, receive spousal social security benefits, and qualify under myriad other federal laws governing pension, bankruptcy, immigration, and other rights of married or divorcing couples. Because national laws ordinarily rely on state law to establish the marital status of an individual applicant,[284] DOMA is a dramatic exception to the traditional rule of deference to the states on a question at the core of family law.

C. Conclusions

Because family law has been primarily a subject of state jurisdiction, and because state laws reflect strong and significant policy differences, the process of coordinating family law across state borders is difficult. Historically, neither Congress nor the states were successful in addressing conflicts in state divorce laws, leaving the Supreme Court to resolve the problem in a long series of cases decided under the Full Faith and Credit Clause.[285] Coordination among states has been more successful with laws that address jurisdiction and recognition of orders in child support and child custody matters.

National legislation directed at interstate conflict and coordination helps define the extent of state power over family law and the shape of American families. In criminal law statutes premised on the Commerce Clause, Congress effectively places national law enforcement at the service of the state courts to help enforce their orders across state lines.

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281 In correspondence with Senator Kennedy placed in the Congressional Record, Laurence Tribe declared unequivocally that "Congress possesses no power under any provision of the Constitution to legislate any such categorical exemption from the Full Faith and Credit Clause of Article IV." Letter from Laurence H. Tribe to Senator Edward Kennedy (May 29, 1996), 142 CONG. REC. S5931 (daily ed. June 6, 1996). *Contra* Letter from Michael W. McConnell to Senator Orrin Hatch (July 10, 1996), *In Defense of Marriage Act: Hearing on S. 1740 Before the Senate Judiciary Committee*, 104th Cong. 56–59 (1996).

282 *See, e.g.*, Smelt v. County of Orange, 447 F.3d 673 (9th Cir. 2006); Wilson v. Ake, 354 F. Supp. 2d 1298 (M.D. Fla. 2005). *But cf.* Marriage Protection Act of 2005, H.R. Res. 1100 § 2, 109th Cong. (2005).

283 28 U.S.C. § 1738C (2000). The language of the statute is quoted *supra* note 279.

284 *See infra* Parts IV.B–C.

285 *See* Estin, *supra* note 33. When no-fault divorce reforms swept the country, only a handful of states enacted the Uniform Marriage and Divorce Act, [9 pt. I.A.] U.L.A. 182 (1998). There was never a Restatement of family law, although the ALI eventually produced a more forward-looking analysis of family law doctrine. *See generally* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2000).

Federal courts have upheld such laws when they target crimes that involve the channels or means and instrumentalities of interstate commerce. However, the courts and the Executive Branch have not been enthusiastic about taking on enforcement responsibilities in interstate family cases. This was evident when Congress considered the civil rights remedy of VAWA and the criminal law aspects of the PKPA.[286] The Supreme Court's rules limiting the jurisdiction of federal courts in cases that touch on family law questions illustrate the same reluctance.[287]

The Supreme Court clearly believes that family litigation should remain the business of state courts. This is usually a sensible approach, which respects the state courts' superior experience and expertise in these matters. Yet in interstate cases, federal courts may be better situated to balance the conflicting interests of different states and different family members. When courts of different states have reached an impasse, the lack of a federal forum to resolve these disputes leaves families with no effective remedy.

In Congress, legislation based on the Full Faith and Credit Clause emerges from the House and Senate judiciary committees. With these laws, the national government incurs minimal enforcement costs. The legislation has not required action by Executive Branch agencies, and courts have not interpreted the statutes as establishing federal court jurisdiction.[288]

Congress's full faith and credit legislation is paradoxical. Laws governing recognition for child support and child custody decrees have been technically complex, but were enacted without significant political or policy disputes.[289] The constitutional authority for this legislation was clear and Congress acted to address problems that caused enormous difficulties among state courts. With DOMA, the question of constitutional authority is closer, and the federalism difficulties more pronounced. Congress acted preemptively, before state courts and legislatures had an opportunity to consider the full range of interests and issues at stake. Beyond the questions concerning Congress's authority under the Full Faith and Credit Clause, DOMA raises federalism concerns because it inverts the usual relationship of state and federal family law.

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286 *See supra* Parts III.A.1., III.A.4.

287 This includes the domestic relations exception to diversity jurisdiction in *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), and the Court's decision limiting the standing of a noncustodial parent to raise constitutional claims on behalf of his child in *Elk Grove Unified Sch. Dist. v. Nedow*, 542 U.S. 1, 12–18 (2004).

288 Although the Supreme Court considered a large number of full faith and credit cases in family law from the mid-nineteenth century through the mid-twentieth century, it has not performed this role for almost fifty years.

289 *But see* Miller-Jenkins v. Miller-Jenkins, 912 A.2d 951 (Vt. 2006); Miller-Jenkins v. Miller-Jenkins, 637 S.E.2d 330 (Va. Ct. App. 2006) (considering application of PKPA in custody dispute between former same-sex partners).

Congress's enactment of DOMA contrasts with its inaction over decades as the states debated the problem of migratory divorce. Unable to reach a workable political solution, Congress did not act despite repeated invitations from the Supreme Court to utilize its constitutional power to address what had become a widespread and intractable problem.[290] In contrast, Congress passed DOMA before any state recognized same-sex marriages or unions, with Congress establishing its position regarding an issue on which state laws are now in real conflict.[291] To the extent that states are still working through the complex conflict of laws questions in this area, federal legislation to preempt that debate was premature and violated the federalism norms routinely invoked by the Supreme Court.

IV. NATIONAL FAMILY POLICIES AND PREEMPTION

Congress makes family law by legislating pursuant to its general powers in areas including civil rights, economic regulation, immigration, and foreign relations. These statutes frequently constrain state laws governing core family law matters including marriage, divorce, and child custody. Under the Supremacy Clause, such national legislation preempts inconsistent state laws. While this overrides the traditional understanding that family law is the province of the states, the Supreme Court has not hesitated to affirm Congress's authority in these areas. The discussion that follows sketches the outlines of the major areas in which broader subjects of national legislation interact with state family laws.

A. Civil Rights and the Family

The intersection of family law and civil rights was a central aspect of post-Civil War Reconstruction lawmaking.[292] The legacy of coverture and segregation from that era still complicates modern family law. Working with the Due Process and Equal Protection Clauses, the Supreme Court has addressed a number of the large constitutional questions produced by gender and race issues embedded in old social and legal family norms.[293] In addition, it has deployed these constitutional norms

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290 *See* Estin, *supra* note 33.

291 *See generally* Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143 (2005). A sizable group of states extends many or all of the rights of marriage to same-sex couples through various forms of marriage, civil union, or registered partnership. Taken together, these jurisdictions account for almost a quarter of the total U.S. population. *See* Ann Laquer Estin, *Divergent Paths: Same-Sex Partnership Rights in the United States,* in INTERNATIONAL SURVEY OF FAMILY LAW 481, 492–93 (Bill Atkin ed., 2008).

292 *See generally* COTT, *supra* note 29; DAVIS, *supra* note 29; Hasday, *supra* note 21.

293 *E.g.*, Palmore v. Sidoti, 466 U.S. 429 (1984); Orr v. Orr, 440 U.S. 268 (1979); Loving v. Virginia, 388 U.S. 1 (1967).

against traditions that diminish the status and recognition extended to non-marital family relationships.[294] More recently, Congress has followed the same path, enacting family legislation based on its enforcement power under Section 5 of the Fourteenth Amendment.[295]

In the modern era, the Supreme Court has broadly construed Congress's power under Section 5,[296] but the Court's more recent cases signal a shift to a narrower view.[297] In *Nevada Department of Human Resources v. Hibbs*, the Court summarized its precedent: although determination of the substantive meaning of constitutional protections is the province of the federal courts, Congress can act both to remedy and to prevent violations of Fourteenth Amendment rights so long as there is sufficient "congruence and proportionality between the injury to be prevented and the means adopted to the end."[298] Because the Supreme Court has articulated due process and equal protection concerns in a wide variety of family law contexts, many types of family-based legislation could fall within the scope of Congress's Section 5 power.

1. Gender Discrimination

Both Congress and the Supreme Court have acted to prevent and remedy aspects of women's legal subordination that are rooted in traditional domestic relations law and traditional attitudes about women's roles in society. The Court has mandated that employers make benefits equally available to male and female employees,[299] and has prohibited states from allowing women, but not men, to seek alimony.[300] Congress has also legislated in this general area, particularly with employment discrimination laws including Title VII of the Civil Rights Act.

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294 *E.g.*, Levy v. Louisiana, 391 U.S. 68 (1968); Stanley v. Illinois, 405 U.S. 645 (1972).

295 U.S. CONST. amend XIV, § 5. "All persons born or naturalized in the United States, . . . are citizens of the United States and of the State wherein they reside. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

296 *E.g.*, United States v. Guest, 383 U.S. 745 (1966).

297 *See generally* Post & Siegel, *supra* note 201, at 442. (noting that "[b]oth *Kimel* and *Morrison* are written in forceful and broad strokes that threaten large stretches of congressional authority under Section 5"). *See also* Bd. of Tr. of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001); Kimel v. Bd. of Regents, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997).

298 538 U.S. 721, 728 (2003) (quoting *City of Boerne*, 521 U.S. at 520). *Hibbs* decided that Congress acted within its power under the Fourteenth Amendment to prevent and remedy gender discrimination when it abrogated state sovereign immunity by authorizing claims against the states under the Family and Medical Leave Act. *Id.*

299 *See*, *e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973).

300 *See* Orr v. Orr, 440 U.S. 268 (1979).

Civil rights legislation addressing gender discrimination in labor and employment also has important family policy dimensions.[301] The Pregnancy Discrimination Act prohibits employers from discriminating on the basis of pregnancy.[302] The Family and Medical Leave Act (FMLA) requires certain employers to permit employees to take up to twelve weeks unpaid leave after the birth of a baby, adoption of a child or placement of a foster child, or in the event of a serious health condition or the need to care for a family member with a serious health condition.[303] Disputes concerning these constitutional and statutory rights are regularly litigated in federal courts.[304] The Supreme Court has generally recognized Congress's authority to enact these employment laws under the Fourteenth Amendment and the Commerce Clause.[305]

When Congress moved to address gender-motivated violence with VAWA, it premised the new civil rights remedy on Congress's enforcement power under Section 5 of the Fourteenth Amendment.[306] As noted above, state supreme court justices and the Judicial Conference of the United States initially opposed this provision.[307] There was concern that the new remedy would federalize domestic relations,[308] and Congress met this concern with statutory language specifying that the federal courts would not have supplemental jurisdiction over claims for divorce, alimony, property division, or custody.[309]

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301 Such laws may also be based on the Commerce Clause power. *See* 42 U.S.C. § 2000e(b) (1994) (defining "employer" for purposes of employment discrimination claims and including a requirement that employer be "engaged in an industry affecting commerce").

302 Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k)) (amending Title VII of the Civil Rights Act). Congress adopted the Act to overrule *Gen. Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which held that pregnancy discrimination was not sex discrimination.

303 Pub. L. No. 103-3, 107 Stat. 6, 7–9 (1993) (codified at 29 U.S.C. §§ 2601–2654). *See generally* Jane Rigler, *Analysis and Understanding of the Family and Medical Leave Act of 1993*, 45 CASE W. RES. L. REV. 457 (1995) (discussing the requirements of the FMLA and its implications for employers).

304 *See*, *e.g.*, United Auto. Workers of Am. v. Johnson Controls, Inc., 499 U.S. 187 (1991) (construing requirements of Pregnancy Discrimination Act); Cal. Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272 (1987).

305 The Court reaffirmed this understanding in *Nev. Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

306 This statute is described *supra* notes 203–13 and accompanying text. The use of the enforcement power and creation of this civil rights remedy were both controversial before Congress enacted the law. *See generally* Siegel, *supra* note 186, at 2196–206.

307 S. REP. NO. 103-138 (1993); *see also* Siegel, *supra* note 186, at 2197–200 (citing other relevant sources). The Senate Judiciary Committee report on the bill emphasized that it required "subjective proof on a case-by-case basis that the criminal was motivated by a bias against the victim's gender." S. REP. NO. 103-138, at 49–50 (1993).

308 *See supra* Part III.A.1.

309 *See* 42 U.S.C.A. § 40302(e)(4) (2006).

The Supreme Court concluded in *Morrison* that the civil rights remedy exceeded Congress's power under Section 5.[310] The Court acknowledged that Congress had authority to act to correct problems of bias in state justice systems against victims of gender-motivated violence,[311] but it rejected the civil rights remedy because it was directed at private conduct rather than state action.[312]

Because the Court framed *Morrison* in terms of the constitutional limits of congressional power, its primary effect was to assign to states all responsibility for addressing gender-motivated violence.[313] As Robert Post and Reva Siegel have argued, the decision did not offer a "positive account of the appropriate relationship between federal and state governments in matters of civil rights enforcement."[314] *Morrison* left many observers to conclude that the Court viewed all gender-motivated violence as beyond the scope of federal legislation.[315]

The Supreme Court clarified its view of Congress's Section 5 power in *Hibbs.* The *Hibbs* Court concluded that the FMLA was a congruent and proportional remedy consistent with *Morrison*'s limits on Congress's power, largely because the Court itself had previously interpreted the Fourteenth Amendment to reach state laws perpetuating sex-role stereotypes in connection with pregnancy and childbirth.[316] Read together,

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310 United States v. Morrison, 529 U.S. 598, 619–24 (2000).

311 *Cf.* Castle Rock v. Gonzales, 545 U.S. 748, 768 (2005) (holding that the "respondent did not, for purposes of the Due Process Clause, have a property interest in police enforcement of the restraining order against her husband").

312 The Court decided *Morrison* "without truly grappling with the systematic nature and breadth of the constitutional violation that Congress was undertaking to remedy." Post & Siegel, *supra* note 201, at 524; *see also* Goldfarb, *supra* note 201, at 116–24. The decision does not engage with a fundamental and important family law question: are relationships within a family outside the rules that govern relationships between other citizens? *See generally*, Siegel, *supra* note 186 (discussing privacy norms and the regulation of marital violence).

313 *See* Post & Siegel, *supra* note 201, at 481–86 ("It is federalism, then that drives *Morrison*'s dismissive treatment of congressional Section 5 power. Having worked so hard in the first section of its opinion to preserve the regulation of violence in domestic relations from the reach of the national Commerce Clause power, the Court in *Morrison* was not about to turn around and let federal authority return through the back door of Section 5."); Young, *supra* note 8, at 162–63 (arguing that the state action requirement in *Morrison* serves to protect state regulatory authority).

314 Post & Siegel, *supra* note 201, at 502.

315 *See* Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761 (2005).

316 In upholding the FMLA, the Court read its prior case law expansively. *See* Reva B. Siegel, *You've Come a Long Way, Baby: Rehnquist's New Approach to Pregnancy Discrimination in* Hibbs, 58 STAN. L. REV. 1871, 1884 (2006) ("*Hibbs* endorses a restrictive interpretation of the Section 5 power that conservatives have long championed. To justify the constitutionality of the FMLA within this restrictive framework, Rehnquist has to demonstrate that the FMLA remedied a pattern of state action violating the Equal Protection Clause as interpreted by the Court in its sex discrimination cases. In making this showing, Rehnquist interprets the Equal Protection clause in ways he would not have in his first decades on the Court.").

Hibbs and *Morrison* allow Congress to act to remedy some types of gender discrimination under Section 5. As *Hibbs* makes clear, this is true even for legislation with a significant family policy dimension, since family welfare was at the heart of Congress's concern with the FMLA and the Court's opinion in *Hibbs*.

2. Race Discrimination

One core purpose of the post-Civil War amendments was to extend the right to marry and establish families to freed slaves. Many states, however, enforced laws prohibiting interracial marriages and interracial sexual relationships well into the twentieth century.[317] By the late 1940s, states had begun to repeal these laws, and the Supreme Court declared them unconstitutional in *Loving v. Virginia* in 1967.[318] The Court also held in *Palmore v. Sidoti* that child custody determinations based on racial considerations violated the Equal Protection Clause.[319]

Congress passed the Howard W. Metzenbaum Multiethnic Placement Act (MEPA) in 1994, permitting states to consider race in making adoptive placements, but prohibiting states from delaying or denying a placement on this basis.[320] Two years later, Congress revised the law to prohibit any consideration of race in placing children.[321] This new measure made it a civil rights violation for a person or government to deny any individual the opportunity to become an adoptive or foster parent, or to delay or deny the placement of a child for adoption or into foster care, on the basis of race, color, or national origin.[322] In addition to its enforcement power under the Fourteenth Amendment, Congress tied the legislation to the extensive federal regulation of adoption and foster care under Title IV-E of the Social Security Act.[323]

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317 *See* COTT, *supra* note 29, at 98–102.

318 *See* Loving v. Virginia, 388 U.S. 1 (1967); *see also* McLaughlin v. State of Florida, 379 U.S. 184 (1964) (holding unconstitutional a Florida statute that punished unmarried, interracial couples living together).

319 Palmore v. Sidoti, 466 U.S. 429 (1984).

320 *See supra* notes 148–49 and accompanying text.

321 *See supra* note 150 and accompanying text.

322 Small Business Job Protection Act of 1996, § 1808(c), Pub. L. No. 104-188, 110 Stat. 1755, at 1904.

323 *See supra* Part II.C; *see also* S. REP. NO. 104-279, at 6 (1996). The Senate Finance Committee considered the bill because it included tax benefits for adoptive parents. In its report on the bill, the Committee indicated that it was "concerned that [the MEPA] was not having the intended effect of facilitating the adoption of minority children" and pointed out that the previous legislation did not have "an enforcement provision backed by serious penalties." S. REP. NO. 104-279, at 5. The new bill provided that any individual harmed by a violation of the rule "could seek redress in any United States District Court." *Id.* at 6.

Congress enacted MEPA during an ongoing national debate over transracial adoption policy,[324] but the Senate report says little about the rationale either for prohibiting the consideration of racial and ethnic matching or for creating a new category of civil rights claims.[325] The federal courts had struggled with these issues for some time,[326] leaving state and local governments to take different policy approaches. MEPA falls squarely within Congress's spending and enforcement powers, however. Since Congress enacted the statute, the federal agencies involved with foster care and adoption have taken seriously their responsibility to prevent discrimination in placing children.[327]

Prior to MEPA, Congress addressed a different set of transracial adoption issues with the Indian Child Welfare Act (ICWA),[328] based on its historically broad power over Indian affairs. ICWA altered state requirements for adoption and termination of parental rights where Indian children are concerned. As described by the Supreme Court, ICWA was "the product of rising concern in the mid-1970's over the consequences to Indian children, Indian families, and Indian tribes of abusive child welfare practices that resulted in the separation of large numbers of Indian children from their families and tribes."[329] In contrast to MEPA and the Title IV-E policies, ICWA heightens family preservation requirements and enacts a series of placement priorities so that Indian children removed from their parents' care are more likely to be placed with other Indian families.

3. Constitutional Family Norms

Some efforts to preempt state laws through constitutional legislation have failed. Congress considered parental rights legislation in 1995 that would have established a civil rights remedy for individuals who believed that the government had interfered with their parental rights.[330] The act would have made it more difficult for state authorities to inter-

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324 For a sense of the debate, see RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 447–79 (2003).

325 *See* S. REP. NO. 104-279.

326 *See, e.g.*, Drummond v. Fulton County Dep't of Family and Children's Serv., 408 F. Supp. 382 (N.D. Ga. 1976), *rev'd*, 563 F.2d 1200 (5th Cir. 1977) (en banc).

327 *See* Nondiscrimination Under Programs Receiving Federal Assistance through the Department of Health and Human Services Effectuation of Title VI of the Civil Rights Act of 1964, 45 C.F.R. § 80 (2008). For a description of compliance actions taken by the Department of Health & Human Services's Office for Civil Rights, see U.S. Dep't of Health & Human Servs., *supra* note 151.

328 Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified at 25 U.S.C. §§ 1901–1961). *See generally* CLARK, *supra* note 53, at 875–76, 887. For a critique, see KENNEDY, *supra* note 324, at 488, 498–99.

329 Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).

330 Parental Rights and Responsibilities Act of 1995, H.R. 1946, 104th Cong. (1995); *see also* S. 984, 104th Cong. (1995). Parental rights recognized in *Meyer v. Nebraska*, 262 U.S.

vene in families to protect children against abuse and neglect or to provide medical care for a child against a parent's wishes.[331] Although Congress did not pass the legislation, House and Senate committees seriously considered it.[332] Under the analysis developed later in *Morrison* and *Lopez*, the bill would not have presented the same constitutional difficulties VAWA encountered, as it was clearly directed at state actors. Under *Hibbs*, an inquiry into the constitutionality of the legislation would be framed in terms of the "congruence and proportionality" between this legislation and the constitutional rights the Court has already identified.[333] There was no question as to the pedigree of the constitutional rights Congress was promoting, though the proposed legislation significantly exceeded the scope of the Supreme Court's prior parental rights decisions.[334]

Other constitutional family law proposals in Congress have looked beyond the Section 5 power and sought to amend the federal constitution. Historically, hundreds of proposed constitutional amendments have been introduced in Congress, most concerning subjects on which the state were divided such as divorce and interracial marriage, and none have succeeded.[335] State and federal court rulings on controversial matters such as abortion and same-sex marriage have also prompted such proposals.[336]

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390 (1923), and *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), (both cases cited in § 2(a)(1) of the Act) supported this remedy.

331 *See* § 2(b)(4) (seeking to "preserve" parental prerogative regarding child's health care). *See generally* Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996). The Act was also intended to reinforce parental prerogatives regarding children's education. *See* §§ 2(b)(3), 3(4)(a)(i); *see also* Woodhouse, *supra*, at 393–400.

332 There were hearings before the House Judiciary Committee, Subcommittee on the Constitution, in 1995. *See* Woodhouse, *supra* note 331; *see also* Peter Applebome, *An Array of Opponents Do Battle Over 'Parental Rights' Legislation*, N.Y. TIMES, May 1, 1996, at A1.

333 *See supra* note 316 and accompanying discussion of *Hibbs.* While reaffirming that the Constitution protects parental rights, the Supreme Court's decision in *Troxel v. Granville*, 530 U.S. 57 (2000), suggests that these rights may be more limited than a broad reading of *Meyer* and *Pierce* would suggest.

334 *See* Woodhouse, *supra* note 331. The legislation raised troubling questions as to how states would resolve conflicts between the proposed federal civil rights claim for parents and the mandates imposed on state child welfare systems under other federal legislation. *Id.* at 400–01.

335 S*ee* Stein, *supra* note 55.

336 *See, e.g.*, Marriage Protection Amendment, H.R.J. Res. 88, 109th Cong. (2005) ("Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any state, shall be construed to require that marriage or the legal incidents thereof be conferred on any union other than the union of a man and a woman."); *see also* S.J. Res. 1, 109th Cong. (2005). *See* Shailagh Murray, *Same-Sex Marriage Ban Is Defeated—Supporters Knew Senate Passage Was a Long Shot*, WASH. POST, June 8, 2006, at A1. *See also* Stein, *supra* note 55, at 614 n.9 (discussing many proposed amendments concerning abortion since the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973)).

Legislation to expand or establish new claims under the civil rights laws or to amend the Constitution typically begins with the House and Senate Judiciary committees. Proposals to amend the Constitution are often highly politicized and may come up for hearing or vote even when there is very little chance of passage.[337] The independent role of the states in the amendment process, and the requirement that two-thirds of the states ratify an amendment, serve to preserve federalism values and protect state autonomy.

B. Economic Regulation

National laws shape economic relationships through regulation of taxes, pensions, and bankruptcy, and reflect many explicit or implicit family policies. One study identified more than one thousand sections of the U.S. Code that rely on marital status as a factor in determining various legal rights, benefits, or privileges, many of which are economic.[338] The national legislation described here often references state law to define the relevant family relationships. Under DOMA, the federal definition of marriage to exclude state-recognized same-sex marriage has been a notable exception to this deferential approach.[339] In addition, other provisions in federal law preempt aspects of state family law in areas such as marital property division and spousal support.[340]

1. Tax Laws

Federal tax laws have treated married couples as single tax-paying units for purposes of the income tax laws since 1948.[341] This reduces total tax liability for married couples with only one wage earner or disparate earnings. Married couples with relatively equal earnings, however, pay more tax than they would if they were unmarried. All married couples receive advantageous treatment under federal estate[342] and gift taxes.[343] For tax purposes, marital status is generally determined by state

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337 *See* Murray, *supra* note 336.

338 *See supra* note 37.

339 *See supra* Part III.B.4.

340 *See, e.g.*, 11 U.S.C. § 101(14A) (2006) (defining "domestic support obligation" under the Bankruptcy Code); 26 U.S.C. § 71(b)(1) (2006) (defining "alimony" under the Internal Revenue Code).

341 *See generally* Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63 (1994); Edward J. McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Shari Motro, *A New "I Do": Towards a Marriage Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994). For the history of this aspect of the tax law, see Carolyn C. Jones, *Split Income and Separate Spheres: Tax Law and Gender Roles in the 1940s*, 6 LAW & HIST. REV. 259 (1988).

342 26 U.S.C. § 2056 (2000).

343 *Id.* § 2523.

law, with more precise federal rules applied in some contexts.[344] Unmarried cohabitants of the same or opposite sex are not eligible for this treatment,[345] and under DOMA, same-sex married couples or registered partners are also not eligible.

For many years, courts have wrestled with the appropriate tax treatment of payments made at the time of divorce under a variety of state laws.[346] Contemporary statutes treat an equitable property division transfer between former spouses as a non-taxable event[347] and allow alimony to be deducted from the payer's income and included in the recipient's.[348] Divorce payments are characterized on the basis of federal tax laws, rather than state family laws.[349] These provisions of federal law are often useful in structuring a divorce settlement, but are also unavailable to cohabiting or same-sex couples at the termination of their relationship.

2. Pensions and Retirement Plans

Federal law has long provided retirement and pension programs that benefit military veterans or retired government employees and their families.[350] Today, these programs include military retirement pay, federal Civil Service retirement benefits, and benefits under the Railroad Retirement Act.[351] In a number of decisions, the Supreme Court has held that state divorce courts could not allocate the benefits payable under federal retirement programs.[352] In response, Congress amended the statutes to permit division of some portions of these benefits.[353] More broadly,

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344 *See, e.g.*, *id.* § 2(a) (defining "surviving spouse"); *id.* § 7703 (defining "married individual").

345 *See* Patricia A. Cain, *Taxing Families Fairly*, 48 Santa Clara L. Rev. 805 (2008); Motro, *supra* note 341.

346 *See, e.g.*, United States v. Davis, 370 U.S. 65 (1962) (noting the tax treatment of property division); Douglas v. Willcuts, 296 U.S. 1 (1935) (noting the tax treatment of alimony payments); Gould v. Gould, 245 U.S. 151 (1917) (noting the tax treatment of alimony payments).

347 26 U.S.C. § 1041. This is not generally true of a settlement of property interests at the end of a cohabitation relationship. *See* Reynolds v. C.I.R., 77 T.C.M. (RIA) 1479 (1999). Congress adopted Section 1041 to equalize the tax treatment of these transactions in community property and non-community property states after *Davis*, 370 U.S. 65. *See* Craven v. U.S., 215 F.3d 1201, 1204 (11th Cir. 2000).

348 *See* 26 U.S.C. §§ 71, 215.

349 *See* Martin J. McMahon, Jr., *Tax Aspects of Divorce and Separation*, 32 FAM. L.Q. 221 (1998).

350 *See* Collins, *supra* note 315, at 1782–803.

351 45 U.S.C. §§ 401–434 (2000).

352 *See* McCarty v. McCarty, 453 U.S. 210 (1981) (holding that military retirement pay not subject to equitable division in divorce case); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (holding that benefits under Railroad Retirement Act are not assignable in divorce proceeding).

353 *See, e.g.*, 45 U.S.C. § 231m(b)(2) (respecting the division of benefits under the Railroad Retirement Act); Uniformed Services Former Spouses' Protection Act, Pub. L. No. 97-

Congress has established the Social Security retirement program, and regulates private pension plans through the Employee Retirement Income Security Act (ERISA).[354]

Under the Social Security program, an individual's earnings and work history determine his or her retirement benefits, which may not be divided in a divorce.[355] Spouses of retired workers receive a supplemental benefit,[356] however, and divorced or widowed individuals with former spouses covered by Social Security may be entitled to receive benefits based on their former partner's earnings record.[357] As in the tax laws, the definition of marriage for purposes of Social Security benefits generally depends on state law.[358] Thus, the question of whether an applicant will receive benefits based on a common law marriage will have a different answer depending on whether or not the applicant's state recognizes common law marriage.[359] DOMA, however, excludes same-sex marriages or civil unions that are the equivalent of marriage under state law.

Provisions of ERISA affect marital and premarital financial planning and divorce cases if an employer-sponsored pension plan covers either spouse. In a variety of contexts, federal courts have held that the ERISA requirements preempt inconsistent state marital and community property laws.[360] The statute provides mechanisms that allow for a transfer of pension rights at divorce,[361] or an order establishing that a child has rights to benefits under a parent's health care plan.[362] ERISA

252, 96 Stat. 730 (1982) (codified at 10 U.S.C. § 1408 and other sections) (respecting the division of military retirement pay); *see also* Civil Service Retirement Spouse Equity Act of 1984, Pub. L. No. 98-615, 98 Stat. 3195 (1984).

354 29 U.S.C. §§ 1001–1461 (2000); *see also* discussion *supra* note 169 regarding ERISA provisions governing private health insurance.

355 42 U.S.C. § 407 (2000). *See generally* Stanley W. Welsh and Franki J. Hargrave, *Social Security Benefits at Divorce: Avoiding Federal Preemption to Allow Equitable Division of Property in Divorce*, 20 J. AM. ACAD. MATRIMONIAL LAW 285 (2007).

356 42 U.S.C. § 402(e)–(f).

357 *See id.* § 402(b)–(c). *See generally* Grace Ganz Blumberg, *Adult Derivative Benefits in Social Security*, 32 STAN. L. REV. 233, 239–43 (1980).

358 *See* 42 U.S.C. § 416(h); *see also, e.g.*, Renshaw v. Heckler, 787 F.2d 50 (2d Cir. 1986).

359 *Renshaw*, 787 F.2d, at 52 (noting that since parties were domiciled in New York at time of husband's death, New York law governs plaintiff's status as a widow and the validity of their alleged common law marriage).

360 *See, e.g.*, Egelhoff v. Egelhoff, 532 U.S. 141 (2001); Boggs v. Boggs, 520 U.S. 833 (1997) (holding that surviving spouse provisions of ERISA preempt state community property law); *see also* Kennedy v. Plan Adm'r for DuPont Sav. and Inv. Plan, 129 S. Ct. 129 (2009) (addressing waiver of spousal interest in pension benefits).

361 25 U.S.C. § 1056 (2000). Provisions allowing for "Qualified Domestic Relations Orders" (QDROs) to allocate benefits were enacted in the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426 (1984).

362 29 U.S.C. § 1169 (2000).

also extends important rights to a surviving spouse that can only be waived with certain formalities.[363]

3. Bankruptcy

The interaction of federal bankruptcy laws and state divorce laws is complex. In order to fulfill the policies underlying the Bankruptcy Code and promote national uniformity in the treatment of similarly situated debtors, federal courts do not defer to state family law or to state court proceedings.[364] When divorce and bankruptcy proceedings coincide, the bankruptcy automatic stay provisions prevent the divorce court from entering property division orders.[365]

Obligations for alimony, maintenance, or child support that qualify as "domestic support obligations" under federal law are not dischargeable in bankruptcy,[366] and have a high priority status for payment from the bankruptcy estate.[367] Bankruptcy treatment of other obligations incident to a divorce is more complex. Property division debts, which could be discharged in bankruptcy proceedings before the amendments to the Bankruptcy Code in 1994 and 2005, are now also nondischargeable in many circumstances.[368] These and other bankruptcy issues pose significant challenges to family law practitioners,[369] and regularly bring federal bankruptcy judges deeply into the territory normally managed by state family court judges.[370]

C. Immigration and Citizenship

Family relationships are central to federal immigration laws. "Immediate relatives" of U.S. citizens, including parents, spouses, and minor

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363 *Id.* § 1055.

364 *See generally In re* Sampson, 997 F.2d 717 (10th Cir. 1993).

365 11 U.S.C. § 362 (2006); *see also id.* § 101(14A). The stay does not apply to proceedings for spousal or child support or to nonfinancial aspects of a divorce case. *See id.* § 362(b)(2).

366 11 U.S.C. § 523(a)(5) (2006). "Domestic support obligations" are defined in Section 101(14A).

367 11 U.S.C. § 507(a)(1) (2006).

368 Under Section 523(a)(15), these debts are nondischargeable in Chapter 7 liquidation proceedings, but they may be discharged in repayment cases under Chapters 11 through 13. *See generally* Judith K. Fitzgerald, *We All Live in a Yellow Submarine: BAPCPA's Impact on Family Law Matters*, 31 S. ILL. L.J. 563 (2007); Janet Leach Richards, *A Guide to Spousal Support and Property Division Claims Under the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, 41 FAM. L.Q. 227 (2007).

369 Another important problem involves judicial liens. *See generally* Owen v. Owen, 500 U.S. 305 (1991) (considering application of 11 U.S.C. § 522(f) to debts created in divorce); Farrey v. Sanderfoot, 500 U.S. 291 (1991).

370 *E.g.*, *In re* Simeone, 214 B.R. 537 (Bankr. E.D. Pa. 1997) (deciding equitable division of marital property in a bankruptcy court adversary proceeding).

unmarried children, are largely exempt from immigration quotas.[371] The laws also include preferences for other relatives of citizens and permanent residents.[372] In addition, immigrants in various categories may bring a spouse and unmarried minor children to the United States.[373] Family ties may also determine eligibility for discretionary relief from removal.[374]

Marriage is particularly important in immigration law.[375] Although the law of an immigrant's home state or country generally determines whether a family relationship exists for immigration purposes, national immigration laws sometimes substitute a different rule.[376] For example, federal courts have ruled that a state common law marriage may be disregarded for immigration purposes.[377] Polygamous marriages are not recognized for immigration purposes, even if valid in the applicant's home country.[378] Under DOMA, same-sex married couples or those in civil unions or registered partnerships are ineligible for marriage-based immigration.[379]

Children born in the United States are U.S. citizens by birth, regardless of their parents' nationalities.[380] The citizenship rights of minor children are limited, however. Even birthright citizen children cannot sponsor the immigration of their parents until they reach the age of 21.[381]

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371 *See* 8 U.S.C. § 1151(b)(2)(A) (2006). Parents are "immediate relatives" only if the sponsoring citizen is at least twenty-one. 8 U.S.C. § 1101(b)(2) (2006). "Child" is a term of art in the immigration statutes, defined as an unmarried person under twenty-one years of age who is a legitimate child, step child, or adopted child. *Id.* § 1101(b)(1).

372 *See* 8 U.S.C. § 1153(a) (2006).

373 *See id.* § 1153(d).

Large numbers of immigrants are granted permanent residence on these grounds. In 2006, more than 580,000 out of the 1.27 million people who obtained legal permanent resident status in the United States immigrated on the basis of family preferences. *See* Office of Immigration Statistics, Yearbook of Immigration Statistics: 2006, tbl.7, *available at* http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2006/table07d.xls (last visited Oct. 13, 2008).

374 *See* 8 U.S.C. § 1229b (2006) (Attorney General may cancel removal or adjust status of alien who establishes that removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child" who is a citizen or permanent resident of the United States).

375 *See generally* Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007); Nicole L. Ezer, *The Intersection of Immigration Law and Family Law*, 40 FAM. L.Q. 339 (2006).

376 *See* Abrams, *supra* note 375, at 1670–73; *see also* Hiroshi Motomura, *The Family and Immigration: A Roadmap for the Ruritanian Lawmaker*, 43 AM. J. COMP. L. 511, 530 (1995).

377 *See generally* Kahn v. I.N.S., 36 F.3d 1412 (9th Cir. 1994); Adams v. Howerton, 673 F.2d 1036, 1039 (9th Cir. 1982) (holding that even if same-sex marriage was valid under state law, it could be disregarded for immigration purposes).

378 *E.g.*, Matter of Mujahid, 15 I & N Dec. 546 (BIA 1976). *See also* Motomura, *supra* note 376, at 528 n.71. Note that under the statutes, "[a]ny immigrant who is coming to the United States to practice polygamy is inadmissible." 8 U.S.C. § 1182a(A) (2006).

379 *See supra* Part III.B.4.

380 *See* 8 U.S.C. § 1401(a) (2006).

381 *See supra* note 363.

In "mixed citizenship" families, the immigration laws may effectively preempt child custody determinations under state law.[382]

Children born outside the United States to an American citizen mother or father are also entitled to U.S. citizenship.[383] If a child's parents are not married to each other, however, the child of a U.S. citizen father and a non-citizen mother must be legitimated before age eighteen to acquire U.S. citizenship by birth.[384] The Supreme Court upheld this rule in *I.N.S. v. Nguyen*,[385] although in other contexts the Court has concluded that distinctions based on legitimacy of birth are unconstitutional.[386] The citizenship of children adopted abroad by an American parent is governed by the Child Citizenship Act of 2000,[387] and international adoption has been regulated principally through the process of issuing orphan visas for adopted children.[388]

Because of the preferences given to the spouse of a citizen or permanent resident, U.S. immigration laws include elaborate provisions to test the validity of marriages entered into within two years before an application for permanent resident status.[389] Since 1986, an alien who seeks to become a permanent resident based on a marriage that is less than two years old can obtain only conditional status.[390] This law makes an alien spouse particularly vulnerable to domestic violence, though subsequent legislation has provided some avenues of relief in these cases.[391]

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382 *See generally* David B. Thronson, *Custody and Contradictions: Exploring Immigration Law as Federal Family Law in the Context of Child Custody*, 59 HASTINGS L.J. 453 (2008).

383 *See* 8 U.S.C. § 1401 (2006).

384 *See id.* § 1409.

385 *See generally* Nguyen v. I.N.S., 533 U.S. 53 (2001); Miller v. Albright, 523 U.S. 420 (1998). These issues also arise with respect to preferred immigration status. *See* Fiallo v. Bell, 430 U.S. 787 (1977).

386 *See supra* note 39.

387 *See* Pub. L. No. 106-395, 114 Stat. 1631 (2000).

388 *See* 8 U.S.C. § 1101(b)(1)(F) (2006) (defining "orphan"); *see also infra* Part IV.D.2 (discussing intercountry adoption).

389 *See* 8 U.S.C. § 1186a (2006). *See generally* Lutwak v. United States, 344 U.S. 604 (1953).

390 *See* Immigration Marriage Fraud Amendments, Pub. L. No. 99-639, 100 Stat. 3537, 3543 (1986). *See generally* Abrams, *supra* note 375. After two years, the condition may be removed, but the spouses must petition jointly and establish that the marriage still exists, or if it does not, that it was genuine at its inception. 8 U.S.C. § 1186a(b)(1); *see also* Motomura, *supra* note 376, at 531–32. If there is no petition, or if the marriage has been dissolved or annulled during the two-year period, conditional resident status terminates and the alien spouse may be deported. *See generally* Ghaly v. I.N.S., 48 F.3d 1426 (7th Cir. 1995) (affirming revocation of visa petition based on fraudulent marriage); Salas-Velazquez v. I.N.S., 34 F.3d 705 (8th Cir. 1994) (denying adjustment of immigration status when applicant had previously entered into a sham marriage).

391 VAWA amended the Immigration and Nationality Act to permit victims of domestic violence to leave their partners and sponsor their own applications for permanent residence, 8 U.S.C. § 1154(a)(1)(a)(iii) (2006), and to permit cancellation of removal for a battered spouse or child in cases of extreme hardship, 8 U.S.C. § 1229(b)(2) (2006). Additional legislation on

As part of the effort to protect women who migrate for marriage purposes, the International Marriage Broker Regulation Act[392] requires disclosures by individuals who use international matchmaking organizations before they may contact potential mates or apply for a "fiancé visa."[393]

D. Foreign Relations

In a recent addition to its national family legislation, Congress has implemented several private international law treaties negotiated by the State Department and ratified through cooperative efforts of the Departments of State, Justice, and Health and Human Services.[394] In constitutional terms, the treaty provisions of Article II, Section 2 assign to the President and Congress the responsibility for conducting foreign affairs and determining the scope of the nation's obligations under international law.[395] Beyond its treaty powers, Congress also has authority to legislate under the foreign commerce clause in Article I, Section 8.[396] Once ratified, treaties have the force of law and are binding on the states under the Supremacy Clause in Article IV Section 2.[397] Under *Missouri v. Holland*,[398] the federalism considerations that apply to other federal legislation do not limit the scope of the treaty power.[399]

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this issue includes the Battered Women Immigrant Protection Act, Pub. L. No. 106-386, §§ 1501–1513, 114 Stat. 1464, 1518–37 (2000), and the renewal of the VAWA legislation enacted in 2006, Pub. L. No. 109-162, 119 Stat. 2960 (2006). *See generally* Abrams, *supra* note 375; Michelle J. Anderson, Note, *A License to Abuse: The Impact of Conditional Status on Female Immigrants*, 102 YALE L.J. 1401 (1993).

392 *See* Pub. L. No. 109-162, 199 Stat. 3066 (2006) (codified at 8 U.S.C. § 1375a).

393 *See generally* Abrams, *supra* note 375, at 1653–64. Kerry Abrams also describes the role of immigration law in some divorce cases. *See id.* at 1700–07.

394 *See* Peter H. Pfund, *The Hague Convention on International Child Abduction, the International Child Abduction Remedies Act, and the Need for Availability of Counsel for All Petitioners*, 24 FAM. L.Q. 35, 37–38 (1990).

Since 1995, the United States has signed international human rights treaties elaborating norms applicable to domestic family law questions, including the International Covenant on Civil and Political Rights, which the United States has also ratified, and the Convention on the Elimination of all Forms of Discrimination Against Women and the Convention on the Rights of the Child, both of which the United States has not yet ratified. *See generally* Ann Laquer Estin, *Families and Children in International Law: An Introduction*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 271, 287–95 (2002).

395 U.S. CONST. art. II, § 2.

396 U.S. CONST. art. I, § 8. The Supreme Court has also described an implicit general foreign relations power. *See, e.g.*, Perez v. Brownell, 356 U.S. 44, 57 (1958).

397 U.S. CONST. art. IV, § 2.

398 252 U.S. 416 (1920) (upholding a federal statute implementing migratory bird treaty challenged under the Tenth Amendment, and concluding that the treaty involved a national interest that could "be protected only by national action in concert with another power").

399 Scholars have debated, however, whether the broad reading of *Missouri* remains appropriate in light of the revival of federalism concerns in the Court's Commerce Clause and Fourteenth Amendment decisions. *See, e.g.*, Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390 (1998). The debate is surveyed in Duncan B. Hollis, *Executive Federalism: Forging New Federalist Constraints on the Treaty Power*, 79 S. CAL.

In Congress, the ratification process begins when a treaty is transmitted to the Senate for its advice and consent to ratification. Private international law treaties in the family law area have been accompanied by implementing legislation. Primary responsibility for considering treaties lies with the Senate Foreign Relations Committee,[400] while implementation has been the responsibility of the agency designated to act as the U.S. "Central Authority" under the treaty, either in the State Department or the Department of Health and Human Services.[401]

1. Parental Kidnapping

The Hague Convention on the Civil Aspects of International Child Abduction,[402] implemented in the United States by the International Child Abduction Remedies Act,[403] established remedies for a parent or custodian in the event a child is wrongfully removed to or retained in a country other than the child's habitual residence.[404] Under the Convention, a parent may seek a court order for the return of the child by bringing a proceeding in the judicial system of the country to which the child has been removed.[405] If the court determines that the child was wrongfully removed or retained, it must order the child's return unless one of four affirmative defenses is established.[406] Once a Hague Abduction petition is filed, any state court custody proceedings must cease.[407]

In the United States, federal and state courts have concurrent jurisdiction in actions for return of a child,[408] and the Office of Children's

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L. REV. 1327, 1333–39 (2006). The Court has never struck a treaty on this basis, however. *Id.* at 1352–60; *see also* David M. Golove, *Treaty Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075, 1292 (2000). The question of how broadly the Court may move to constrain the foreign relations powers has been sharpened by its decision in *Medellin v. Texas*, 128 U.S. 1346 (2008).

400 *See* Pfund, *supra* note 394, at 38.

401 *See infra* notes 409, 420, 428.

402 Convention on the Civil Aspects of International Child Abduction, October 25, 1980, 19 I.L.M. 1501 (1980) [hereinafter *Convention on Child Abduction*].

403 International Child Abduction Remedies Act of 1988, Pub. L. No. 100-300, 102 Stat. 437 (codified as amended at 42 U.S.C. §§ 11601–11610). These remedies are available only in the event of an abduction between countries that participate in the Child Abduction Convention. At this writing, eighty-one nations are parties to the Convention. Hague Conference on Private International Law, Status Table: 28 Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=24 (last visited Oct. 13, 2008).

404 *See* 42 U.S.C. § 11603 (2000); *see also Convention on Child Abduction*, *supra* note 402, at art. 12.

405 *Convention on Child Abduction*, *supra* note 402, at art. 12.

406 *See id.*; *see also* 42 U.S.C. § 11603(e)(2) (2006). Regarding the defenses to a return order, see Articles 12, 13, and 20 of the *Convention on Child Abduction*.

407 *See Convention on Child Abduction*, *supra* note 402, at art. 16.

408 42 U.S.C. § 11603(a) (2000).

Issues in the State Department serves as Central Authority.[409] Federal courts have published dozens of opinions and decided hundreds of cases under the Convention in the years it has been in effect in the United States.[410] Although the courts are not permitted to decide an abduction case governed by the Convention as if it were a custody proceeding, many of these disputes have required federal judges to consider questions that are usually litigated in state courts.[411] Federal courts applying the treaty have rejected arguments for abstention in favor of state-court custody proceedings, reading the treaty ratification and the legislation as a clear indication of Congress's intent to preempt state custody law in this situation.[412]

Beyond legislation implementing the Abduction Convention, Congress enacted the International Parental Kidnapping Crime Act (IPKCA) based on its foreign commerce power.[413] The IPKCA criminalizes removal from or retention of a child outside the United States with the intention of obstructing the exercise of parental rights, and applies more broadly than the Child Abduction Convention. In one challenge to the statute, the Court of Appeals sustained Congress's use of the foreign commerce power to reach conduct involving travel outside the United States.[414]

Child abduction cases have significant foreign relations implications, and State Department personnel regularly handle such cases at the consular and diplomatic levels.[415] By definition, these are also cases that involve travel in the channels of foreign commerce. Before and after

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409 *See* Hague Conference on Private International Law, Authorities, http://www.hcch.net/index_en.php?act=authorities.details&aid=133 (last visited Oct. 13, 2008) (listing U.S. State Department as Central Authority for abduction convention).

410 *See* Hague Conference on Private International Law, The International Child Abduction Database (INCADAT), www.incadat.com (last visited Oct. 13, 2008) (containing eighty-five published U.S. federal decisions and thirty-one state court decisions to date).

411 *Compare* Blondin v. Dubois, 238 F.3d 153 (2d Cir. 2001), *and* Walsh v. Walsh, 221 F.3d 204 (1st Cir. 2000), *with* Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996).

412 *E.g.*, Yang v. Tsui, 416 F.3d 199 (3d Cir. 2005); Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005). *See generally* Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 56–60 (2003) (discussing problems of concurrent state and federal jurisdiction); Ion Hazzikostas, Note, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421 (2004).

413 International Parental Kidnapping Crime Act of 1993, Pub. L. No. 103-173, 107 Stat. 1998 (1993) (codified at 18 U.S.C. § 1204).

414 *See, e.g.*, United States v. Cummings, 281 F.3d 1046, 1048–49 (9th Cir. 2002) (noting that IPKCA includes an express jurisdictional element insuring that any prosecution under the statute involves actions that implicate international movement).

415 *See generally* DEPT. OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 23–27 (2008), *available at* http://travel.state.gov/family/abduction/hague_issues/hague_issues_2952.html (last visited Oct. 13, 2008).

Congress enacted these laws, congressional committees convened regular hearings to address controversial abduction cases.[416]

2. Intercountry Adoption

The United States began implementation of the Hague Convention on the Protection of Children and Co-Operation in Respect of Intercountry Adoption[417] (Adoption Convention) by enacting the Intercountry Adoption Act of 2000[418] and was finally able to deposit its instruments of ratification in 2007.[419] The Office of Children's Issues in the State Department serves as Central Authority under the Adoption Convention, with direct adoption services performed by providers certified under federal regulations developed to implement the treaty.[420] Creating this system was complicated by the fact that most aspects of adoption are governed by state law.[421]

Before the ratifying the Adoption Convention, the United States primarily regulated international adoptions through the Bureau of Citizenship and Immigration Services, which issued immigrant visas to parents for their adopted children.[422] The same process still applies to children adopted from countries that have not ratified the Convention.[423] Under both procedures, the State Department has been actively involved at the consular and diplomatic level. Because the purpose of Adoption Convention is to protect against abuses, including fraud and child trafficking, implementation has required the U.S. government to work

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416 *See, e.g.*, INT'L RELATIONS COMM., A PARENT'S WORST NIGHTMARE: THE HEARTBREAK OF INTERNATIONAL CHILD ABDUCTIONS, H.R. REP. NO. 108-156 (2004).

417 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134 (1993). *See generally* Peter H. Pfund, *Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise*, 28 FAM. L.Q. 53 (1994).

418 Intercountry Adoption Act of 2000, Pub. L. No. 106-279, 114 Stat. 825 (2000), *reprinted in* 41 I.L.M. 222 (codified as amended at 42 U.S.C. § 14901 and other sections).

419 *See* Hague Conference on Private International Law, 33: Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, http://hcch.e-vision.nl/index_en.php?act=conventions.status&cid=69 (last visited Oct. 13, 2008).

420 *See* 42 U.S.C. §14911 (2000).

421 The Department of State went through a prolonged rulemaking process to produce regulations governing certification of these providers and provision of services required by the treaty. Regulations governing accreditation and monitoring of agencies and intercountry adoption service providers are published at 22 C.F.R. § 96 (2008). Regulations governing certifications required in outgoing adoption cases are published at § 97, and regulations on preservation of adoption records are published at § 98.

422 *See* 8 U.S.C. §1101(b)(1)(F) (2000).

423 *See* U.S. Dept. of State, Office of Children's Issues, Intercountry Adoption: Overview, http://www.travel.state.gov/family/adoption/convention/convention_462.html (last visited Oct. 13, 2008) (providing additional information on the Hague Adoption Convention).

closely with countries such as Guatemala and Cambodia in order to strengthen the safeguards for children in those systems.[424]

3. Child Support Enforcement

Negotiations for another international family law agreement, the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance ("Child Support Convention") concluded in November 2007, and the United States signed the agreement immediately,[425] reflecting its intention to ratify the new convention. President Bush transmitted the treaty to the Senate in September 2008.[426] The extensive national child support enforcement program in place will make the implementation process much easier for this treaty.[427]

For the Child Support Convention, the Central Authority will be the Office of Child Support Enforcement in the Department of Health and Human Services, with most responsibilities for individual cases delegated to state child support agencies.[428] This agency already serves as Central Authority on a series of bilateral agreements between the United States and other countries for reciprocal enforcement of child support obligations.[429] At the state level, implementation of the new convention will require relatively minor amendments to the Uniform Interstate Family Support Act, which is now in effect in all states.[430]

E. Conclusions

Many subjects of national legislation incorporate significant family policy dimensions. Civil rights laws define a vision of the family and

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424 *See generally* D. Marianne Blair, *Safeguarding the Interests of Children in Intercountry Adoption: Assessing the Gatekeepers*, 34 CAP. U. L. REV. 349 (2005) (describing problems in sending countries).

425 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Hague Conference on Private International Law, Proceedings of the Twenty-first Session, Nov. 23, 2007, *available at* http://hcch.evision.nl/index_en.php?act=conventions.pdf&cid=131.

426 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Sen. Treaty Doc. 110-21, 110th Cong. (Sept. 8, 2008) (pending Senate approval), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_documents&docid=f:td021.110.pdf.

427 *See supra* Part II.B. Since the 1996 welfare reform legislation, federal law has provided for state or federal level reciprocal bilateral support enforcement agreements with foreign countries. *See* 42 U.S.C. § 659a (2000).

428 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, *supra* note 426, at VIII.

429 *See* 42 U.S.C. § 659a(c); *see also* Notice of Declaration of Foreign Countries as Reciprocating Countries for the Enforcement of Family Support (Maintenance) Obligations, 73 Fed. Reg. 72,555 (Nov. 28, 2008) (listing "foreign reciprocating countries").

430 *See supra* notes 101, 265; Nat'l Conference of Comm'rs on Uniform State Laws, For Approval: Amendments to Uniform Interstate Family Support Act (2001), http://www.law.upenn.edu/bll/archives/ulc/uifsa/2008am_approved.pdf.

basic rights of citizenship in the context of family life. Tax, pension, and bankruptcy laws promote family financial security. Immigration laws prioritize family unification even as they police the shape and definition of family relationships. International laws implemented at the national level establish important protections for families and family members as they travel across international borders.

Federal courts working with these national laws become enmeshed in questions that implicate the core areas of family law. Bankruptcy courts hear disputes concerning marital property and debts and balance the financial equities between former spouses. In tax cases, federal courts review whether a husband or wife is entitled to "innocent spouse" relief from joint and several marital tax liabilities.[431] Immigration tribunals hear cases contesting the bona fides of particular marriages. Judges deciding international child abduction cases consider questions that overlap with the traditional state domain of custody law. In deciding these cases, the courts recognize the importance of national policy, and do not hesitate to conclude that national laws preempt state family law.

In Congress and the Executive Branch, these general laws are often not drafted or implemented by family policy experts, but are instead rooted in a particular vision of the family and family roles. This phenomenon extends back to civil rights and immigration laws enacted during the nineteenth century and economic laws during the New Deal, and is still a prominent feature of national lawmaking.[432] Because of the Supremacy Clause and the deferential approach of the federal courts, political branches of government are left with the task of determining when uniform national policy is appropriate and the extent to which federal legislation should prevail over inconsistent state laws.

V. SHARING GOVERNANCE

For a century and a half, the Supreme Court has constructed rules that exclude most family law matters from the jurisdiction of the federal courts.[433] The Court has continued to reaffirm this approach in contemporary cases.[434] Although these decisions have concerned the scope of

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431 *E.g.*, Comm'r v. Ewing, 439 F.3d 1009 (9th Cir. 2006); Baranowicz v. Comm'r, 432 F.3d 972 (9th Cir. 2005); Aranda v. Comm'r, 432 F.3d 1140 (10th Cir. 2005); Maier v. Comm'r, 360 F.3d 361 (2d Cir. 2004); Cheshire v. Comm'r, 282 F.3d 326 (5th Cir. 2002) (construing 26 U.S.C. § 6015).

432 *See* COTT, *supra* note 29, at 132–55, 172–79.

433 *E.g.*, *Ex parte* Burrus, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."); Barber v. Barber, 62 U.S. 582, 584 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce or for the allowance of alimony . . . .").

434 Ankenbrandt v. Richards, 504 U.S. 689, 703 (1992) (holding that the federal courts' power is limited "to issue divorce, alimony and child custody decrees"); *see also* Elk Grove

federal judicial power, the Court seemed to broaden this doctrine with dicta in *Lopez* and *Morrison.* These cases suggested for the first time that Congress's powers might be categorically limited, and that legislation based on the Commerce Clause might be prohibited in matters involving marriage, divorce, and child custody.[435] Since *Lopez* and *Morrison*, scholars have debated how these dicta should be understood.

One reading of *Lopez* and *Morrison* suggests that the Court was reviving a dual federalism approach, cordoning off the core areas of family law as entirely beyond the reach of federal legislative power. This reading is hard to sustain, however, since many aspects of the existing national family law system critically affect state laws governing marriage, divorce, and child custody. Over the years, despite its evident awareness of these programs, the Court has shown no inclination to invoke dual federalism or otherwise curtail any other of the powers on which Congress has relied in enacting its broad program of family legislation. In all of these areas, the Court has consistently deferred to Congress's determination of when to implement a national solution to a particular family policy problem.

Another reading of the Court's dicta is that the Court is providing a more specific warning to Congress. The Court has repeatedly asked Congress to avoid expanding federal court dockets by "federalizing" state criminal law,[436] and several Justices articulated this concern before Congress enacted VAWA.[437] In this reading, the Court's primary objection is not that federal legislation might alter state family laws, but rather that federal legislation might shift litigation from the state to the federal courts.

In family law, the Court has left most federalism questions to Congress, the Executive Branch, and the political process. The alternative reading of *Lopez* and *Morrison* understands the federalism language as a signal to Congress to take these questions seriously, with an implicit threat to intervene if the political branches do not reasonably accommodate federalism values.

Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) ("One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations."); Mansell v. Mansell, 490 U.S. 581, 587 (1989) ("[D]omestic relations are preeminently matters of state law . . . ."); Moore v. Sims, 442 U.S. 415, 435 (1979) ("Family relations are a traditional area of state concern.").

435 Lopez v. Morrison, 514 U.S. 549, 564 (1995); *see supra* notes 192–202 and accompanying text.

436 *See, e.g.*, *supra* notes 235–38. In this concern, the federal courts often find an ally in the Executive Branch, which has voiced its opposition to legislation that assigns new responsibilities to the Justice Department. *See id.*

437 *See supra* notes 190, 207 and accompanying text. The same concerns are evident in the Court's domestic relations exception to diversity jurisdiction.

If Congress heeds these signals from the Court, what implications would this have for maintaining a productive balance of federal and state authority? The Court's dicta clearly emphasize the importance of respecting state institutions and preserving the states' primary role in establishing state family laws and policies. The tradition of local regulation of family law is grounded in a political theory that understands the states as distinct communities, and family law as uniquely rooted in local norms and values.[438] Beyond theory and tradition, there are strong pragmatic reasons to maintain the central role of state governments in family regulation, given the infrastructure and practical experience available at the state and local levels.

For both constitutional and pragmatic reasons, Congress should take the broad range of policy variation among the states into consideration when crafting family legislation so that states may tailor the implementation of federal programs to their traditions and circumstances. Congress should be particularly hesitant to enact legislation that preempts state policy determinations without offering tangible support or benefits to the states in return. This principle also suggests that Congress should limit its family legislation to subjects on which a broad consensus can be achieved, favoring bipartisan and widely supported measures over more politicized and controversial ones.[439]

In making law, the national government has obvious strengths: the power of the purse, the fact-finding capacity of Congress, and the enormous institutional resources of the Executive and Judicial branches. Because Congress is a national forum, it represents a wider cross-section of values and interests than most state legislatures. Because it acts for the nation, Congress is in a unique position to determine and implement common solutions to widely-shared problems. The national government can also speak with greater moral authority. With the increasing mobility of families and individuals in the United States and around the world, it no longer makes sense to assume that families are closely connected to particular communities and within the jurisdiction of a single state. The growth of a body of national family law is an important response to this change and an acknowledgment of the very real ways in which we now feel ourselves to be members of a broader national community.[440] Uniform national law is especially important to coordinate different state

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438 *See, e.g.*, Dailey, *supra* note 21, at 1860–61.

439 From this perspective the civil rights remedy of VAWA, which Congress enacted with broad support from the states, does not present federalism concerns. See Goldfarb, *supra* note 201, at 137–42.

440 *See generally* Pettys, *supra* note 61.

laws in an era when individuals and families move easily across state borders and around the world.[441]

The national government also has weaknesses as a source of family law. There is no clear locus of responsibility and authority over family matters in either Congress or the Executive Branch. Many other national imperatives and priorities make these questions a relatively low priority, unless hot-button political questions are involved. Sometimes experimentation is useful in finding policy solutions to our most difficult family policy problems, and a single national approach may unduly limit those possibilities. Information exchange between state actors in the trenches of family law and officials at the epicenter of federal policymaking is difficult. When a federal policy fails and Congress responds with major changes, the costs for states and for families can be substantial. To the extent that states come to depend on the flow of federal dollars, even changes in national budgets or fiscal policy can have enormous and detrimental effects.

National legislation that provides states with additional help or resources to fulfill their traditional responsibilities is consistent with the important federalism principles considered here. This includes federal spending programs, as well as Commerce Clause-based legislation that supplements the efforts of state courts and prosecutors. In the context of interstate enforcement disputes, there should be no question that a strong federal role is appropriate.[442] Congress would do well to authorize broader uses of federal court jurisdiction than it has done in existing family legislation. Although the Court has resisted this type of legislation, Congress has clear authority under several of its powers to create a federal remedy for the most serious interstate conflict of laws problems. At one time, the Supreme Court performed an important mediating role under the Full Faith and Credit Clause when the courts of different states reached impasse, but the Court has not served this function in many years.[443]

CONCLUSION

Family law in the United States incorporates three distinct types of federalism, each responsive to a different set of national needs and priorities. In response to major demographic changes in the family, Congress has taken responsibility for assuring an adequate minimum standard of

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441 State efforts to harmonize or unify state family laws have met with only mixed success. *See generally* James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096 (1991).

442 The criminal law aspects of the PKPA that Congress did not enact would have been a useful tool to support state family-law orders. *See supra* notes 235–37 and accompanying text.

443 *See generally* Estin, *supra* note 33; *cf.* Thompson v. Thompson, 484 U.S. 174 (1988); *supra* notes 254–57 and accompanying text.

support and assistance for children's welfare, using a cooperative federalism model funded and regulated at the national level and implemented by state and local governments. As families increasingly move and extend across state borders, Congress has addressed interstate enforcement and coordination problems through a mixture of federal remedies and mandates that help to extend the reach of state family regulation. In the context of legislation concerning civil rights, economic rights, and international law, Congress has enacted uniform national family policies that preempt inconsistent state laws.

In its legislation, Congress has largely been respectful of the traditional responsibility of state governments for family welfare and family law. Although federal courts regularly hear and decide cases under these diverse statutes, the Supreme Court has left Congress free to resolve important federalism questions on its own terms. *Lopez* and *Morrison*, which announced new limits on Congress's Commerce Clause powers, have left this legislation intact, even as the Court signaled its strong opposition to laws that would transfer major responsibility for family law from the state courts to federal courts.

As Congress determines when and how to legislate in family law, the experience surveyed here suggests that shared governance is most likely to be successful if Congress moves cautiously before imposing new obligations or restrictions on states. Federal intervention will be more welcome if it brings real resources to the table to help states carry out their important functions in this area, or if it uses the unique competences of the national government, as in international relations or cross-border law enforcement. By the same token, the intervention of the national government into the sphere of family regulation is less appropriate and less useful if it is designed to serve symbolic or political purposes, or if it restricts the states in their efforts to support and protect families and children.