

**Courts As Instruments of Change in American Family Law:
Realities, Benefits, Risks and Limits**

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Abstract

President Donald Trump, delivering a major foreign policy speech in Warsaw, Poland on July 6, 2017. In it, he emphasized our need to defend and protect the values and institutions that undergird Western Civilization, including the family. He declared: “We put faith and family, not government and bureaucracy, at the center of our lives.” He asked: “The fundamental question of our time is whether the West has the will to survive. . . . Do we have the desire and the courage to preserve our civilization in the face of those who would subvert and destroy it?” He warned: “[I]f we do not have strong families and strong values, then we will be weak and we will not survive.” Those observations by the President of the United States about the importance of strong families to the survival of Western Civilization provide an excellent introduction to this symposium, and to this paper.

Family law scholars are committed to providing effective legal protections and opportunities for the family. We seek to develop and to support government policies that safeguard and nurture the institution of the family, and that protect and advance all members of the family. So we invest a lot of time studying, evaluating and suggesting reforms to existing and proposed substantive family policies.

However, it is important also to remember that families and their members are profoundly impacted by structural mechanisms and procedural operations, as well as by substantive policies. Governmental systems and processes influence the way that substantive legal policies are applied and received.

In most democratic legal systems, substantive regulations and legal policies are created primarily by the politically-accountable branches – i.e., the legislature (mostly) and the executive branch. In those legal systems, the courts have a more limited, reflexive role to interpret and apply the laws, but the judicial branch usually does not have the authority to create broad, general substantive legal rules and regulations. Thus, normally, in democratic legal systems, general substantive rules and legal policies are created by the politically-accountable branches. The courts have a different, more limited role to interpret and apply in particular cases the general laws that are made (mostly) by the other branches.

However, in some democratic or republication nations today, many of the rules regulating some areas of human relations and behaviors are judicially created. In the United States, courts have played a prominent role in creating legal policies, especially in creating family law policies.

The active role of the judicial branch in creating family law in the United States manifests important (and potentially troubling) facets of American family law. Several of these factors are reviewed herein. This paper examines the impact that courts – the judicial branch of government – have upon families and family law in the United States of America.