

## **The Uniform Interstate Family Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism**

by  
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At various points since its founding in 1892, the Uniform Law Commission (“ULC”)<sup>1</sup> has attempted to reduce the diversity of child support and family maintenance law and ensure the recognition and enforcement of child support orders throughout the country. Review of this history shows a shifting focus from initial statutes purely criminal in nature to statutes focused on interstate reciprocity during the period of 1900 to 1960. The focus shifted yet again in the 1990s with the promulgation of the Uniform Interstate Family Support Act (“UIFSA”) in 1992, an Act that established a system of initial and continuing jurisdiction and answered questions of multistate jurisdiction. UIFSA articulated the principle of exclusive continuing jurisdiction and successfully effected major changes to child support enforcement and recognition throughout the United States. The recent decision of the United States to join the international community in a family maintenance treaty ushers in an expansion of the principles of UIFSA and a new approach to the implementation of pri-

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<sup>1</sup> The Uniform Law Commission (ULC), formerly known as the National Conference of Commissioners on Uniform State Law, has worked to advance uniformity of state law for over a century. Originally created in 1892, the ULC assesses what areas of the law should be uniform from state to state, and drafts statutory text to propose for enactment by state legislatures. Commissioners are appointed from every state, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico. The only requirement for appointment as a commissioner is that the individual be a licensed attorney. As a result, the roster of commissioners includes state legislators, practitioners, judges, and law professors. Commissioners receive no salary or fees for their work with the ULC.

vate international agreement through state law. Just as UIFSA harmonized the domestic system, the newest amendments will maximize enforcement and recognition that has emerged along with the idea of a global family—all while respecting the traditional authority of state law within the federal system.

The 2007 Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (“Hague Convention” or “Convention”) expands the principles of interstate recognition and enforcement familiar to domestic child support cases to international cases.<sup>2</sup> Although the United States routinely enforces the child-support orders issued by foreign jurisdictions, reciprocity of enforcement is often lacking when cases originating in the United States are reviewed abroad. The Hague Convention will serve as the mechanism that will provide recognition and enforcement in the estimated 150,000 international child support cases that currently involve parties in the United States.<sup>3</sup>

Approval of the Hague Convention on September 29, 2010 by the United States Senate represented the first in a series of steps necessary for its provisions to become part of child support practice in the United States. Uniform passage of the 2008 Amendments to the Uniform Interstate Family Support Act (“UIFSA 2008”) is necessary to facilitate full implementation of the Hague Convention, a process that requires changes in state law governing family support orders.<sup>4</sup> Coordinating the marriage of domestic and international private law required extensive cooperation between federal and state actors and represents a

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<sup>2</sup> Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Nov. 23, 2007, S. TREATY DOC. NO. 110-21, available at [http://www.hcch.net/index\\_en.php?act=conventions.text&cid=131](http://www.hcch.net/index_en.php?act=conventions.text&cid=131) [hereinafter Hague Convention].

<sup>3</sup> *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Hearing on Treaty Doc. 110-21 Before S. Comm. on Foreign Relations*, 110th Congress. (2009) (Statement of Keith Loken, Assistant Legal Advisor, Office on Private Int’l Law, Dep’t of State), available at <http://foreign.senate.gov/hearings/hearing/?id=91830b27-997d-cdb9-8856-484b75c05d9b>.

<sup>4</sup> UNIFORM INTERSTATE FAMILY SUPPORT ACT (2008), available at <http://uniformlaws.org/Act.aspx?title=interstate%20Family%20Support%20Act%20Amendments%20%282008%29>. [hereinafter UIFSA2008] (last visited Mar. 5, 2011).

novel approach to private international law agreements. The final outcome of this effort preserves the primacy of state law in an international context and provides a familiar and efficient process for parties in the midst of international disputes. UIFSA 2008 marks another chapter in legal reforms completed by the ULC that establish clear jurisdictional rules regarding the issuance or modification of a support order and ensure enforcement of orders across national and international boundaries. Equally important however, the combined operation of state and federal actors may serve as model for future fulfillment of international obligations that impact state law.

The purpose of this article is to present an overview of the development and substance of UIFSA2008 with commentary on the questions of federalism that impacted the drafting and implementation process. Part I presents a history of uniform family support to develop an understanding of the backdrop that colors internationalization of family maintenance. Part II addresses the main provisions of the Hague Convention, focusing specifically on the provisions that required changes in domestic law. In Part III, this article illustrates the use of a coordinated effort known as cooperative federalism as a means of achieving the implementation of international obligations through changes in state law. Part IV discusses the substance of UIFSA2008, with particular focus on the new rules for international cases involving signatory countries to the Hague Convention.

## **I. History of Uniform Family Maintenance Acts**

The ULC's first attempt at improving laws related to child support was a criminal statute and was a far cry from many contemporary uniform acts, which trend towards addressing interstate recognition and enforcement of family law judgments or orders. The Uniform Desertion and Non-Support Act arose from the progressive reforms of the early 1900s.<sup>5</sup> The Act made it a

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<sup>5</sup> National Conference of Commissioners on Uniform State Law, Proceedings of the Eighteenth Annual Conference, Report of Committee on Marriage and Divorce at 124 (1908). The committee report stated, "From the best statistics that can be gathered it appears the offence is increasing, and it would appear that it is due to moral rather than to physical causes. . . It follows, therefore that the offence should be treated as a crime. It requires no argument to show that the community has an interest in requiring all able-bodied men, who

criminal offense for a man to willfully neglect or to refuse to provide for his wife and to refuse to provide similar support to his children.<sup>6</sup> The detrimental impact such a failure would have on the health of the surrounding community made such inaction fit for criminalization. Twenty-one states enacted this Act in uniform or substantially similar fashion.<sup>7</sup> Thirty-five years later, the ULC explored drafting uniform legislation, based in part upon New York's Uniform Support of Dependents Law, designed to define the extent of enforceable support duties. However, the difficulty of reconciling the laws of the various states forced the ULC to abandon the drafting process.<sup>8</sup> Although thwarted in this project, the ULC continued to look at ways to improve collection of family maintenance obligations and foster interstate cooperation.

Substantial reform occurred in 1950 with the completion of the Uniform Reciprocal Enforcement of Support Act ("URES A").<sup>9</sup> URES A was the progeny of a six year drafting process that attempted to improve the enforcement of duties of support through reciprocal legislation that was both criminal and civil in nature. The criminal component required extradition of the obligor,<sup>10</sup> while the civil component involved interstate cooperation designed to enforce the order through a series of interstate findings and transference of cases between states.<sup>11</sup> By

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have assumed the responsibility of family cares, to continue to the support of their families." *Id.*

<sup>6</sup> UNIF. DESERTION AND NON-SUPPORT ACT, 10 U.L.A. 1 (1922).

<sup>7</sup> Jurisdictions that adopted the Uniform Desertion and Non-Support Act with uniform provisions were Alabama, California, Idaho, Kansas, Massachusetts, Mississippi, Nevada, North Dakota, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin, Wyoming. States that adopted the act with substantially similar provisions included Alaska, Delaware, Hawaii, Illinois, New Jersey, and Virginia. The Executive Committee of the ULC deemed the Uniform Desertion and Non-Support Act obsolete in 1966. Kathleen A. Burdette, *Making Parents Pay: Interstate Child Support Enforcement After United States v. Lopez*, 144 U. PA L. Rev. 1469, 1483 n.98 (1996).

<sup>8</sup> W. J. Brockelbank, *The Problem of Family Support: A New Uniform Act Offers a Solution*, 37 ABA J. 93, 95 (Feb. 1951). Brockelbank served as chair of the URES A drafting committee.

<sup>9</sup> See UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 1, 9B U.L.A. 553 (1987).

<sup>10</sup> *Id.* §§5-6.

<sup>11</sup> *Id.* §§7-28.

1992, either URESA or its successor, the Revised Uniform Reciprocal Enforcement of Support Act (“RURESAs”), were law in all of the states and governed the establishment and enforcement of support obligations across state lines.

In 1992, promulgation of the UIFSA signaled another major reform in interstate child support law. UIFSA replaced URESA and RURESAs and ameliorated many of the problems that had developed because of divergent interpretation of statutes throughout the country and the resultant gaps in state law. UIFSA combined principles of long-arm jurisdiction with principles of continuing jurisdiction based upon the home state of the child.<sup>12</sup> This combination had the effect of helping the forum state take personal jurisdiction over the party absent from the jurisdiction. UIFSA located modification jurisdiction in only one state at a time.<sup>13</sup> This scheme solved the problems associated with multiple states claiming jurisdictional authority to issue or modify support orders. UIFSA ensured that at any given time only one order was effective and provided rules for resolving disputes pending in more than one state.

As a result of questions raised about interpreting the Act, the ULC amended UIFSA in 1996 to assure optimum child support enforcement. The amendments clarified that if parties reside in the same state, which is not the issuing state, a tribunal of that state has jurisdiction to enforce and/or modify the issuing state’s child support order.<sup>14</sup> Further, a tribunal exercising such jurisdiction was to apply the definitional and long-arm jurisdiction sections of UIFSA, the rest being inapplicable to an intra-state case. Otherwise, a tribunal was to apply the procedural and substantive law of that particular state. The 1996 UIFSA amendments were coupled with federal welfare reform legislation that mandated state adoption of child support guidelines and established enforcement procedures related to wage withholding, tax intercepts, and credit reporting. The amendments specified that the obligor’s employer must comply with a withholding order from another state which is regular on its face and which expresses the amounts to be withheld as sums certain and as peri-

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<sup>12</sup> See UNIF. INTERSTATE FAMILY SUPPORT ACT (1992) § 205, 9B U.L.A. 477, 487 (2005).

<sup>13</sup> *Id.* at 489.

<sup>14</sup> *Id.*

odic payments.<sup>15</sup> The amendments further provided that the law of the obligor's work state shall apply with respect to charging processing fees, determining garnishment limitations, and establishing priorities if the employee has multiple support obligations.<sup>16</sup>

The uniformity and harmonization brought about by the federal mandate benefited the development of interstate family support laws because it illustrated areas of the law that needed improvement. In 2001, the ULC once again amended UIFSA. The 2001 amendments clarified jurisdictional rules limiting the ability of parties to seek modifications of orders in states other than the issuing state. In particular, all parties and the child must have left the issuing state, and the petitioner in such a situation must be a nonresident of the state where the modification is sought.<sup>17</sup> The 2001 amendments also allowed parties to voluntarily have an order issued or modified in a state in which they do not reside.<sup>18</sup> The amendments spell out in greater specificity how a controlling order is to be determined and reconciled in the event multiple orders are issued. Additional provisions clarified the procedures state support enforcement agencies are to follow in such circumstances, including submission to a tribunal where appropriate.

Importantly, the 2001 amendments to UIFSA began to focus, for the first time, on international obligations pertaining to the international aspects of child support. Prior to these changes, UIFSA continued the basic approach first found in RURESA which defined a state as "any foreign jurisdiction in which this [RURESA] or substantially similar reciprocal law is in effect."<sup>19</sup> The 2001 amendments expanded the definition of "state" to include foreign countries that had entered into bilateral agreements with the United States. The definition of "state" was

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<sup>15</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT (1996), § 501-502, 9B U.L.A. 281, 401- 408 (2005).

<sup>16</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT (1996), § 503, 9B U.L.A. 281, 412 (2005).

<sup>17</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT (2001), § 611-615, 9B U.L.A. 159, 254 (2005).

<sup>18</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT (2001), § 205, 9B U.L.A. 159, 192 (2005).

<sup>19</sup> UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT § 2, *supra* note 10.

expanded to include foreign countries that the U.S. State Department had declared to be reciprocating jurisdictions.<sup>20</sup> However, the determination that a foreign nation was a reciprocating country was merely advisory, and did not obligate the states to act. The amendments clearly provided that an order issued by a foreign country may be enforced as a matter of comity.<sup>21</sup>

The decision by the United States to sign the Hague Convention necessitated the modification of UIFSA. The simplistic provisions did not comport with a more complex international agreement. Although the language may be unfamiliar to the United States, the Hague Convention achieves the international recognition and enforcement of orders originating in the United States in much the same way that the international orders were recognized and enforced domestically.

## II. The Hague Convention

The Hague Convention is the culmination of a five year negotiation process whose object was to “ensure the effective international recovery of child support and other forms of family maintenance.”<sup>22</sup> The Hague Convention is intended to replace the prior international agreements on child support enforcement that have been rendered obsolete and ineffective.<sup>23</sup> These agree-

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<sup>20</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT (2001), § 102(21)(B), 9B U.L.A. 159, 177 (2005).

<sup>21</sup> UNIF. INTERSTATE FAMILY SUPPORT ACT (2001), § 104, 9B U.L.A. 159, 183 (2005).

<sup>22</sup> Hague Convention. See William Duncan, *The Development of the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 38 FAM. L.Q. 663 (2004); Robert G. Spector, *Toward an Accommodation of Divergent Jurisdictional Standards for the Determination of Maintenance Obligations in Private International Law*, 36 FAM. L.Q. 273 (2002) (explaining the negotiation process and the surrounding issues).

<sup>23</sup> See Convention on the Law Applicable to Maintenance Obligations Towards Children, Oct. 24, 1956, 510 U.N.T.S. 161, available at <http://www.legallanguage.com/resources/treaties/hague/1956-october-24th-convention-1/>; Convention Concerning the Recognition and Enforcement of Decisions Relating to Maintenance Obligations Towards Children, Apr. 15, 1958, 539 U.N.T.S. 29, available at <http://www.legallanguage.com/resources/treaties/hague/1958-april-15th-convention-3/>; Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, Oct. 2, 1973, 1021 U.N.T.S. 209 [hereinafter 1973 Hague Enforcement Convention], available at <http://www.legallanguage.com/resources/treaties/hague/1973-october-2nd-convention-3/>;

ments also lacked global appeal and were utilized primarily by European nations. The United States relied upon bilateral treaties to facilitate recognition and enforcement of child support obligations.<sup>24</sup>

Much of the Hague Convention addresses administrative activities of the signatory countries.<sup>25</sup> Establishing a robust framework for international administrative cooperation was essential if the Hague Convention was going to succeed. Under the Hague Convention, applications for child support will be processed through a system of central authorities. In the United States, this responsibility will be assigned to the Department of Health and Human Services. Other responsibilities assigned to the central authority under the Hague Convention include locating the obligor or obligee, facilitating enforcement, and ensuring collection of payments.<sup>26</sup>

The administrative provisions of the Hague Convention required careful deliberation and compromise on behalf of all parties involved. But the difficulties encountered during the negotiations on these issues paled in comparison to the issues related to the negotiation of provisions that would directly impact recognition and enforcement of decisions within the United States and abroad.

Chapter V of the Hague Convention provides that maintenance obligations issued by one signatory country shall be recognized and enforced in another signatory country—a concept made familiar within the United States by UIFSA. However, the Hague Convention contains six bases for the recognition and enforcement of maintenance decisions established in signatory

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Convention on the Law Applicable to Maintenance Obligations, Oct. 2, 1973, 1056 U.N.T.S. 199, *available at* <http://www.legallanguage.com/resources/treaties/hague/1973-october-2nd-convention-4/>; Convention on the Recovery Abroad of Maintenance, June 20, 1956, 268 U.N.T.S. 3, *available at* <http://www.unhcr.org/refworld/country3dda24184,0.html>.

<sup>24</sup> The United States has bilateral agreements in effect with Australia, Czech Republic, El Salvador, Finland, Hungary, Ireland, Israel, Netherlands, Norway, Poland, Portugal, Slovak Republic, Switzerland, and the United Kingdom, <http://www.acf.hhs.gov/programs/cse/international/>. The United States has also entered into separate agreements with eleven Canadian provinces, <http://www.acf.hhs.gov/programs/cse/international/country/canada/>.

<sup>25</sup> *See generally* Hague Convention, at Art. 7-17.

<sup>26</sup> Hague Convention, Art. 6.



countries.<sup>27</sup> These bases are not direct bases for jurisdiction, but indirect bases of jurisdiction. Jurisdiction is conferred if (1) the respondent was a habitual resident of a country,<sup>28</sup> (2) the respondent voluntarily submitted to the jurisdiction or did so defending a claim on the merits,<sup>29</sup> (3) the creditor was a habitual resident in the state of origin at the time proceedings were instituted,<sup>30</sup> (4) the child for whom maintenance was ordered was a habitual resident in the state of origin at the time proceedings were instituted,<sup>31</sup> (5) voluntary agreement by all parties to submit to jurisdiction,<sup>32</sup> or (6) the decision was made by an authority exercising jurisdiction on a matter of personal status or parental responsibility, unless that jurisdiction was based solely on the nationality of one of the parties.<sup>33</sup>

The persistence of the international community to include creditor-based jurisdiction complicated negotiations.<sup>34</sup> Creditor-based jurisdiction is common throughout the world, except for the United States. However, pursuant to the jurisprudence born out of the Supreme Court's holding in *Kulko v. Superior Court*, "the mere fact that the creditor or child resides in the forum does not give the forum jurisdiction over the debtor in a child support case."<sup>35</sup> The United States is likely to take such a reservation to ameliorate constitutional concerns involving the nexus between the debtor and forum in establishing jurisdiction.<sup>36</sup> This reservation is not expected to deter from the ability of the United States to accede to the Hague Convention. With the reservation in place, courts in the United States will not be forced to recognize

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<sup>27</sup> *Id.* at Art. 20.

<sup>28</sup> *Id.* at Art. 20 (1)(a).

<sup>29</sup> *Id.* at Art. 20 (1)(b).

<sup>30</sup> *Id.* at Art. 20 (1)(c).

<sup>31</sup> *Id.* at Art. 20 (1)(d).

<sup>32</sup> *Id.* at Art. 20(1)(e).

<sup>33</sup> *Id.* at Art. 20(1)(f).

<sup>34</sup> See UIFSA2008, § 708, commentary.

<sup>35</sup> Mary Helen Carlson, *U.S. Perspective on the New Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance*, 43 FAM. L.Q. 21, 27 (2009). See *Kulko v. Superior Court*, 436 U.S. 84 (1978).

<sup>36</sup> Carlson, *supra* note 35, at 28. A reservation is a declaration of a party that specifies as a condition of its becoming a party that one or more provisions of the agreement shall not apply to the reserving signatory, or shall apply only under specified circumstances or in a specified way.

42 *Journal of the American Academy of Matrimonial Lawyers*

or enforce a foreign support order on child-based jurisdiction founded solely on the location or residence of the obligee or the child in the foreign country.

Another issue facing the U.S. delegation negotiating the terms of the Hague Convention related to the issue of cost. The United States was unlikely to accede to the Convention if the Convention did not provide no-cost or low-cost services.<sup>37</sup> The insistence that the Hague Convention include cost-free services was initially met with strong opposition from other delegations.<sup>38</sup> However, the final draft of the Convention provides for free legal assistance for child support applications.<sup>39</sup> The Hague Convention also includes a provision of free legal assistance based on a test that assesses the means of the child. This provision applies only to cases involving the establishment of a child support order.<sup>40</sup> Compromise on the issue of cost has members of the American delegation hopeful that other countries will develop cost-effective and efficient systems for processing international child support cases.<sup>41</sup>

Soon after its adoption on November 23, 2007, the United States became one of the first countries to sign the Hague Convention.<sup>42</sup> But until its provisions are implemented through changes to the law in the United States, the benefits cannot be realized. The choice of how to implement international private law obligations into a field of law rooted in individual state law brought forth practical difficulties. Federal interests, state interests, notions of federalism, and most importantly, effectiveness of the chosen technique, all weighed upon the decision.

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<sup>37</sup> *Id.* at 29.

<sup>38</sup> *Id.* at 30.

<sup>39</sup> Hague Convention Art. 15.

<sup>40</sup> Hague Convention Art. 16.

<sup>41</sup> Carlson, *supra* note 35, at 31.

<sup>42</sup> See Hague Conference on Private International Law, Status Table [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=131](http://www.hcch.net/index_en.php?act=conventions.status&cid=131) (last visited March 5, 2011) (providing a list of signatory countries to the Hague Convention).

### **III. Cooperative Federalism, State Law, and International Law**

It was clear to participants and observers that the Hague Convention was not a self-executing treaty. Self-executing treaties operate independent of any act of Congress to establish enforceable rights in domestic law. Self-executing treaties are written with requisite specificity so that the terms of the treaty can be applied as law.<sup>43</sup>

Because of the consensus that the Convention was not self-executing, domestic implementation became an issue. Federal and state parties involved in the drafting process questioned whether it would be prudent to implement the Hague Convention solely through federal law or work on a compromise that maintained a role for state law and the long involvement of state courts and agencies in child support matters.

An approach that relied purely on state law implementation would have jeopardized the ability of the United States to guarantee that the obligations imposed by the Convention were being followed across the country. Under the protocols of the Hague, the United States cannot deposit the instrument of ratification at the Hague until all states had adopted the provisions of the Convention.<sup>44</sup> It would have been audacious to cede responsibility of implementing the Convention to each individual state. There would likely have been significant variance in the language used throughout the states. Variance would not only jeopardize international compliance but also could create unintended disruption of domestic rules covering family maintenance. This approach relies upon an uneasy concert of state action and may complicate the agreement and reputation of the United States in international eyes.<sup>45</sup>

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<sup>43</sup> As an example, the United Nations Convention on the International Sale of Goods (CISG) was implemented in the United States as a self-executing treaty. The CISG preempts Article 2 of the Uniform Commercial Code in the areas in which its terms are applicable.

<sup>44</sup> Duncan, *supra* note 22 at 17.

<sup>45</sup> The Federalist Papers discuss the relationship of states and international treaty obligations. Under the Articles of Confederation Hamilton observed that treaties of the United States “are liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures.” If states remained the primary agents

44 *Journal of the American Academy of Matrimonial Lawyers*

Even free of the whims of the individual legislatures, implementation solely reliant on the states to make the appropriate and corresponding changes to existing law would be marked by significant delay. Four legislatures meet biennially.<sup>46</sup> Other states have shortened sessions every other year in which only budget matters and exigent matters can be discussed. The shifting nature of legislative attentiveness and constricted legislative calendars could relegate the implementation of the Hague Convention behind other legislative priorities deemed more important to the state. Pure state law would be neither effective nor expedient, so it was necessary to embark upon an alternative approach that is known as cooperative federalism.

Cooperative federalism allows states autonomy of choice within a framework delineated by federal law. The federal government cannot simply direct the states to administer policy.<sup>47</sup> However, Congress can provide “a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.”<sup>48</sup> Cooperative federalism establishes the federal government as the central agent that possesses incentives that can be used to reward the cooperative behavior of the states and if substantial enough, ensure quick realization of a national goal. It is, in its purest sense, a partnership between the federal and state government that accomplishes a national goal while respecting state autonomy and insuring uniformity of compliance.

While cooperative federalism has been widely used in domestic affairs to achieve national policy objectives,<sup>49</sup> its use to implement an international obligation was less tested. The inte-

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of treaty implementation “[t]he faith, the reputation, the peace of the whole Union are thus continually at the mercy of the prejudices, the passion, and the interest of every member of which it is composed.” THE FEDERALIST NO. 22 at 113 (Alexander Hamilton) (Ian Shapiro, ed. 2009).

<sup>46</sup> Montana, Nevada, North Dakota, and Texas do not hold legislative sessions during even numbered years. See Annual versus Biennial Legislative Sessions, NATIONAL CONFERENCE OF STATE LEGISLATURES, available at <http://www.ncsl.org/default.aspx?tabid=17541>.

<sup>47</sup> *New York v. United States*, 505 U.S. 144, 188 (1992).

<sup>48</sup> *Id.* at 166.

<sup>49</sup> *E.g.*, Federal Water Pollution Control Act (“Clean Water Act”), 33 U.S.C. §§ 1251-1387 (2008); Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (2006).

gration of international law into the rubric of cooperative federalism was colored by the applicability of two prior approaches that involved uniform acts. Federal and state officials rejected an approach that relied upon conditional preemption. Instead, they preferred the use of conditional spending because it caused little disruption to the balance of state and federal law and had been utilized previously to harmonize state law on family support.

Conditional preemption is predicated on states acting out of self interest to pass laws consistent with federal legislation. Federal law would take effect in those states that did not opt out. Federal and state law covering the same subject are allowed to coexist throughout the country as long as the state law does not undermine the central purposes of the federal legislation.<sup>50</sup> This approach provides both uniformity and instantaneous implementation when utilized in a treaty context. However, this approach can only be applied in situations when the federal government has power to legislate in the area covered by the treaty. Moreover, this approach could have created a bifurcated jurisdiction for child support cases brought under the Hague Convention. In states that opted to pass state based implementation, cases would be heard in state courts. In those states preempted by the federal legislation, such cases could involve the federal court system. While such an approach potentially complicates questions of forum, it may remain preferable if deviation on forum does not cause sufficient problems for implementation of the substance of the treaty.

The second approach to cooperative federalism utilizes the ability of Congress to condition receipt of federal funding on

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<sup>50</sup> The Uniform Law Commission dealt with questions of conditional preemption when E-Sign was approved by Congress and signed into law by President Clinton. Prior to federal action, the ULC promulgated the Uniform Electronic Transactions Act (UETA). Both acts validate the use of electronic records and signatures and provide that electronic contracts and signatures are enforceable despite existing electronically. Under Section 102 of E-Sign, states can avoid federal preemption if UETA or a similar legislation is enacted to give legal effect to electronic records or electronic signatures. *See* Electronic Signatures in Global and National Commerce Act (E-Sign), 15 U.S.C. §§ 7001-7006 (2000). *See also* UNIF. ELECTRONIC TRANSACTIONS ACT (1999), available at <http://www.nccusl.org/Act.aspx?title=electronic%20Transactions%20Act>.

state adoption of certain laws.<sup>51</sup> Congress has historically employed this spending power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.<sup>52</sup> This approach is deemed constitutional if the spending program abides by four factors. First, the exercise of the spending power must be in pursuit of the general welfare. Second, Congress must exercise the spending power unambiguously, allowing states to exercise their choice independently but with full cognizance of the repercussions of the choice. Third, the conditions must be related to the federal interest in particular national projects and programs. Fourth, the terms of conditional spending must not run afoul of other constitutional provisions.<sup>53</sup>

The conditional spending approach is successful only if the funds under condition are important enough to force modification of a state’s law. Conditional funding may influence a state’s legislative choices, but is by no means determinative of statutory change.<sup>54</sup> Congress is merely an architect of choice, directing the states toward a decision that effectuates federal policy without infringing upon state sovereignty.<sup>55</sup> Use of a financial incentive that is both significant and related to important state programming pacifies the calls within a state to interpose on a federal objective through an expression of state sovereignty.

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<sup>51</sup> U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”).

<sup>52</sup> *South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

<sup>53</sup> *Id.* at 206-08.

<sup>54</sup> See Albert J Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1134-38 (1987) (“In connection with intergovernmental immunities, as in other areas in which the validity of conditional federal spending has been questioned, the problem of consent by the recipient arises. And here, as in other areas, the rejoinder may be made that what appears to be consent may in fact be coercion.”).

<sup>55</sup> See RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008). Thaler and Sunstein discuss how governments can direct actors towards specific actions through proper framing of incentives. In the context of cooperative federalism, an approach utilizing funding does not restrict the freedom of choice enjoyed by the state, but the salience of the money directs the state to act in accordance with the overarching federal goals.

Cooperative federalism was integral to the welfare reform legislation championed by President Bill Clinton. Uniformity of state law on child support collection was necessary to improve collection rates and strengthen enforcement of delinquent payments. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (“PRWORA”)<sup>56</sup> used conditional spending as a means to institute uniformity of state law and the universal enactment of UIFSA. The PRWORA linked federal funding of state administered programs for the enforcement of family support cases under Title IV-D of the Social Security Act. The program, established in 1975, assists states in establishing paternity and enforcing child support orders. Currently, the program serves 17 million children and collects \$26.6 billion in child support payments.<sup>57</sup> The PRWORA made enactment of UIFSA a prerequisite to the receipt of the substantial funding provided to state IV-D programs by the federal government.<sup>58</sup>

The wording of the mandate created confusion when UIFSA was subsequently amended in 2001. State compliance with the PRWORA provisions was dependent on adoption of the 1996 version of UIFSA, and the implementing statute was not written to anticipate for further modification to UIFSA. Thus, state agencies were hesitant to adopt the 2001 amendments, fearing that the changes in law would no longer be compliant with the PRWORA mandate. Some agencies believed that risked the loss of federal funding. However, federal officials have issued waivers to states that have passed UIFSA2001 in order to maintain compliance and continued receipt of federal funds. The PRWORA experiment illustrated that cooperative federalism is an effective method for implementing federally desired child support reforms into state law.

As the negotiations to finalize the Convention moved toward completion, focus shifted toward the appropriate method of

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<sup>56</sup> Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

<sup>57</sup> *Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, Hearing on Treaty Doc. 110-21 Before S. Comm. on Foreign Relations, 110th Congress. (2009)* (Statement of Vicki Turet-sky, Comm’r, Office of Child Support Enforcement, Dep’t of Health and Human Serv.), available at <http://foreign.senate.gov/hearings/hearing/?id=91830b27-997d-cdb9-8856-484b75c05d9b>.

<sup>58</sup> 42 U.S.C. § 666 (2011).

incorporating its terms within the laws of the United States. Out of deference to the role of states as the traditional locus of jurisdiction, the Department of State, Department of Health and Human Services, and the ULC agreed upon implementation through cooperative federalism.<sup>59</sup> All groups agreed that the previous success using the UIFSA to implement welfare reform could be replicated to implement an international convention.

#### **IV. UIFSA 2008**

With the partnership of federal and state action established, the ULC faced a critical choice: Would the Hague Convention be implemented as amendments to UIFSA or would this be an appropriate time to embark on comprehensive overhaul of the laws governing all family support orders? Because of the time sensitivity and desire for quick accession to the Hague Convention, the ULC decided that the drafting committee would only amend those parts of UIFSA impacted by the Hague Convention.

The typical ULC drafting process requires a minimum of three years of study and debate before a final statute is available for enactment in the states. First, a committee studies the issues associated with drafting an act in the proposed area of law, focusing the ability of a statute to minimize the diversity of state law and the eventual enactability of the law throughout the country. Viable projects proceed into a drafting process in which the language of a proposed act is then considered by a committee of the whole in at least two annual meetings. The ULC waived the requirement that the act be considered twice, and quickly went to work on the amendments aiming to have a final draft ready for consideration at the ULC's 2008 Annual Meeting. The drafting committee for the UIFSA2008 first met in September 2007.<sup>60</sup> Reprising their role as chair and reporter during the 1996 and 2001

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<sup>59</sup> The United States Department of State presented a proposal to the ULC's Scope and Program Committee in July 2006 calling for federal state partnership in the implementation of the Hague Convention. The Scope and Program Committee recommended that a study committee be convened.

<sup>60</sup> To expedite the drafting process, the committee met in person in March 2008 and May 2008. It also held numerous other conference calls during this time. The committee consisted of nine uniform law commissioners that were joined by representatives of the U.S. Department of State, U.S. Department of Health and Human Services, the National Child Support Enforcement



amendment process of UIFSA were Honorable Battle Robinson<sup>61</sup> and Professor John J. Sampson.<sup>62</sup> The Uniform Law Commission approved the final draft of the UIFSA2008 in July 2008.

It was not necessary for much of the Hague Convention to be included in the statutory changes to UIFSA. As noted, the Hague Convention contains several provisions that govern the interaction between countries. The foreign affairs component of the Hague Convention does not impact state action, so implementation could be accomplished through changes in federal law or procedures. Arrangements of international cooperation and the time frames for processing cases are matters of federal regulation. Comments found in UIFSA2008 merely provide guidance to state tribunals facing these issues.<sup>63</sup>

To accommodate those provisions necessitated by the Hague Convention, the drafting committee realigned UIFSA so that all provisions relating to international maintenance would be found in Article 7. The inclusion of specific provisions for international cases warranted change to the definition of “state.” In the 2001 amendments to UIFSA, foreign countries declared to be federal reciprocating jurisdictions and those who had reciprocal arrangements with the United States were included within the definition of “state.” With inclusion of new international provisions in the 2008 amendments, the ULC decided that a foreign country could not remain the functional equivalent of an American state. The term “of a state,” was amended to read, “of a state or foreign country.”<sup>64</sup>

Taken as a whole, UIFSA2008 has three component parts: (1) changes resulting from incorporation of UIFSA2001, (2) non-signatory international cases, and (3) cases governed by the Hague Convention involving a signatory country. The changes contained within UIFSA2008 will improve both domestic and in-

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Association, the American Academy of Matrimonial Lawyers, the American Bar Association, and numerous other members of the child support community.

<sup>61</sup> Uniform Law Commissioner, Delaware and retired judge of the Family Court of Delaware.

<sup>62</sup> Professor of Law, University of Texas School of Law.

<sup>63</sup> Battle Rankin Robinson, *Integrating an International Convention into State Law: The UIFSA Experience*, 43 FAM. L.Q. 61, 70 (2009).

<sup>64</sup> UIFSA2008 § 102(26).

ternational cases. The next section will proceed by highlighting each of these components.

#### A. *Changes Resulting From Incorporation of UIFSA2001*

The drafting committee used the 2001 amended version of UIFSA as its base language and then incorporated changes necessitated by accession to the Hague Convention. Only twenty-two jurisdictions adopted the 2001 amendments to UIFSA.<sup>65</sup> Thus, practitioners unfamiliar with the 2001 amendments will encounter, possibly for the first time, changes related to jurisdictional priority, the determination of controlling order, and the calculation of arrearages. While some of these changes are procedural and others substantive, none make a fundamental change in UIFSA's underlying policies. For purely domestic cases, UIFSA2008 continues to serve the basic principle of when an order from one state will be enforced in other states.

UIFSA2008 further memorializes the uniform jurisdictional rules that have become commonplace in child custody and child support cases. UIFSA established the rule, later utilized for custody cases governed by the Uniform Child Custody Jurisdiction and Enforcement Act, that only one state had the continuing, exclusive jurisdiction to issue or modify a support order. UIFSA2008 incorporates changes found in the 2001 amendments that clarify the rules limiting the ability of parties to seek modifications in orders in states other than the state that issued the initial support decree. The amendments spell out in greater specificity how a controlling order is to be determined and reconciled in the event multiple orders are issued.<sup>66</sup> Petitions to determine a controlling order can be brought by support enforcement agencies,<sup>67</sup> including submission to a tribunal where appropriate. To

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<sup>65</sup> Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Maine, Mississippi, Nebraska, Nevada, New Mexico, Oklahoma, Rhode Island, South Carolina, Texas, Utah, Virginia, Washington, West Virginia, Wyoming. Legislative Fact Sheet – Interstate Family Support Act, Uniform Law Commission, *available at* <http://uniformlaws.org/LegislativeFactSheet.aspx?title=interstate%20Family%20Support%20Act%20%282001%29>.

<sup>66</sup> UIFSA2008 § 207.

<sup>67</sup> *Id.* at § 207(c).

determine which order controls, the tribunal must have personal jurisdiction over both the obligor and the individual obligee.<sup>68</sup>

UIFSA2008 allows for parties to submit to the jurisdiction of a state for family matters. A party may voluntarily submit to the jurisdiction of a state for purposes of a divorce proceeding or child support determination, and seek the issuance of an original support order at that tribunal. Jurisdiction for support orders and child custody jurisdiction remain separate, and a party submitting to a court's jurisdiction for purposes of a support determination automatically submits to the jurisdiction of the responding state with regard to child custody or visitation.<sup>69</sup>

Further amendments adopted in 2001 addressed the issues created by the existence of multiple orders. Multiple orders confuse the ability of parties to enforce one controlling order and the ability to determine proper jurisdiction. Section 602 enhances the procedures for registration and enforcement of orders. Previously, when multiple orders had been issued, some child support agencies chose to register the support order with the highest support amount, treating it as if it were the controlling order. The amendments adopted in 2001 prohibited such a practice. In the event of multiple support orders, section 602(d) requires the person requesting registration for enforcement to provide copies of all support orders in effect and which order should be the controlling order.<sup>70</sup> Multiple issuances of support orders under varying statutory schemes also conflate the calculation of arrearages. UIFSA2008 requires the tribunal that determines the controlling order to state in its order "the total amount of consolidated arrears and accrued interest, if any, under all of the orders after all payments made are credited."<sup>71</sup>

While UIFSA2008 focused on the application of international obligations, amendments first issued in 2001 were designed to provide clearer guidance with regard to the purely interstate enforcement procedures and remedies. Practitioners and jurists in states that have yet to adopt the 2001 amendments will encounter these changes once the implementing legislation for the Hague Convention is enacted by Congress and the mandate is

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at § 104.

<sup>70</sup> *Id.* at § 602(d).

<sup>71</sup> *Id.* at § 207(f).

imposed upon the states to enact UIFSA2008. However, none of these incorporated changes will significantly disrupt the law governing interstate support orders

### B. *International Cases Involving Hague Signatory Countries*

Incorporation of the Hague Convention forced the drafting committee to harmonize the common law jurisdictional rules of the United States with the civil law approach used by the rest of the world. The tireless effort of the committee overcame the obstacles presented by the two differing systems of law and produced Article 7, an article that applies only to orders from countries that are signatories to the Hague Convention. Because many provisions of the Hague Convention had similarities with provisions already enshrined in UIFSA, the content of Article 7 will not be especially unfamiliar to practitioners. The discrete provisions in Article 7 of UIFSA2008 improve the processing, recognition, and enforcement of international cases.

Parties seeking to register an international order within the United States will be able to utilize the procedures similar to those used in domestic cases.<sup>72</sup> However, the Hague Convention requires parties to provide a variety of documents that are not required in interstate cases. UIFSA2008 instructs parties to provide (1) a complete text, or an abstract, of the foreign order, (2) a record stating the order is enforceable in the country of issuance, (3) a record that memorializes that a party had notice and opportunity to appear if that party did not appear and was not represented in the initial proceeding, (4) a calculation of arrearages, (5) a record showing requirement for automatic adjustment of support, and (6) documentation that the applicant received free legal assistance if such documentation is necessary.<sup>73</sup> Practitioners within the United States will likely be unfamiliar with a case abstract, a statement of enforceability, and the proof that a party received notice, had the opportunity to be heard, or received free legal assistance because such practices are rarely used or required.<sup>74</sup>

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<sup>72</sup> *Id.* at § 706. *See id.* at §§ 601-608.

<sup>73</sup> *Id.* at § 706(b).

<sup>74</sup> *Id.* at § 706, cmt.

A contest of the registration of an order will be governed generally by Section 605-608 of UIFSA2008, but provisions in the Hague Convention necessitated expansion of the time frame for challenging a convention support order. The residence of the party contesting registration is the governing factor for determination of the time allowed. If the party contesting the registration of a support order under the Hague Convention resides outside the United States, the contest must come within sixty days after notice of the proceeding is issued. Otherwise, the party has thirty days after notice of registration.<sup>75</sup>

Generally, child support orders issued by signatories to the Hague Convention will be recognized and enforced in a manner similar to the interstate recognition and enforcement provisions.<sup>76</sup> However, a tribunal in the United States may refuse to recognize a child support order from a signatory country if defects in due process, notice and opportunity to be heard and other bases commonly used in interstate cases are present.<sup>77</sup> However, the merging of civil law and common law complicates refusals based on jurisdiction. As noted earlier, the jurisdictional bases used throughout the globe for recognition and enforcement of child support orders were the greatest obstacle for American accession to the terms of the treaty, and such bases will create similar difficulties for practitioners utilizing UIFSA2008. UIFSA2008 incorporates the severability clause of the Hague Convention; even if the entirety of a convention support order cannot be enforced within the United States because of one of the challenges found in section 708, courts must enforce those parts that are enforceable.<sup>78</sup>

Furthermore, private support agreements are entitled to enforcement by a tribunal. In the United States, such agreements are treated as a form of a contract.<sup>79</sup> The UIFSA2008 requires a tribunal to enforce and recognize private support agreements.<sup>80</sup> To be enforceable, the agreement must be enforceable as a decision in the country of origin. Private support agreements that

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<sup>75</sup> *Id.* at § 707.

<sup>76</sup> *Id.* at § 708(a).

<sup>77</sup> *Id.* at § 708(b).

<sup>78</sup> *Id.* at § 709.

<sup>79</sup> *Id.* at § 710, cmt.

<sup>80</sup> *Id.* at § 710.

54 *Journal of the American Academy of Matrimonial Lawyers*

would be enforceable only as a contract in the country of origin do not fall within the scope of section 710. Inclusion of private support agreements was necessary to allow UIFSA2008 to respond to developing forms of agreements arising out of forms of alternate dispute resolution.<sup>81</sup>

Modification of child support orders under the Hague Convention is limited under UIFSA2008. An American court cannot modify a convention child support order if the obligee remains a resident of the country that issued the order. However, modification is allowed if the obligee submits to the jurisdiction of the domestic court or the issuing tribunal lacks or refuses to exercise jurisdiction to act on the order, either by modifying its terms or issuing a new order.<sup>82</sup>

### C. *Non-signatory Countries*

The vast majority of international child support cases in the courts of the United States involve Canada, Mexico, and countries of the European Union. It is anticipated that these countries will become signatories to the Hague Convention and thus, cases from these countries will come to be governed by Article 7 of the UIFSA2008. However, it is inevitable that orders issued by non-signatory countries will end up in courts across the United States.

The recognition and enforcement of child support orders from non-signatory countries will continue to be governed by principles of comity. Sections 601 to 608 of UIFSA2008 constitute the procedures for recognition and enforcement of these orders. Modification of orders issued by non-signatory countries can occur if the foreign tribunal lacks or refuses to exercise jurisdiction to modify the order.<sup>83</sup> Additionally, a tribunal in the United States can modify an order if both parties are subject to personal jurisdiction because of an obligee's submission to the jurisdiction and the obligor's residence in the state.<sup>84</sup>

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<sup>81</sup> *Id.* at § 710, cmt.

<sup>82</sup> *Id.* at § 711.

<sup>83</sup> *Id.* at § 615.

<sup>84</sup> *See id.* at § 615, cmt.

## Conclusion

In late September 2010, the U.S. Senate gave its advice and consent to the Hague Convention. Soon thereafter, the Department of State, together with the Department of Health and Human Services, worked to introduce federal implementing legislation for consideration by both chambers of the 111th Congress. The Strengthen and Vitalize Enforcement (SAVE) Child Support Act of 2010<sup>85</sup> mirrored the approach used by PRWORA and amended Title IV, part D of the Social Security Act tying the receipt of federal funding to state enactment of UIFSA2008.<sup>86</sup> The SAVE Act directed the Secretary of Health and Human Services to withhold federal funds to ensure compliance with U.S. treaty obligations under the Hague Convention.

The 111th Congress failed to pass the SAVE Act before adjournment. In spite of Congressional inaction, several states—Maine,<sup>87</sup> Nevada,<sup>88</sup> North Dakota,<sup>89</sup> Tennessee,<sup>90</sup> Wisconsin<sup>91</sup>—have enacted UIFSA2008 in anticipation of the looming federal legislation. However, several of these states have added a condi-

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<sup>85</sup> Strengthen and Vitalize Enforcement Child Support Act of 2010, S.3848, 111th Cong. (2010), available at <http://www.govtrack.us/congress/bill.xpd?bill=S111-3848>.

<sup>86</sup> The SAVE Act sought to amend Section 466(f) (42 U.S.C. § 666(f)) to read “(f) on and after January 1, 2013, each State must have in effect the Uniform Interstate Family Support Act, as approved by the American Bar Association on February 9, 1993, and as in effect on October 1, 2008, including any amendments officially adopted as of such date by the National Conference of Commissioners on Uniform State Laws.” *Id.* at § 3(a)(1). The Act also sought to amend Section 452 (42 U.S.C. § 652) by adding “(n) Secretary’s Authority To Ensure Compliance With Multilateral Child Support Convention- Consistent with the national policy of the United States to fully comply with the obligations of any multilateral child support convention to which the United States is a party, the Secretary shall utilize Federal and, as appropriate, State enforcement mechanisms in furtherance of this policy and take such steps as may be necessary within the Secretary’s authority to ensure compliance with the United States treaty obligations under such convention in the event the Secretary determines that a State plan does not comply with such obligations.” *Id.* at § 3(c)(1)(a)(ii).

<sup>87</sup> ME. REV. STAT. ANN. tit. 19-A, §§ 2801-3401 (2011).

<sup>88</sup> NEV. REV. STAT. §§ 130.015-130.802 (2010).

<sup>89</sup> N.D. CENT. CODE §§ 14-12.2-01 to 14-12.2-49 (2009).

<sup>90</sup> TENN. CODE ANN. §§ 36-5-2001 to 36-5-2903 (2010).

<sup>91</sup> WIS. STAT. §§ 769.101-769.904 (2011).

tional clause ensuring that UIFSA2008 does not come into effect of law prior to ratification of the Hague Convention.<sup>92</sup> Absent Congressional action, other states considering UIFSA2008 are opting to include similar language.

But until Congress acts, there will likely remain a general reluctance throughout the country to move forward on this legislation in the absence of a federal mandate. Part of this reluctance stems from the perceived illogic of enacting a statute referencing international obligations that are not yet recognized in the international community. The 112th Congress must move forward with similar, if not the same, legislation if the benefits of the Hague Convention and UIFSA2008 and the promise of cooperative federalism to implement private international agreements are to be realized.

Despite the delays in implementation, UIFSA2008 illustrates how meaningful legal reform can be brought about by domestic and international cooperation. Domestically, UIFSA2008 represents the experimental use of cooperative federalism as a means to ensure that the United States can uphold international legal obligations while respecting the traditional role of the state within the federal system. Internationally, it represents an understanding that increased mobility and interconnectivity of all people necessitate uniform provisions governing the recognition and enforcement of child support orders. UIFSA2008 is an important step in domestic and international law and the experiences negotiating, drafting, and implementing its provisions will color future projects involving international private law instruments.

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<sup>92</sup> Wisconsin included the following provision: “This act becomes effective on the date that the United States deposits the instrument of ratification for The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance with the Hague Conference on Private International Law.” WIS. STAT. § 769.904, et seq. (2011).