The Constitution of the United States is a delicate instrument that divides governing power between two sovereigns whose purpose is to provide for the betterment of the whole. The Founding Fathers acknowledged that “federal and state governments are in fact but different agents and trustees of the people, constituted with different powers and designed for different purposes.” The federal government is responsible for integrating citizens of states with different histories, resources, and needs together into one unified nation. At the same time, the Constitution circumscribes the powers of the federal government. States remain sovereign, free to a separate and independent existence, so far as the exercise of power does not conflict with powers specifically enumerated as within the purview of the federal government. Maintaining this constitutional division of power between state and federal authority is ultimately dependant on the political process. A robust Federalism has been, and will continue to be, a dynamic arrangement of governance with its sustainability dependent on the spirited exploration of its limits by the people.

Although the structure of the Constitution has not changed, the authority of the federal government with respect to the powers reserved to the states has changed over the years. From the ever expanding and contracting conception of the commerce clause, to the tendency for a legislator to draft legislation attuned more to popular opinion than the structural benefits of federalism, the choices made during the political process often create unforeseen implications on the balance of federal and state powers. As such, the powers of the state are in need of constant protection from federal encroachment.

The inherent tendency in protecting state law is to wait until an intrusion into state law is perceived to violate the 10th Amendment and seek judicial intervention. Advocates rely on the courts to fulfill their role as ultimate arbiter of the bounds of federalism, swayed by claims that the action in controversy will, for example, be a “death-knell for the Constitution’s finely calibrated system of federalism.”

Without question, the judiciary plays a significant role maintaining the design contemplated by the Constitution’s framers. But the role is passive and unpredictable, and should be one of last resort. By design, the judiciary is not to be an active participant in the political process. The balance of federalism is best maintained through the political process, with the representatives of the people engaged in debate and competition to establish the proper bounds of federal and state authority.

Unique state-based institutions, such as the Uniform Law Commission, offer an alternative to the reliance on litigation to advance the cause of state law. The active participation of the Commission in the political process is providing considerable protection from federal encroachment on state power and helping to shape future discussions on the issue of federalism.

The Uniform Law Commission

For well over a century, the more than 250 uniform acts drafted by the Uniform Law Commission have brought consistency, clarity and stability to state statutory law. While one of the original intentions of state governments when founding the Commission was to have a forum where state leaders could consider state law, determine in which areas of the law uniformity is important, and then draft uniform and model acts for consideration by the states, the Uniform Law Commission plays an important role in preserving the balance of federalism. Although uniform legislation was initially characterized by some as tending toward the same sort of centralization imposed by federal mandate, voluntary state action through uniform laws “takes from the general
government any excuse for absorbing powers now confined to the states, and therefore directly tends to preserve the independence of the states."

As the debate over federalism intensifies, the Uniform Law Commission is continuing to preserve the role of state law within a federal system. Recently, the Commission has served as a bulwark against federal legislation that wouldederalize areas of family law, while at the same time offering a state solution. It also has worked with the federal government to integrate international obligations into state law without damaging existing laws. And, much in the same way, it has played an important role in addressing the feasibility of federal initiatives and provides commentary that can help guide federal policy. Expounding on these examples, the involvement of the Uniform Law Commission as a political institution of state government able to engage in the political pursuit of federalism becomes clear.

Defending State Law from Federal Encroachment

The Uniform Law Commission, which has drafted ubiquitous laws such as the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) and the Uniform Interstate Family Support Act (UIFSA), has defended against departures from the longstanding deference to state laws in matters involving child custody and domestic relations. Complex family matters are best reserved to the state courts, which, over the course of time, have developed appropriate expertise and mechanisms to make fact-driven determinations needed in such cases.

Recently introduced federal legislation addressing the child custody arrangements of deployed military service members threatens the harmonious balance of state and federal law as it relates to family matters. More than 30 states have laws affording protections for service men and women involved in child custody arrangements. But with relentless determination, U.S. Rep. Michael Turner of Ohio has made the issue a core item of his agenda. His proposed legislation would prohibit state courts from using past deployments or the possibility of deployment against service members when making child custody determinations. The language also would prohibit courts from permanently altering custody orders during a parent’s deployment, and requires pre-deployment custody to be reinstated unless that is not in the best interests of the child. Variations of the bill have been introduced on multiple occasions. On each occasion, the Uniform Law Commission, joined by other groups such as the American Bar Association and the National Center for State Courts, has been vocal in opposing the legislation on grounds that the changes to federal law hinders the powers of the states to legislate in the area of family law. Even after its most recent defeat, the bill was reintroduced.

Under the threat of federal pre-emption, this important issue remains ripe for a national solution that is rooted in state law. The Uniform Law Commission is spearheading a project to draft a uniform statute that states may adopt to govern child custody and visitation rights when a service member is deployed for military service. Based in part on existing statutes, the uniform law will go well beyond the proposed federal legislation and will establish a comprehensive set of state law procedures and protections for the custody issues that military families face. The Uniform Law Commission is expected to give the uniform act final approval in July 2012.

This example illustrates how the Uniform Law Commission can work within the political process to concurrently defend traditional areas of state law while offering solutions to national problems without departing from the balance of state and federal law. Providing a forum for each state to have a voice in crafting a uniform act respectful of existing law, the commission is able to reform law in a way that achieves the objectives sought by Congress without eradicating the deference to the states in matters of traditional state authority.

Cooperative Federalism

In addition to its involvement with domestic law, the Uniform Law Commission has recently embarked on an effort to aid the federal government in implementing international treaties through indigenous state law, thereby preserving the existing balance of domestic law. This method of implementation is termed “conditional pre-emption” or “cooperative federalism.” While the states and federal government have used cooperative federalism in the past to achieve specific domestic policy objectives, its use to implement international obligations is a fairly new idea.

The involvement of the Uniform Law Commission in the process ensures that any resulting changes in domestic law are brought about in a way that is respectful of state interests, and ensures certainty in the application of the treaty terms. Just as important, the Commission provides a method that is transparent and allows states to have a voice in the process.
The fundamental approach revolves around a set of principles and procedures designed to maintain the balance of state and federal power without disrupting larger policy objectives. First, federal law would implement the international agreement at the federal level. The U.S. Senate would provide advice and consent on the treaty or convention, and legislation would be introduced that would execute the agreement. State law would implement the convention at the state level if a state adopted the uniform act. If a state did not adopt the act, federal law would govern in that particular state. This process creates a mechanism for the instantaneous implementation of the act and an opportunity for the states to preserve an important balance in existing state and federal law.

**Effective Implementation of International Obligations Through State Law**

In 2007, the U.S. participated in the drafting of the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. The Convention aims to increase cooperation among nations for the international recovery of child support and other forms of family assistance through administrative cooperation premised on clear rules of jurisdiction. The Convention also applies to the establishment and modification of spousal support in cases where no related request for child support is present. State child support agencies will administer the convention provisions at the state level. The U.S. Department of Health and Human Services will serve as central authority under this convention, but many of the responsibilities of the central authority will be delegated to the individual state child support agencies.

Working in conjunction with the Departments of State and Health and Human Services, the Uniform Law Commission established a drafting committee to determine how the parts of the Convention affecting state law could be best integrated with the Uniform Interstate Family Support Act, a framework that is law in all states. The drafting committee determined that it should refrain from any temptation to amend provisions of the Uniform Interstate Family Support Act (UIFSA) except to the extent necessary to accommodate the procedures of enforcement and recognition contained in the Convention. The uniform act was completed in July 2008.

Despite what appears to be an agreed upon and formulaic approach to implementing the Convention, the process has not been without its share of disruptions. When the Uniform Law Commission completed the necessary changes to UIFSA, all parties involved, both state and federal, envisioned quick passage of the federal implementing legislation. However, concern over language in the preamble of the Convention caused the Senate to delay its advice and consent; specifically the reference to principles espoused in the United Nations Convention on the Rights of the Child.

While the United States was a signatory to the Convention, it has never been ratified because of concerns that the Convention changes the relationship of the child, the parent and the state. Core principles of the U.N. Convention on the Rights of the Child—the “best interests of the child” and the child’s “evolving capacities”—have been seen as potentially contrary to American principles. The Hague Convention on Family Maintenance does not change the relationship of the family to the state. It is strictly a procedural Convention, focusing on procedures for the collection of child support across borders and ensuring reciprocal enforcement of orders between the U.S. and other signatory countries.

Nonetheless, when the Senate acted to provide advice and consent, Sen. Jim DeMint offered an amendment reinforcing that “The United States is not a party to the Convention on the Rights of the Child and understands that a mention of the convention in the preamble of this treaty does not create any obligations and does not affect or enhance the status of the convention as a matter of United States or international law.” With the amendment, the treaty was approved.

Pursuant to the idea of cooperative federalism, legislation had to be introduced to fully implement the treaty. Both the Senate and the House of Representatives are considering the use of conditional spending to ensure national adoption of the changes to UIFSA. This approach is not new to the area of child support. The 1996 Welfare Reform Act made major changes to welfare programs requiring modification of state law. With the Welfare Reform Act, Congress made the enactment of UIFSA a condition of state eligibility for federal support of child support enforcement. In conformity with this requirement, all states adopted UIFSA within the two-year window provided in the legislation. Just as was the case with the Welfare Reform Act, states will be given a similar timeframe when the legislation to implement the Convention is passed.

Throughout the process of implementing the Convention, the Uniform Law Commission work
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illustrates that state law can be used as the vehicle to reach substantial national conformity with the language of treaties that are federal priority. But the Uniform Law Commission can play another role when international obligations may affect state law: that of a protector of state interests.

Protecting State Law Impacted by International Agreements

More than 12 years of discussion on international judgment recognition concluded with the completion of the Hague Convention on Choice of Court Agreements in the summer of 2005. The Convention provides rules for the enforcement of exclusive choice of forum clauses and for recognition and conventions with other countries. The Convention and this act contain three key rules. These rules govern when a court must hear a case; when a court must decline to hear a case; and when a court must recognize and enforce a judgment from another court.

Recognizing the Convention’s potential impact on state law, especially the terms governing the exclusive choice of forum clauses and recognition and enforcement of foreign judgments, the Department of State asked the Uniform Law Commission to study how these terms could be implemented without detrimentally affecting the internal administration of state courts. Equally as important was the recognition that ordering state courts to administer their courts in a particular manner through federal legislation has both constitutional and practical political implications.

The Uniform Law Commission established a study committee on this matter in July 2007. The study committee found that ratifying the Convention would facilitate the participation of the United States commercial entities in cross-border commercial transactions and would provide an excellent judicial alternative to international arbitration. The conclusions that the Convention could be implemented through cooperative federalism further encouraged the Department of State to sign the convention, which it did in January 2009.

Since then, a drafting committee has been working on comprehensive uniform state legislation that would implement the Convention in a manner that is consistent with the Convention and in harmony with state law. The committee continues its work to resolve certain policy differences regarding the scope of the federal act and its impact on existing state law. First among the issues is the scope of federal court jurisdiction in actions for recognition and enforcement of a judgment of a court chosen under the convention. Although some voiced support for federal question jurisdiction along the lines of provisions in the Federal Arbitration Act, a possible compromise would involve the minimal diversity jurisdiction based on the approach in the Class Action Fairness Act. The second issue concerned the applicable law in federal court in a state that has adopted the uniform act.

All parties are hopeful that compromise can be reached and the final version of the uniform act will be approved in 2012. But until compromise is reached, the Uniform Law Commission continues to ensure that federal initiatives do not unduly burden areas of traditional state interest.

Forging a Principled Approach

In light of its experience as a defender of state law in overreaching federal legislation, a partner with federal authorities in finding workable solutions to issues of national importance, and the growing need to further explore the responsible coordination of state and federal law to address emerging policy issues, the Uniform Law Commission formed the Committee on Federalism and State Law in July 2009. The task of the committee is to study and make recommendations on how to advance the public understanding of the importance of areas of traditional state law within the federal system.

The committee is working to issue “Principles of Federalism” that would promote a healthy balance of federal and state responsibilities, re-evaluate the current balance between federal and state law, and identify specific criteria to guide future decisions about the relative roles of the federal and state governments. In particular, standards will provide guidance on the appropriate circumstances in which federal law should substantially pre-empt state law and areas where federal law should establish minimum standards for the states, which would thereby encourage states to engage in the healthy experimentation that would further refine the approach to reach policy objectives. The principles also illustrate how pre-emption can be avoided and intergovernmental cooperation encouraged.

One of the committee’s other goals is to foster the conversation between state and federal leaders on important federalism issues. In October 2010, the Uniform Law Commission hosted a symposium on federalism in Washington, D.C., that brought together state lawmakers, federal stakeholders and policy experts to discuss the role of state law in the
federal system. Participants debated banking regulation, pharmaceutical regulation and unfunded mandates levied on the states by federal legislation. The Uniform Law Commission will continue to sponsor these forums, with the next program anticipated in the winter of 2013.

By working cooperatively with federal agencies in the implementation of international agreements, defending encroachments on areas of traditional state law and actively working to foster an understanding of the importance of state law during times of comprehensive discussions over the expanding role of federal power, the Uniform Law Commission will continue to be an important asset of state government in the political debates involving federalism. Engaging state and federal leaders through symposia on federalism, joint projects with state judicial and legislative organizations, and vigorous assertion of the rights and benefits of state law, especially when federal legislation or regulations threaten pre-emption, will help maintain federal and state interests and the continued vitality of state law. The continued involvement of the Uniform Law Commission in engaging political actors in debate over the proper role of state law in the federal system will help shape how federalism is understood and protected for decades to come.

Notes

1 The Federalist Papers No. 46 (James Madison).
5 For example, in 2009, South Carolina enacted the Military Parent Equal Protection Act (S.C. Acts 63-5-900), which makes custody orders issued upon deployment of a service member temporary, provides for expedited hearings and contains several other provisions designed to protect service members and the best interests of the child.
10 Senate Amdt 4683, 111th Cong. (2010).

About the Author

Eric M. Fish serves as interim legal counsel to the Uniform Law Commission. In this capacity, he works with state and federal legislators, as well as the executive branches of state government on public policy issues, including federalism, commercial law, criminal law, and family and elder law. He is a graduate of the Loyola University of Chicago School of Law, where he was the editor-in-chief of the Loyola University Chicago International Law Review. He received an undergraduate degree with honors from the University of Chicago. The statements contained within are attributable to the author and do not necessarily represent the official position of the Uniform Law Commission.