CHAPTER 8

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The United States is not yet a party to the U.N. Convention on the Rights of the Child (CRC). If the United States ratifies the CRC, it is likely to do so with a reservation, understanding, or declaration that the treaty is not “self-executing” within the United States, meaning that treaty provisions could not be enforced in the United States without domestic implementing legislation. This requirement poses concerns to the U.S. system of federalism, as many of the rights enshrined in the CRC come within the jurisdiction of state governments, as opposed to that of the federal government. The federalism argument is one of the two main arguments against ratification of the Convention, the other argument being undue interference with the parent-child relationship (discussed elsewhere in this book).

Traditionally, areas of family law and juvenile justice have been within the purview of state governments. Many provisions of the CRC, such as those regarding abuse, neglect, education, labor, and capital punishment of children fall within those areas of the law. Thus, the federal government, which would bind itself in ratifying the treaty, would not, as a general proposition, have the power to legislate in those areas covered by the treaty. However, under the supremacy clause of the U.S. Constitution, the federal government does have the power to ratify a treaty that supersedes

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3 See Law, *supra* note 1, at 1867 nn.170–71 (citing U.S. CONST. art. I, § 8, cl. 1–18 (powers of Congress), and U.S. CONST. art. I, § 10, cl. 1–13 (powers denied states)).
existing state laws, but Congress has been reluctant to use that power for fear of usurping power from state governments.

The CRC itself does not require that the implementation be done at the national level. While the national government of the state party binds itself to implementing the provisions of the treaty, it is not required by the terms of the Convention to enact national legislation to implement those provisions. When state laws comport with the provisions in the Convention, no conflict arises. Conflicts arise only where state laws are at odds with the Convention provisions. Fortunately, much of U.S. law, when defined as a combination of state and federal programs and laws, already complies with the standards and provisions of the CRC.

This chapter sets forth a few basic examples of areas of potential conflict between the CRC and the U.S. system of federalism for purposes of illustration; provides examples of U.S. reservation clauses that have been used to resolve such a conflict; and discusses possible solutions to the conflict.

A. MAIN AREAS OF CRC CONFLICT WITH U.S. FEDERAL SYSTEM

In the United States, the risk of conflict lies in areas that can be categorized as those where U.S. law is either in direct conflict with the Convention, recognizes a right given in the Convention but only to a lesser degree, or does not recognize the right at all. These issues come most sharply to the fore with respect to juvenile penal codes, education, and the child’s right to be heard.

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4 See Law, supra note 1, at 1853 (citing U.S. Const. art. II, § 2, cl. 2, which states that the President of the United States has the power to ratify a treaty with the advice and consent of two-thirds of the Senate present; and U.S. Const. art. VI, cl.2, which states that, if ratified, a treaty supersedes state law and federal law if ratified later in time that act of Congress); Louis Henkin, U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker, 89 Am. J. Int’l L. 341, 345-46 (1995).

5 See Law, supra note 4, at 1853. See also Kilbourne, Federalism Issues, supra note 2, at 329, n.28 (citing Child Grab: Why Does the United Nations Want to Control Our Kids?, The New Am., June 18, 1991, at 4, 7, for the proposition that the Convention conflicts with federalism because the Constitution and Bill of Rights were drafted with a view to “limiting the power and scope of the federal government and providing the legal standing for the people and the states to assert themselves against encroachments by the federal government.”); Peter J. Spiro, The States and International Human Rights, 66 Fordham L. Rev. 567, 576 (1997).

6 See Kilbourne, Federalism Issues, supra note 2, at 330.

7 See id.

8 See id. at 329.

9 See Law, supra note 1, at 1853.