

Casenote

The Last Rights: Controversial *Ne Exeat* Clause Grants Custodial Power Under *Abbott v. Abbott*

I. INTRODUCTION

The weight to be assigned to the laws and practices of foreign legal systems in the analysis of international agreements and domestic statutory disputes has long been a topic of debate in the legislative, executive, and judicial branches of the United States government.¹ On

1. Compare *Atkins v. Virginia*, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting) (alterations in original) (quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868 n.4 (1988) (Scalia, J., dissenting)) (internal quotation marks omitted) (“We must never forget that it is a Constitution for the United States of America that we are expounding. . . . [W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.”), with *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting) (citations omitted) (“Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem . . .”). See Donald E. Childress III, *Using Comparative Constitutional Law to Resolve Domestic Federal Questions*, 53 DUKE L.J. 193 (2003) (comparing the alternative views of utilizing foreign precedence in domestic decisions); Adam Lamparello, *A New*

one side of the argument, traditional scholars contend that, as a sovereign, the United States should make decisions based solely on the best interests of its citizens, regardless of the detriment imposed on the international community by such practices.² Conversely, as a modern approach, the cosmopolitan view of international systems³ depicts the United States as just one member in an international web of judicial, legislative, and executive decisions, with each country's procedures affecting the others' laws and lifestyles.⁴

This debate is becoming increasingly significant as the United States continues to augment its reliance on foreign products and investments.⁵ Consequently, the study of international law is becoming less of a legal

Method to Guide Constitutional Interpretation: Introducing "Negative Originalism," 18 U. FLA. J.L. & PUB. POL'Y 383 (2007) (discussing the alternative views of Justices of the Supreme Court of the United States). Interestingly, in *Abbott v. Abbott*, Justice Scalia sided with the majority, which utilized international law to determine the definition of a *ne exeat* clause as a "right of custody." 130 S. Ct. 1983, 1987-97 (2010). Justice Breyer sided with the dissent, deciding that the decisions of foreign courts, in this case, were not consistent with the Hague Convention. *Id.* at 1997-2010 (Stevens, J., dissenting).

2. See *Atkins*, 536 U.S. at 324-25 (Rehnquist, J., dissenting) ("I fail to see, however, how the views of other countries regarding the punishment of their citizens provide any support for the Court's ultimate determination."); see also *id.* at 347-48 (Scalia, J., dissenting) (footnote omitted) (citations omitted) ("[T]he Prize for the Court's Most Feeble Effort to fabricate 'national consensus' must go to its appeal . . . to the views of . . . members of the so-called 'world community' . . . I agree with THE CHIEF JUSTICE [Rehnquist], that the views of professional and religious organizations and the results of opinion polls are irrelevant. Equally irrelevant are the practices of the 'world community,' whose notions of justice are (thankfully) not always those of our people.").

3. See IMMANUEL KANT, *Idea for a Universal History with a Cosmopolitan Intent*, in PERPETUAL PEACE AND OTHER ESSAYS ON POLITICS, HISTORY, AND MORALS 29 (Ted Humphrey trans., Hackett Publ'g Co. 1983) (1784).

4. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 573 (2003) (utilizing foreign precedent to decide the constitutionality of a state law); *Atkins*, 536 U.S. at 307, 316 n.21 (utilizing foreign precedent to decide an Eighth Amendment issue); *Roe v. Wade*, 410 U.S. 113, 130-33 (1973) (discussing historical and foreign law in the context of abortion laws); *New York v. United States*, 326 U.S. 572, 580 n.4, 583 n.5 (1946) (discussing foreign law in the context of tax law); *Muller v. Oregon*, 208 U.S. 412, 419 (1908) (examining foreign statutes in the context of setting employment hours); David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA L. REV. 539, 544-49 (2001) (describing the history of utilizing foreign precedence in domestic decisions).

5. See, e.g., Press Release, Office of the United States Trade Representative, United States Trade Representative Ron Kirk Signs Agreement on Trade and Economic Cooperation to Promote American Exports to Brazil (Mar. 19, 2011), available at <http://www.ustr.gov>.

phantom and more a living reality for the United States.⁶ As recent internationally-based cases demonstrate, courts more frequently must make controversial decisions whether to use the customary legal practices of foreign nations as informative authority.⁷ In 2010 the Supreme Court of the United States held in *Abbott v. Abbott*⁸ that a parent's *ne exeat* right granted in a foreign court will be considered by the United States to constitute a "right of custody," as defined in the Hague Convention on the Civil Aspects of International Child Abduction (Hague Convention),⁹ rather than a "right of access."¹⁰ In making this decision about parental child abduction and the contested *ne exeat* right, the Supreme Court, through the analysis of foreign custom and legal precedence, impressed upon domestic courts the importance of foreign laws when interpreting international treaties.¹¹

The Supreme Court's decision in *Abbott* should be examined using two distinct lenses. Viewing this decision domestically, by determining the United States's stance on international custody rights, the Supreme Court resolved a federal circuit split and dictated the standard for domestic courts to follow in cases involving the Hague Convention.¹² More importantly, on an international level, this decision signals to the international community that the United States judicial system is willing to utilize foreign laws and policies to interpret treaties to which the United States is a party.¹³ This is a lengthy stride in giving the field of international law more validity in the realm of multi-national and domestic litigation.¹⁴

6. See Judge John Kane, *International Law From the Trial Judge's Vantage Point*, 35 DENV. J. INT'L L. & POL'Y 379, 379 (2007) (discussing how international law is rapidly affecting a court's daily tasks).

7. See, e.g., *Dalrymple v. United States*, 460 F.3d 1318, 1331-32 (11th Cir. 2006) (discussing the litigation arising out of the custody dispute for Elian Gonzalez); Kane, *supra* note 6, at 380 ("The fact is that international law and foreign law are being raised in our federal courts more often and in more areas than our courts have the knowledge and experience to handle.").

8. 130 S. Ct. 1983 (2010).

9. Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Hague Convention].

10. *Abbott*, 130 S. Ct. at 1990.

11. See *id.* at 1993.

12. See *id.* at 1989.

13. See *id.* at 1993.

14. See Childress, *supra* note 1, at 200-01 (discussing the use of foreign law in domestic cases); Fontana, *supra* note 4, at 544-49 (describing the history of utilizing foreign precedence in domestic decisions).

II. FACTUAL BACKGROUND

In 2003 Timothy Abbott, a British citizen, and Jacquelyn Abbott, a United States citizen, separated and relied on the Chilean Family Court to determine who would retain custody of A.J. Abbott, their young son. The court awarded Ms. Abbott daily care and control of A.J., and Mr. Abbott received regular visitation rights. The court additionally granted a *ne exeat* order.¹⁵ A *ne exeat* order is a custody device used by international courts that requires either both parents' consent or permission from the court before a custodial parent may change a child's country of residence.¹⁶

In August 2005 Ms. Abbott removed A.J. from Chile without the consent of Mr. Abbott or the Chilean court. After a private investigation, Ms. Abbott and A.J. were found living in Texas where Ms. Abbott had filed for a divorce and a modification of paternal visitation rights in the State Court of Texas. Mr. Abbott subsequently requested that the state court grant him visitation rights and order A.J.'s return to Chile. The state court denied A.J.'s return but granted visitation rights on the condition that Mr. Abbott remain in Texas. Not satisfied, Mr. Abbott requested the United States District Court for the Western District of Texas to grant an order, pursuant to the Hague Convention, requiring A.J.'s return.¹⁷ The district court denied relief and "held that the father's *ne exeat* right did not constitute a right of custody under the [Hague] Convention and, as a result, that the return remedy was not authorized."¹⁸ On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision, following the precedent of the United States Courts of Appeals for the Second, Fourth, and Ninth Circuits.¹⁹ In contrast to the opinion of the United States Court of Appeals for the Eleventh Circuit²⁰ and the Second Circuit dissent of former Circuit Court Judge Sotomayor in *Croll v. Croll*,²¹ the Fifth Circuit determined that a parent's *ne exeat* right is merely a "veto

15. *Abbott*, 120 S. Ct. at 1988. In Chile, it is customary to grant a *ne exeat* order to any parent with visitation rights. *Id.*

16. BLACK'S LAW DICTIONARY 1131 (9th ed. 2009). A *ne exeat* clause is defined as "[a]n equitable writ restraining a person from leaving, or removing a child or property from, the jurisdiction." *Id.*

17. *Abbott*, 130 S. Ct. at 1988.

18. *Id.*

19. *Id.* at 1988-89; see *Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002); *Croll v. Croll*, 229 F.3d 133 (2d Cir. 2000).

20. See *Furnes v. Reeves*, 362 F.3d 702, 719-20 (11th Cir. 2004).

21. See 229 F.3d at 144-54 (Sotomayor, J., dissenting).

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right” over their child’s departure from a country.²² To resolve the conflict between the circuits, the Supreme Court granted certiorari.²³

III. LEGAL BACKGROUND

A. *The Hague Convention on the Civil Aspects of International Child Abduction*

On October 25, 1980, the Hague Conference on Private International Law (Hague Conference)²⁴ formally recognized that there was an international crisis involving parental abductions of minor children.²⁵ The Hague Conference adopted the Hague Convention on the Civil Aspects of International Child Abduction to address this issue.²⁶ Although parental child abduction is not a new issue, the frequency of abductions has multiplied exponentially resulting from the ease of international travel, high divorce rates worldwide, and an increase in intercultural marriages.²⁷ Members of broken families are often left with feelings of “animosity, frustration[,] and bitterness” in response to parental separation.²⁸ In multicultural families, these feelings tend to be magnified moreso than in monocultural families if there is not an agreement between the custodial and noncustodial parent as to where, internationally, and how, culturally, the child will be raised.²⁹ Many times cultural disagreements involving child-rearing, coupled with the prospect of receiving more favorable custody adjudications in a home jurisdiction, are the principle motives behind international parental child

22. *Abbott v. Abbott*, 542 F.3d 1081, 1087 (5th Cir. 2008), *rev'd*, 130 S. Ct. 1983 (2010).

23. *Abbott*, 130 S. Ct. at 1989.

24. Overview, Hague Conference on Private International Law, http://www.hcch.net/ind_ex_en.php?act=text.display&tid=26 (last visited Mar. 21, 2011) [hereinafter Hague Conference]. The Hague Conference provides the following overview:

[T]he Hague Conference on Private International Law is a global inter-governmental organi[z]ation. A melting pot of different legal traditions, it develops and services multilateral legal instruments, which respond to global needs.

An increasing number of non-Member States are also becoming Parties to the Hague Conventions. As a result, the work of the Conference encompasses 130 countries around the world.

Id.

25. Gloria DeHart & William M. Hilton, *International Enforcement of Child Custody*, in 5 CHILD CUSTODY AND VISITATION LAW AND PRACTICE § 32.02[1][a] (Matthew Bender rev. ed. 2010).

26. *Id.*

27. *Outline: Hague Child Abduction Convention*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (Sept. 2008), <http://www.hcch.net/upload/outline28e.pdf>.

28. DeHart & Hilton, *supra* note 25, § 32.01[1].

29. *See id.*

abductions among multicultural families.³⁰ Children are often the victims of this type of separation, frequently losing contact with one of their parents, leaving their home, and being transplanted into a new culture.³¹

Currently encompassing eighty-four contracting countries,³² the Hague Convention's most notable attribute is the return mechanism, which prompts contracting countries to return "wrongfully"³³ removed children to their habitual country of residence.³⁴ The purpose of the return mechanism is based on the policy that the best interests of the child will be met if they are returned to their customary environment and are allowed the continuity of an ordinary life while disputes are settled.³⁵ Moreover, the prompt return of a child to their home country serves as a deterrent to parents who choose to abduct the child in violation of court-imposed custody rights as a way of shopping for a more favorable custody decision from another jurisdiction.³⁶ The United States's ratification of the Hague Convention in 1986³⁷ and the passage

30. *See id.* Scholars acknowledge that

[f]actors within the family leading to parental child abduction include[]: (1) an unworkable relationship between the parents; (2) significant cultural differences based on the parents' differing nationalities; (3) frustration by lack of access to the child or fear of loss of the child by prejudiced proceedings, lack of finances or concealment by the other parent; (4) opportunity; and (5) the prospect of something to be gained through self-help.

Id.

31. *Outline, supra* note 27.

32. *Status Table-28: Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last updated Feb. 2, 2011).

33. Hague Convention, *supra* note 9, at 98. The Hague Convention defines "wrongful" removal as

[t]he removal or the retention of a child . . . where-

a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

Id.

34. *Id.*

35. *Outline, supra* note 27.

36. *Id.*

37. DeHart & Hilton, *supra* note 25, § 32.02[1][c][i]. The United States signed the Hague Convention on December 23, 1981. *Id.* "[T]he State Department submitted [the Hague Convention] to the President with the recommendation that it be transmitted to the Senate for . . . ratification" on October 4, 1985. *Id.* On October 30, 1985, the Hague Convention was transmitted. *Id.* The Senate ratified the Convention on October 9, 1986, and the Hague Convention became effective July 1, 1988. *Id.*

of several domestic child abduction statutes,³⁸ including the International Child Abduction Remedies Act (ICARA)³⁹ in 1988, have transformed the United States into an undesirable jurisdiction for abductors seeking more sympathetic treatment.⁴⁰ As an immediate benefit of implementing the return policy, the United States has witnessed the return of many children to the United States from other countries so that custody disputes could be decided in the correct international forum.⁴¹

Although a positive step in the direction of limiting parental child abduction, the Hague Convention has caused conflict in United States courts with regard to the distinction between a “right of custody” and a “right of access.”⁴² A right of custody has been defined by the Hague Convention as a “right[] relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence.”⁴³ Alternatively, a right of access is described as a visitation right or “the right to take a child for a limited period of time to a place other than the child’s habitual residence.”⁴⁴ Although instances when the noncustodial parent has been the abductor have been handled relatively simply by United States courts,⁴⁵ there has been confusion when the child has been removed from their habitual residence against court order by the *custodial* parent.⁴⁶ The Hague Convention provides

38. See, e.g., International Parental Kidnapping Crime Act of 1993 (IPKCA), 18 U.S.C. § 1201 (2006); Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (2006); see also Arpita Gupte, Comment, *Rights of Access With Ne Exeat Clause Do Not Create Rights of Custody Under Hague Convention—Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008), 33 SUFFOLK TRANSNAT’L L. REV. 187 (2010).

39. 42 U.S.C. § 11601 (2006). ICARA is the implementing statute for the Hague Convention. *Id.*

40. DeHart & Hilton, *supra* note 25, § 32.02[1][c][iii].

41. *Id.*

42. Compare, e.g., *Furnes v. Reeves*, 362 F.3d 702, 710 (holding that a *ne exeat* order is a “right of custody” and thereby splitting the federal circuits), with *Croll v. Croll*, 229 F.3d 133, 135 (2d Cir. 2000) (holding that neither a *ne exeat* order nor “rights of access” constitute a “right of custody”).

43. Hague Convention, *supra* note 9, at 99.

44. *Id.*

45. See, e.g., *Nicolson v. Pappalardo*, 605 F.3d 100 (1st Cir. 2010); *Cuellar v. Joyce*, 596 F.3d 505 (9th Cir. 2010); see also Mark Dorosin, *You Must Go Home Again: Friedrich v. Friedrich, The Hague Convention and The International Child Abduction Remedies Act*, 18 N.C.J. INT’L L. & COM. REG. 743 (1993) (discussing the Hague Convention and its implementing statute).

46. Compare, e.g., *Furnes*, 362 F.3d at 722, 724 (holding that a *ne exeat* order given to a noncustodial parent triggers the return mechanism if violated by a custodial parent under the Hague Convention), with *Croll*, 229 F.3d at 143-44 (holding that a *ne exeat* order given to a noncustodial parent does not trigger the return mechanism if violated by a

the return mechanism only when a child is abducted from their habitual residence in opposition to one parent's exercised right of custody; removal in violation of a limited custody right of access does not trigger a prompt return.⁴⁷ In the United States, the principle issue debated was the classification of a *ne exeat* right as either a right of custody or a right of access⁴⁸ before the Supreme Court made this determination.⁴⁹

B. Early Opinions on Ne Exeat Orders

Up until the Supreme Court's decision in *Abbott*,⁵⁰ the Second Circuit's opinion in *Croll*⁵¹ and the corresponding dissenting opinion⁵²

custodial parent under the Hague Convention).

47. Hague Convention, *supra* note 9, at 98-100.

48. Compare, e.g., *Furnes*, 362 F.3d at 710 (holding that a *ne exeat* order is a "right of custody" and thereby splitting the federal circuits), with *Croll*, 229 F.3d at 135 (holding that a *ne exeat* order is not a "right of custody").

49. See *Abbott*, 130 S. Ct. at 1989.

50. 130 S. Ct. 1983 (2010).

51. See generally Daniel M. Fraidstern, Note, *Croll v. Croll and the Unfortunate Irony of the Hague Convention on the Civil Aspects of International Child Abduction: Parents With "Rights of Access" Get No Rights to Access Courts*, 30 BROOK. J. INT'L L. 641 (2005) (discussing implications of the Second Circuit's decision in *Croll*). The majority opinion in *Croll* was written by (former) Judge Jacobs. 229 F.3d at 134. Chief Circuit Judge Dennis Jacobs

became Chief Judge on October 1, 2006. At the time of his appointment in 1992, he was a partner in the New York law firm of Simpson[,] Thacher & Bartlett.

Judge Jacobs received his B.A. degree from Queens College of the City University of New York in 1964; his M.A. degree from New York University in 1965; and his J.D. degree from the New York University School of Law in 1973.

Judge Jacobs was a lecturer in the English Department of Queens College of the City University of New York from 1967 until 1969. He was in private practice from 1973 with the New York law firm of Simpson, Thacher & Bartlett, serving as a partner there from 1980 until his judicial appointment.

In 1997-2004, Judge Jacobs was a member of the Committee on Judicial Resources of the Judicial Conference of the United States; starting in 1999 he was chair of that committee

Judge Jacobs is a native of New York City.

Biographical Information: Dennis Jacobs, UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/Judgesbio.htm> (last visited Mar. 22, 2011).

52. *Croll*, 229 F.3d at 144-154 (Sotomayor, J., dissenting). The dissenting opinion in *Croll* was written by former Circuit Court Judge Sotomayor. *Id.* at 144. Associate Supreme Court Justice Sonia Sotomayor

was born in Bronx, New York, on June 25, 1954. She earned a B.A. in 1976 from Princeton University, graduating summa cum laude and receiving the university's highest academic honor. In 1979, she earned a J.D. from Yale Law School where she served as an editor of the Yale Law Journal. She served as Assistant District Attorney in the New York County District Attorney's Office from 1979-1984. She

were the leading—most persuasive—alternative views concerning the issue of *ne exeat* rights and the Hague Convention.⁵³ Similarly to *Abbott*, in *Croll*, Ms. Croll, the custodial parent of minor Christina Croll, removed Christina from Hong Kong without attaining consent from Mr. Croll in violation of a Hong Kong court-issued *ne exeat* order. Mr. Croll's petition in the United States District Court for the Southern District of New York was granted by the district court for the return of Christina to Hong Kong after finding that Ms. Croll wrongfully removed Christina in violation of the *ne exeat* order and the Hague Convention.⁵⁴ On appeal, the Second Circuit reversed the district court's decision, holding that, even when paired with a *ne exeat* clause, rights of access do not become rights of custody within the realm of the Hague Convention and thus do not invoke the return of the child.⁵⁵

The majority opinion in *Croll* reasoned that the textual and historical aspects of the Hague Convention, coupled with the lack of conformity in international case law, did not indicate that *ne exeat* orders should convey a right of custody to an otherwise noncustodial parent.⁵⁶ To do this, the court utilized the “purpose and design of the [Hague] Convention, its wording, the intent of its drafters, and caselaw in other signatory states,”⁵⁷ albeit with significant disparities in the weight assigned to each.⁵⁸ The court explained that courts are not allowed to “consider the merits of underlying custody disputes.”⁵⁹ Courts may, however, determine whether there was a “wrongful” removal within the boundaries of the Hague Convention.⁶⁰

then litigated international commercial matters in New York City at Pavia & Harcourt, where she served as an associate and then partner from 1984-1992. In 1991, President George H.W. Bush nominated her to the U.S. District Court, Southern District of New York, and she served in that role from 1992-1998. She served as a judge on the United States Court of Appeals for the Second Circuit from 1998-2009. President Barack Obama nominated her as an Associate Justice of the Supreme Court on May 26, 2009, and she assumed this role August 8, 2009.

Biographies of Current Justices of the Supreme Court, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Jan. 31, 2011)

53. See *Abbott*, 542 F.3d at 1084-85; *Furnes*, 362 F.3d at 719; *Fawcett*, 326 F.3d at 500; *Gonzalez*, 311 F.3d at 944.

54. *Croll*, 229 F.3d at 135-36.

55. *Id.* at 135.

56. *Id.* at 137-43.

57. *Id.* at 136 (internal organizational lettering omitted).

58. See *id.* at 138-43 (placing more weight on the textual aspects of the Hague Convention rather than on foreign case law).

59. *Id.* at 138.

60. *Id.*

Utilizing several popular dictionary definitions of “custody,” the court concluded that “custody of a child entails the primary duty and ability to choose and give sustenance, shelter, clothing, moral and spiritual guidance, medical attention, education, etc., or the (revocable) selection of other people or institutions to give these things.”⁶¹ The court disregarded Mr. Croll’s argument that a *ne exeat* right gave him “the right to determine [the] child’s place of residence” and should therefore be considered a right of custody under the Hague Convention.⁶² The court held that the power to determine a child’s home country or territory by vetoing a custodial parent’s decision cannot be considered a right of custody by any set of standards.⁶³ Moreover, the court determined that the requirement of returning the child to a parent who had neither the right nor the responsibility of full custody without also requiring the return to the custodial parent would be counter to the purpose of the Hague Convention.⁶⁴ The court explained that the Hague Convention “does not contemplate return of a child to a parent whose sole right—to visit or veto [*ne exeat*]—imposes no duty to give care” and thus would be a contradiction to the policy of acting in the best interests of the child.⁶⁵

Although Judge Jacobs described the textual and structural features of the Hague Convention as sufficient to define a *ne exeat* right, in referring to extrinsic sources, the court analyzed the Pérez-Vera Report⁶⁶ to further realize the intent of the Hague Convention’s drafters.⁶⁷ As the official reporter of the Hague Conference, the Pérez-Vera Report

recount[ed] that [a]lthough the problems which can arise from a breach of access rights, especially where the child is taken abroad by its custodian, were raised . . . the majority view was that such situations could not be put in the same category as the wrongful removals which [the Convention] is sought to prevent.⁶⁸

61. *Id.*

62. *Id.* at 139.

63. *Id.* at 140-41.

64. *Id.* at 140.

65. *Id.* at 140.

66. Elisa Pérez-Vera, *Explanatory Report on the 1980 Hague Child Abduction Convention*, in 3 ACTS AND DOCUMENTS OF THE FOURTEENTH SESSION 426 (1982), available at http://www.hech.net/index_en.php?act=publications.details&pid=2779.

67. See *Croll*, 229 F.3d at 142 (analyzing the Pérez-Vera Report).

68. *Id.* (second alteration in original) (internal quotation marks omitted); see also Pérez-Vera, *supra* note 66, at 444-45.

The court thus concluded that the option of applying the return mechanism to situations in which rights of access were violated was contemplated and subsequently rejected by the Hague Conference.⁶⁹ Furthermore, the court relied on correspondence regarding the Hague Convention from the Secretary of State, George P. Schultz, to President Reagan, who wrote that “[t]he remedies for breach of the access rights of the non-custodial parent do not include the return remedy.”⁷⁰ Secretary Schultz also clarified that “[p]ersons should not be able to *obtain* custody of children by virtue of . . . wrongful removal or retention.”⁷¹ These discussions of extrinsic sources by the court further compelled the holding that *ne exeat* rights were not intended as rights of custody. The court maintained that, in instances when the custodial parent violates the noncustodial parent’s rights, there are other methods of relief, short of returning the child, to a parent deemed only to have access rights.⁷²

As the final analysis, the court put little weight in the opinions issued by other signatories of the Hague Convention, exemplifying the court’s use of the traditional view of sovereignty as the approach to interpreting treaties.⁷³ The court stated that although “opinions of our sister signatories [are] entitled to considerable weight,”⁷⁴ there are “no doctrine[s] requiring our deference to a series of conflicting cases from foreign signatories.”⁷⁵ The court went so far as to say that the cases worldwide were “few, scattered, conflicting, and sometimes conclusory and unreasoned.”⁷⁶ The Second Circuit’s practice of skeptically utilizing foreign law to solve treaty and convention disputes and giving more deference to domestic laws and traditions was adopted by the

69. *Croll*, 229 F.3d at 141-42.

70. *Id.* at 142 (alteration in original) (internal quotation marks omitted).

71. *Id.* (alteration in original) (internal quotation marks omitted).

72. *Id.* at 143-44.

73. *Id.* at 143.

74. *Id.* (alteration in original) (quoting *Air France v. Saks*, 470 U.S. 392, 404 (1985)) (internal quotation marks omitted).

75. *Id.*

76. *Id.*

Ninth Circuit in 2002 in *Gonzalez v. Gutierrez*,⁷⁷ and again, in 2003 by the Fourth Circuit in *Fawcett v. McRoberts*.⁷⁸

In her dissent, former Circuit Court Judge Sotomayor focused on the text of the Hague Convention in reference to the Convention's international objective and purpose.⁷⁹ Judge Sotomayor argued that although United States custom is important to treaty interpretation, this subject requires courts to "look beyond parochial definitions to the broader meaning of the Convention" as a reason why the court should rule in favor of viewing *ne exeat* orders as rights of custody.⁸⁰ Additionally, Judge Sotomayor proffered the argument that only one custody right need be violated to allow for the return mechanism under the Hague Convention.⁸¹ Despite Judge Sotomayor's argument, United States courts seemed unwavering in the consideration of a *ne exeat* clause as merely a right of access instead of a right of custody.⁸² This changed in 2004 with the Eleventh Circuit's holding in *Furnes v. Reeves*.⁸³

77. 311 F.3d 942 (9th Cir. 2002). In *Gonzalez*, Ms. Gutierrez, after living in a violent marital relationship with Mr. Gonzalez, filed for divorce and received custody of her children in a Mexican court. The order from the court included a *ne exeat* clause, requiring consent from both parents before removing the children from Mexico. Ms. Gutierrez, after suffering several violent attacks from her ex-husband, removed the children without his consent to California, violating the *ne exeat* provision. Mr. Gonzalez petitioned for the return of the children in accordance with the Hague Convention and its implementing statute. The district court, conducting an analysis of first impression in the Ninth Circuit, found that the *ne exeat* provision was violated and that the children would have to be returned to Mexico. *Id.* at 946-47. On appeal, however, utilizing the Second Circuit's opinion in *Croll*, the Ninth Circuit reversed the district court's ruling, holding that "the existence of a *ne exeat* clause in the divorce agreement [did] not transform [Gonzalez's] visitation rights into custodial rights under the [Hague] Convention." *Id.* at 948. Much like the Second Circuit, the Ninth Circuit also discounted the use of foreign court opinions in deciding this issue, stating that foreign opinions give "no clear consensus" and thus should be weighed lightly. *Id.* at 952.

78. 326 F.3d 491 (4th Cir. 2003). The Fourth Circuit encountered its first bout with the *ne exeat* clause in 2003 with *Fawcett v. McRoberts*. See 326 F.3d 491. Involving a similar set of facts as *Croll* and *Gonzalez*, the court reversed the district court, holding that the child was not required to be returned to Scotland from the United States after his custodial father removed him in violation of a Scottish court order requiring the child to remain in Scotland. *Id.* at 499, 501.

79. *Croll*, 229 F.3d at 144 (Sotomayor, J., dissenting).

80. *Id.* at 145.

81. *Id.* at 147.

82. See sources cited *supra* notes 77-78.

83. 362 F.3d 702 (11th Cir. 2004).

C. Circuit Split Gives Life to Croll Dissent—The Eleventh Circuit

The dissent of Judge Sotomayor in the *Croll* opinion remained dormant until 2004 when the Eleventh Circuit issued its first opinion regarding *ne exeat* clauses.⁸⁴ In *Furnes* Mr. Furnes and Ms. Reeves agreed on a custody schedule for their daughter in a Norwegian court. Both parents were to have “joint parental responsibility” with Ms. Reeves retaining custody.⁸⁵ In accordance with Norwegian law, joint parental responsibility includes a *ne exeat* clause.⁸⁶ Soon after agreeing on the custodial settlement, Ms. Reeves requested permission to take her daughter to the United States. Ms. Reeves never intended on returning to Norway with her daughter, and she remained in the United States without notifying Mr. Furnes of their whereabouts. Mr. Furnes subsequently conducted a private international search for his daughter. After locating his child in Georgia, Mr. Furnes filed a request for the return of his daughter to Norway pursuant to the Hague Convention and its implementing statute. The district court denied Mr. Furnes’s petition, holding that he merely maintained rights of access coupled with a *ne exeat* order, and therefore, his situation would not trigger the use of the Hague Convention’s return mechanism.⁸⁷

On appeal, the Eleventh Circuit broke new ground by holding contrary to the Second, Fourth, and Ninth Circuits, creating a split in the federal courts regarding *ne exeat* issues.⁸⁸ The Eleventh Circuit used many of the same tools utilized in the previous *ne exeat* cases, but the court distributed the weight given to each of these tools differently, similar to the dissent in *Croll*.⁸⁹ The court first established that only one parental custody right needed to have been violated to prompt the return of a child under the Hague Convention, varying from other courts that described rights of custody as bundled rights.⁹⁰ Under the bundled rights theory, all aspects of custody would have to have been violated to use the return mechanism.⁹¹ Thus, according to this theory, the return of a child would only be a remedy in situations when the noncustodial

84. *See id.*

85. *Id.* at 706 (internal quotation marks omitted).

86. *Id.* at 707-08.

87. *Id.* at 708-09.

88. *See id.* at 704.

89. Compare *id.* at 710-14, with *Croll*, 229 F.3d at 144-54 (Sotomayor, J., dissenting).

90. Compare *Furnes*, 362 F.3d at 714-15, with *Croll*, 229 F.3d at 141-43 (determining that the drafters of the Hague Convention did not intend a violation of a single custodial right to invoke the return remedy).

91. *Croll*, 229 F.3d at 139.

parent has abducted the child in violation of the custodial parent's rights.⁹²

Like the Second, Fourth, and Ninth Circuits, the Eleventh Circuit began by analyzing the text of the Hague Convention; conversely, however, the Eleventh Circuit distinguished that "in applying the Hague Convention, [courts] must look to the definition of 'rights of custody' set forth in the Convention and not allow . . . different American concepts of custody to cloud [the courts'] application of the Convention's terms."⁹³ Rather than utilizing dictionary definitions of key terms, the court analyzed the Norwegian law on which the custody agreement was based.⁹⁴ The court held that the decision of where the child would live was divided into two parts of equal importance in regards to the "place of residence" language in the Hague Convention definition of right of custody.⁹⁵ Part one of the decision was where the child would live within Norway, the custodial right of Ms. Reeves, and part two was whether the child could live outside of Norway, the custodial *ne exeat* right of Mr. Furnes.⁹⁶

Noting that the Hague Convention does not explicitly include a definition of the phrase "place of residence," the court maintained that, as an international treaty, the Hague Convention was signed using a global vision.⁹⁷ The court noted that the purpose of the Hague Convention was to form an alliance of foreign policies on parental child abduction so that treaty signatories could be certain that custody disputes and the children central to these disputes would remain within the country of original jurisdiction.⁹⁸ Realizing the international purpose and the practicalities of enforcing the Hague Convention, the court indicated that place of residence was more likely to refer to a country or region of residence rather than the specific city, street, or actual home where the child would reside.⁹⁹ Furthermore, the court held that not only would Mr. Furnes be determining the place of residence for his daughter but, by deciding to enact his *ne exeat* right, he would be ensuring that his daughter would "participate in Norwegian culture."¹⁰⁰ Therefore, he additionally would be making decisions "relating to the care of the person of the child," which is the principle

92. *See id.*

93. *Furnes*, 362 F.3d at 711.

94. *Id.* at 715.

95. *Id.*; *see also* Hague Convention, *supra* note 9, at 99.

96. *Furnes*, 362 F.3d at 715.

97. *See id.* (internal quotation marks omitted).

98. *Id.* at 710; *see also* Hague convention, *supra* note 9, at 98.

99. *Furnes*, 362 F.3d at 715.

100. *Id.* at 716.

portion of the rights of custody definition.¹⁰¹ The court also determined that to maintain the status quo of the child's custody, the child would need to be returned to the country in which her parents had made the agreement; otherwise, the United States would be determining custody issues already decided by a foreign court.¹⁰²

In moving from the text of the treaty to international custom, the court cited the adoption of broadly-viewed definitions concerning rights of custody in courts of the United Kingdom, Australia, South Africa, and Israel.¹⁰³ These foreign "courts have stressed the need for enforcement of custody orders (including *ne exeat* clauses)."¹⁰⁴ The Eleventh Circuit acknowledged that there are foreign decisions in opposition to the holding in *Furnes*¹⁰⁵ but noted that these cases are far less cited due to less persuasive reasoning and dissimilar fact patterns.¹⁰⁶ Ultimately the court acknowledged its split from the Second Circuit by joining Judge Sotomayor's powerful dissent in *Croll*.¹⁰⁷ This argument would not make its next appearance until the Supreme Court's decision in *Abbott*.

IV. COURT'S RATIONALE

In 2008 the Fifth Circuit gave its opinion in *Abbott v. Abbott*,¹⁰⁸ determining which side of the *ne exeat* conflict the court would adopt.¹⁰⁹ Utilizing the alternate opinions of the federal circuits, the court found the argument in *Croll v. Croll*¹¹⁰ more persuasive and held that *ne exeat* clauses would not furnish rights of custody to noncustodial parents.¹¹¹ Determining that a uniform holding was necessary, the

101. *Id.* (internal quotation marks omitted); *see also* Hague Convention, *supra* note 9, at 99.

102. *Furnes*, 362 F.3d at 717.

103. *Id.* at 717-18. *See generally* *International Child Abduction Database*, HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, <http://www.incadat.com> (last visited Mar. 23, 2011) [hereinafter INCADAT] (summarizing cases discussed in *Furnes*).

104. *Furnes*, 362 F.3d at 717.

105. *Id.* at 718; *see also* INCADAT, *supra* note 103 (summarizing Canadian and French decisions discussed in *Furnes*). The court further mentioned that in both Canadian cases the reference to *ne exeat* rights as rights of custody were expressed in dicta, and therefore, were not as persuasive. *Furnes*, 362 F.3d at 718. Moreover, the court described the holding of the French court as misguided because the court "focus[ed] on the mother's right to expatriate rather than the issues of custody set forth in the Hague Convention." *Id.*

106. *Furnes*, 362 F.3d at 718.

107. *Id.* at 719.

108. 542 F.3d 1081 (5th Cir. 2008), *rev'd*, 130 S. Ct. 1983 (2010).

109. *See id.* at 1082.

110. 229 F.3d 133 (2d Cir. 2000).

111. *Abbott*, 542 F.3d at 1087.

Supreme Court granted certiorari¹¹² to decide the custody status of *ne exeat* orders.¹¹³

Ten years after the *Croll* decision, Justice Sotomayor was given a second chance to weigh in on the issue of international parental child abduction and *ne exeat* clauses. This time her dissenting argument in *Croll* became the majority opinion of the Supreme Court in *Abbott* (as written by Justice Kennedy).¹¹⁴

A. *The Majority Opinion—A Victory for Justice Sotomayor*

Writing for the majority, Justice Kennedy made several breakthroughs in ultimately defining a *ne exeat* right as a right of custody.¹¹⁵ The Court additionally determined that a *ne exeat* right can be exercised absent its outright violation.¹¹⁶ Furthermore, the Court gave significant deference to the opinions of fellow contracting nations to the Hague Convention regarding *ne exeat* clauses, evidencing a movement by the Court toward the cosmopolitan perspective.¹¹⁷

The Court, similarly to the Eleventh Circuit, first consulted the textual aspects of Mr. Abbott's custody settlement in the context of Chilean law and the text of the Hague Convention to determine whether the Chilean version of a *ne exeat* order should be considered a right of custody under the Convention.¹¹⁸ The Court noted that a Chilean

112. *Abbott v. Abbott*, 129 S. Ct. 2859 (2009).

113. *Abbott v. Abbott*, 130 S. Ct. 1983, 1989 (2010).

114. *Compare id.* at 1987-97, with *Croll*, 229 F.3d at 144-54 (Sotomayor, J., dissenting).

Associate Justice Anthony M. Kennedy

was born in Sacramento, California, July 23, 1936. He married Mary Davis and has three children. He received his B.A. from Stanford University and the London School of Economics, and his LL.B. from Harvard Law School. He was in private practice in San Francisco, California from 1961-1963, as well as in Sacramento, California from 1963-1975. From 1965 to 1988, he was a Professor of Constitutional Law at the McGeorge School of Law, University of the Pacific. He has served in numerous positions during his career, including a member of the California Army National Guard in 1961, the board of the Federal Judicial Center from 1987-1988, and two committees of the Judicial Conference of the United States: the Advisory Panel on Financial Disclosure Reports and Judicial Activities, subsequently renamed the Advisory Committee on Codes of Conduct, from 1979-1987, and the Committee on Pacific Territories from 1979-1990, which he chaired from 1982-1990. He was appointed to the United States Court of Appeals for the Ninth Circuit in 1975. President Reagan nominated him as an Associate Justice of the Supreme Court, and he took his seat February 18, 1988.

Biographies of Current Justices of the Supreme Court, *supra* note 52.

115. *Abbott*, 130 S. Ct. at 1990.

116. *Id.* at 1991-92.

117. *See id.* at 1993.

118. *Compare id.* at 1990, with *Furnes*, 362 F.3d at 714-15.

agency explained the *ne exeat* provision to mean “neither parent can unilaterally establish the [child’s] place of residence.”¹¹⁹ The Court further determined that the Hague Convention defines all custodial rights “relating to the care of the person of the child and, in particular, the right to determine the child’s place of residence” as rights of custody.¹²⁰ The Court conceded that “a *ne exeat* right does not fit within traditional notions of physical custody” and that this distinction was “beside the point.”¹²¹ After discussing the definition of “determine,” the Court concluded that Mr. Abbott’s *ne exeat* right gave him the right “[t]o set bounds or limits to” the place of his child’s residence and the care of the child because requiring that the child remain in Chile instead of the United States would affect the child’s cultural upbringing.¹²²

Disagreeing with Ms. Abbott’s argument that *ne exeat* rights are not custody rights because they cannot be exercised, the Court held that “a *ne exeat* right is by its nature inchoate and so has no operative force except when the other parent seeks to remove the child from the country.”¹²³ Therefore, “[w]hen one parent removes the child without seeking the *ne exeat* holder’s consent, it is an instance where the right would have been ‘exercised but for the removal or retention.’”¹²⁴ Further, the Court maintained that in contrast to access rights, *ne exeat* right violations may only be remedied with the return of the child.¹²⁵

When considering extrinsic sources, the Court first gave light to the views of the United States Department of State.¹²⁶ These views endorse the opinion that *ne exeat* clauses are rights of custody: “The Executive is well informed concerning the diplomatic consequences resulting from this Court’s interpretation of ‘rights of custody,’ including the likely reaction of other contracting states and the impact on the State Department’s ability to reclaim children abducted from this country.”¹²⁷ In accord with the Eleventh Circuit’s analysis, the Court described the international opinion of *ne exeat* as a custody right to be

119. *Abbott*, 130 S. Ct. at 1990 (alteration in original) (internal quotation marks omitted).

120. *Id.* (internal quotation marks omitted); *see also* Hague Convention, *supra* note 9, at 99.

121. *Id.* at 1991.

122. *Id.* (alteration in original) (internal quotation marks omitted).

123. *Id.* at 1991-92.

124. *Id.* at 1992; *see also* Hague Convention, *supra* note 9, at 99.

125. *Abbott*, 130 S. Ct. at 1992.

126. *Id.* at 1993.

127. *Id.*

one of “broad acceptance.”¹²⁸ The Court recognized that the Canadian Supreme Court has adopted a contrary view, and that French courts are divided on the subject.¹²⁹ Nevertheless, the harmony of the court systems in contracting nations such as England, Israel, Austria, South Africa, Germany, Australia, and Scotland persuaded the Court to rule that *ne exeat* orders convey custody rights.¹³⁰ Additionally, the Court referenced a consensus among scholars regarding the violation of *ne exeat* orders as a trigger to the return remedy of the Hague Convention.¹³¹ Thus, the Court determined that the United States should be compelled to follow international custom and legal precedence in this treaty’s interpretation.¹³²

Returning to Justice Sotomayor’s earlier dissent in *Croll*, the Court maintained that “[d]enying a return remedy for the violation of such rights would ‘legitimize the very action—removal of the child—that the home country, through its custody order [or other provision of law], sought to prevent.’”¹³³ In conclusion, the Court explained that allowing a custodial parent to remove a child in violation of a *ne exeat* clause would undermine the Hague Convention’s purpose of preventing forum shopping.¹³⁴

B. Justice Stevens’s Dissent

Joined by Justices Thomas and Breyer, Justice Stevens¹³⁵ dissented

128. *Id.*

129. *Id.* at 1994.

130. *Id.* at 1993-94.

131. *Id.* at 1994.

132. *See id.* at 1993.

133. *Id.* at 1996 (second alteration in original) (quoting *Croll*, 229 F.3d at 147 (Sotomayor, J., dissenting)).

134. *Id.*

135. Now retired, Associate Justice John Paul Stevens was born in Chicago, Illinois, April 20, 1920. He married Maryan Mulholland, and has four children - John Joseph (deceased), Kathryn, Elizabeth Jane, and Susan Roberta. He received an A.B. from the University of Chicago, and a J.D. from Northwestern University School of Law. He served in the United States Navy from 1942–1945, and was a law clerk to Justice Wiley Rutledge of the Supreme Court of the United States during the 1947 Term. He was admitted to law practice in Illinois in 1949. He was Associate Counsel to the Subcommittee on the Study of Monopoly Power of the Judiciary Committee of the U.S. House of Representatives, 1951–1952, and a member of the Attorney General’s National Committee to Study Antitrust Law, 1953–1955. He was Second Vice President of the Chicago Bar Association in 1970. From 1970–1975, he served as a Judge of the United States Court of Appeals for the Seventh Circuit. President Ford nominated him as an Associate Justice of the Supreme Court, and he took his seat December 19, 1975. Justice Stevens retired from the Supreme Court on June 29,

from the majority opinion and agreed with the argument proposed by the Second Circuit in *Croll*.¹³⁶ The dissent focused on the traditional concept of custody rather than an international one.¹³⁷ The dissent referred to the *ne exeat* clause not as a right but rather an “opportunity to veto” or restrict travel.¹³⁸ In accord with the opinion in *Croll*, the dissent argued that it would be contrary to the purpose of the Hague Convention to return a child to a noncustodial parent.¹³⁹ Moreover, the dissent emphasized that although “[t]he fact that a removal may be ‘wrongful’ in the sense that it . . . violates only ‘rights of access’ does not make it ‘wrongful’ within the meaning of the [Hague] Convention.”¹⁴⁰ The dissent also criticized the weight afforded to the contrary opinions of international courts and noted that the Department of State’s opinion on the issue has changed throughout the years since the implementation and ratification of the Hague Convention.¹⁴¹ Ultimately, the dissent disapproved of using the return remedy to protect noncustodial parents’ rights.¹⁴²

V. IMPLICATIONS

Although the Supreme Court ruled in favor of Mr. Abbott by allowing a *ne exeat* order to constitute a right of custody,¹⁴³ the real-life consequences for the Abbotts are minimal. There are exceptions to the Hague Convention’s return mechanism,¹⁴⁴ and since the provisions of the

2010.

Biographies of Current Justices of the Supreme Court, supra note 52.

136. *Compare Abbott*, 130 S. Ct. at 1997-98 (Stevens, J., dissenting), *with Croll*, 229 F.3d at 135.

137. *See Abbott*, 130 S. Ct. at 1997 (Stevens, J., dissenting) (describing activities that would traditionally suggest custody).

138. *Id.*

139. *Compare id.* at 1997-98, *with Croll*, 229 F.3d at 139.

140. *Abbott*, 130 S. Ct. at 1998 (Stevens, J., dissenting).

141. *Id.* at 2007-09.

142. *Id.* at 2010.

143. *Abbott v. Abbott*, 130 S. Ct. 1983, 1990 (2010).

144. *See, e.g.*, Hague Convention, *supra* note 9, at 100-01. If “it is demonstrated that the child is now settled in its new environment,” the Hague Convention does not require the child’s return. *Id.* at 100. Moreover, the Hague Convention provides that a state is not required to return a child if:

the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; or . . . there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

Id. at 101. Additionally, the Hague Convention allows the administrative authority to “refuse to order the return of the child if it finds that the child objects to being returned

Hague Convention only apply to children under the age of sixteen,¹⁴⁵ A.J., now fifteen, will soon be allowed to personally choose his home. While this opinion is of little consequence to the specific actors in this case, in making this monumental decision, the Court has made significant contributions to international family law disputes litigated in the United States and to the United States' view on treaty interpretation. These contributions should be bilaterally examined.

Domestically, the Court's opinion in *Abbott* has determined the definitive holding for the United States judicial system regarding *ne exeat* clauses as rights of custody.¹⁴⁶ By resolving the federal circuit split of opinion, the Supreme Court has decided a uniform position for all domestic courts to follow and gives guidance in the area of international family disputes—an area that was lacking in domestic consensus before the decision in *Abbott*.¹⁴⁷ Now, the Hague Convention's purpose to prevent forum shopping can be uniformly applied throughout the United States federal court system. Parental child abductors, in deciding their forum of choice, will no longer have the additional option of choosing the most favorable federal circuit. Moreover, with the decision in *Abbott*, United States courts can be certain that custody decisions are made in accord with the foreign policies of the United States government. Thus, in determining foreign family law issues United States courts are now less likely to unintentionally determine international policy, a task assigned to the executive branch.

Most noteworthy, on an international level, is the Court's determination of the United States's stance on treaty interpretation. The Court's analysis and decision in *Abbott* exhibits that the United States regards the Hague Convention—and other international treaties—as significant enough to require the substantial expenditure of time and resources to solve treaty disputes. Interestingly, both the majority and the dissent claimed to apply similar approaches to their analyses but came to very different conclusions.¹⁴⁸ The majority concluded that the foreign country's law and the international nature of the Hague Convention need to be analyzed to define ambiguous terms within the Hague Convention and determine the actual custodial meaning of a *ne exeat*

and has attained an age and degree of maturity at which it is appropriate to take account of its views." *Id.*

145. *Id.* at 99.

146. *Abbott*, 130 S. Ct. at 1990.

147. *See id.* at 1988-89.

148. *See id.* at 1983-2010 (beginning with a textual analysis and then moving to an analysis of extrinsic sources in both the majority and dissenting opinions).

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order.¹⁴⁹ Conversely, the dissent determined that the interpretation should be made based on United States custom, and ambiguous terms should follow common United States word usage and meaning.¹⁵⁰ Regardless of how the Supreme Court Justices examined the issue, the majority and the dissent utilized international precedent whether it was to support or oppose the acceptance of a *ne exeat* clause as a custody right. The use of foreign law in a time when controversy abounds around using foreign precedence in United States courts¹⁵¹ suggests that the Court has only limited its use of foreign policy to questions requiring judicial interpretation of the United States Constitution and domestic statutes.¹⁵² The *Abbott* opinion ultimately sends a message to the world that the United States is willing to accept the laws of international courts in its opinions to further become an effective international partner in worldwide justice.

DANIELLE L. BREWER

149. *See id.* at 1990-97.

150. *See id.* at 2008 (Stevens, J., dissenting) (declaring that the Court “should not substitute the judgment of other courts for [its] own”).

151. *See* Childress, *supra* note 1, at 193-97 (comparing the alternative views of utilizing foreign precedence in domestic decisions).

152. *See, e.g.*, sources cited *supra* note 1.