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Sam F. Halabi
University of Missouri School of Law, halabis@missouri.edu

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Article

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*692 I. Introduction

The 1980 Convention on the Civil Aspects of International Child Abduction has, over the course of its nearly thirty years in federal and state courts, generated unanticipated challenges to the constitutional balance struck between Congress and the federal judiciary with respect to the scope of the Constitution's "judicial power" as well as more routine tests respecting state courts' capacity and inclination to respect the United States' international obligations. [1] The treaty addressed a common and growing problem facing the international community: parents taking their children across international borders in an attempt to obtain more favorable custody determinations. [2] The treaty aimed to deprive the abducting parent of any advantage by requiring the return of the child, and in the case of visitation rights, to ensure respect for those rights. [3] The United States signed the treaty in 1981 and Congress passed an implementing statute, the

International Child Abduction Remedies Act ("ICARA"), in 1988.[4] ICARA gave federal and state courts concurrent original jurisdiction over treaty claims and required them to respect each other's judgments.[5]

***693** In previous work, I examined state and federal courts' behavior with respect to adjudicating the rights of parents seeking the return of their children under the treaty, finding that not only did state and federal courts order return at nearly similar rates, but that they granted and denied affirmative defenses under the treaty at similar rates as well.[6] Nevertheless, federal appellate courts had demonstrated an overwhelming hostility to district court orders that abstained from parallel state proceedings, based largely on distrust of state court competence and neutrality.[7] In the course of that study, I also discovered that while federal courts jealously guarded their jurisdiction over the remedy of return, they had done precisely the opposite with respect to rights of access or "visitation" as they would be more commonly understood in the United States.[8] That is, instead of asserting jurisdiction over access claims even over parallel state court proceedings, federal courts largely concluded that they had no jurisdiction over access claims at all.

This article explores this discrepancy in the law of federal jurisdiction as it has developed under the Hague Child Abduction Convention.[9] In contrast to return claims where the remedy is discrete, finite, and closely tied to fundamental international obligations under the treaty, orders to enforce access rights are, or would be, amorphous, ongoing, and subject to other administrative structures codified in the convention as well as, in the U.S. system, adding responsibilities for federal judges more generally associated with those undertaken by state judges.[10] Even in the one federal appellate decision that explicitly acknowledged a judicially enforceable right to ensure access, the court fashioned the remedy toward return, ultimately rendering that part of the decision dicta.[11] In any case, federal courts have overwhelmingly rejected jurisdiction over access claims, emphasizing state courts' role in making child custody determinations and alternative treaty ***694** mechanisms like cooperation between executive branch officials.[12]

Ultimately, this article argues that there is little if any support in the language of the Hague Child Abduction Convention or in its implementing statute, the International Child Abduction Remedies Act, to justify federal courts' refusal to hear access claims. Rather, the rationales adopted by federal courts in allocating access cases to state courts resurrects a long-standing problem in the law of federal jurisdiction: Is the exception to federal jurisdiction for matters relating to divorce, maintenance, and child custody based on courts' interpretation of jurisdictional statutes or did Article Ill's jurisdictional grant to "cases" or "controversies" always exclude matters traditionally handled by ecclesiastical courts in 1787 Britain?[13] While this article takes no position on that problem directly, it does suggest that federal courts have appropriated to themselves authority to determine jurisdiction based on their own assessment of state courts' competencies, what is called here a "latent" domestic relations exception to federal question jurisdiction.

The judicial federalism problem posed by these decisions is that, statutory parity notwithstanding, federal appellate courts are shaping jurisdiction under the treaty based on an implied Article III power to uphold the United States' international obligations, but interpreting those obligations in light of historical zones of competency between state and federal courts, not according to Congress' plan.[14] In their view, state courts, not federal, deal with visitation.[15] In the long term, the process by which federal appellate courts have shaped state jurisdiction under the treaty is likely to disrupt the perception of U.S. compliance with the treaty regime--creating a binary system whereby parents seeking return of a child may resort to federal judicial authorities but everything else must be ***695** adjudicated or managed elsewhere.[16] This argument implicates a wider theoretical debate on the law of federal jurisdiction in the treaty context generally as well as more immediate, practical questions about the effectiveness of ICARA's jurisdictional scheme--questions that are especially important to resolve in light of the family law treaties now awaiting ratification and implementation.[17]

Part I of this article provides background to the increasing influence of international law on judicial authority generally and the United States' increased engagement with international family law treaties specifically. Part II analyzes federal judicial decisions under the Hague Child Abduction Convention, showing that notwithstanding statutory parity, federal courts have shaped jurisdiction under the treaty so as to retain expansive, and exclusive, jurisdiction over return claims while allocating access or visitation claims to state courts or to the U.S. State Department. While rationales supporting these decisions have some relationship to the treaty text and implementing statute, the orders and decisions also go to some length to discuss the competency of other actors such as state courts. Part III applies the lesson of Hague Child Abduction Convention jurisdiction-shaping to family law treaties the United States has either signed or already ratified. Part IV takes stock of recent U.S. participation in family law treaties and provides a glimpse into how federal judicial behavior may complicate both family law and commercial treaties that the United States is now preparing to join.

*696 II. The Increasing Influence of International Law on the Scope of the Constitutional "Judicial Power" and the Implementation of the Hague Child Abduction Convention [18]

A. Constitutional Structure and Federal Treaties

To understand the difficulties raised by the Hague Child Abduction Convention, it is necessary to review the constitutional framework for the implementation of treaties and the spread of international law into spheres historically regulated by states. [19] The U.S. Constitution originated in significant part because the Articles of Confederation condoned competition and conflict between the states in ways that threatened long-term unity and invited external interference. [20] The Founders, as part of a comprehensive if not total displacement of state sovereignty over foreign relations, stripped away the states' powers to conclude treaties and regulate foreign commerce and vested those powers in Congress and the President. [21] For example, Article I, Section 8 of the U.S. Constitution authorizes Congress to regulate foreign commerce and to define and punish offenses against the law of nations, while Section 10 prohibits states from "enter[ing] into any treaty, alliance, or confederation"; Article II provides for a joint treaty-making process between the President and the Senate. [22] Under the Articles of Confederation, states were prohibited from entering into any "agreement or compact" with a *697 foreign power or engaging in war without Congressional consent. [23]

Article Ill's enumerated classes of Supreme Court jurisdiction established federal judicial control over disputes most likely to affect international relations. [24] For example, maritime and admiralty disputes were fundamentally tied to both commercial and security interests of the United States as a unitary sovereign under the law of nations. [25] Article III, Section 2 specifically extended the "judicial power" to "treaties," "all cases affecting ambassadors, other public ministers and consuls," and cases "between a state, or the citizens thereof, and foreign states, citizens or subjects." [26] Thus, the judicial power was always intertwined with the United States' international obligations.

Article VI of the Constitution binds state judiciaries to give effect to actions taken by the political branches in executing these functions. [27] However, initial state judicial resistance to the enforcement of British creditors' treaty-based rights after independence established a long tradition of skepticism about whether state judges would robustly enforce international commitments--especially when doing so threatened important state interests. [28] When states threatened the United States' international obligations through executive, legislative, or judicial action, federal judges readily invalidated those measures by applying one of several doctrines of conflict or field preemption flowing from Article VI. [29]

***698** To prevent the abuse of international-lawmaking powers, the Founders built both explicit and implicit safeguards into the Constitution.[30] Explicitly, states enjoyed participation in Congress through their elected delegations--the "political safeguards of federalism" which protected state interests when Congress, for example, regulated foreign commerce or codified customary international law.[31] With respect to treaties, for example, a super-majority of Senators (then elected by state legislatures) were required to approve agreements entered into by the President.[32] Implicitly, it was understood that treaties covered a relatively narrow class of national interests, limiting the areas for which this non-bicameral form of law-making might be used.[33] The judiciary fashioned its own methods to enforce that implicit understanding, ***699** principally the doctrine of "self-execution"[34] under which courts determined whether or not treaties required additional action from Congress to have domestic legal effect.[35]

Historical, geopolitical, and constitutional changes have pressured this relatively strong set of safeguards.[36] The Civil War (and the Reconstruction Amendments that followed) shifted the center of lawmaking authority from state governments to the national government.[37] Diminishing barriers to the international movement of goods and people encouraged the national government to enter into a greater number of bilateral and multilateral agreements that coordinated, protected, and regulated interests implicated by these movements.[38] These international agreements inevitably influenced traditional areas of state authority.[39] In 1921, the U.S. Supreme Court held, in *Missouri v. Holland*, that the federal government could accomplish through treaty what the ***700** Constitution otherwise allocated to the states.[40] In *Zschernig v. Miller*,[41] later reaffirmed on narrower preemption grounds in *American Insurance Association v. Garamendi*, state statutes and administrative measures face a significant risk of preemption if they impose more than an "incidental effect" on foreign relations, even where they do not directly conflict with a treaty or federal statute.[42] In its most recent decision in the treaty-making context, the U.S. Supreme Court implicitly endorsed Congress' broad authority to invade the historical province of state regulation when adopting implementing legislation, requiring only that it do so explicitly.[43]

B. U.S. Engagement with Family Law Treaties

Family law is an area over which states have historically enjoyed virtually unfettered authority.[44] Diplomatically, the United States protected state family law either through reservations, understandings, and declarations stating that any international agreement was subject to principles of federalism or by rejecting agreements which overstepped traditional understandings of the division between federal and state authority.[45] This was especially true of family law treaties,[46] which had long been a focus of the ***701** Hague Conference on Private International Law, an international organization committed to the harmonization and unification of choice-of-law rules.[47]

Major federal interventions into family law arose in part because some states abused this authority, giving little or no deference to family adjudications in other states, creating precisely the kind of full faith and credit problem the federal constitution was designed to address.[48] Aggrieved parents absconded with their children to haven states in search of a more favorable custody or maintenance determination.[49] Judicially mandated child and family support obligations also emerged as an important barrier between self-sufficiency and eligibility for federal assistance.

Over the last three decades, the federal government has increasingly regulated family law with a range of mandatory and permissive legal regimes aimed at these federal interests.[50] For example, citing the relationship between delinquent family maintenance obligations and federal welfare assistance, Congress imposed a mandatory regime that requires

states to actively pursue individuals who are delinquent in family maintenance payments. [51] ***702** With respect to child custody decisions, Congress passed the Parental Kidnapping Prevention Act ("PKPA") to eliminate haven states by requiring state judges to defer to the continuing jurisdiction of any decree issued by a previous state judge with jurisdiction over the case. [52] The PKPA makes the Federal Parent Locator Service available in all custody cases and makes the federal Fugitive Felony Act applicable to interstate child abductions. [53]

The two interests that caused the federalization of certain aspects of family law domestically--recovery of maintenance obligations and elimination of haven states--also necessitated protection at the international level. [54] As marriages between people from different countries became more common and families became more mobile, so did the need to reach parents in foreign countries when those marriages ended. [55] As a result, the executive branch has shown greater openness to participation in treaties previously ***703** regarded as excessively intrusive into states' family law authority. [56] The United States has ratified the Hague Child Abduction Convention as well as the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption. [57]

The United States has signed, but not ratified, two additional treaties that upon adoption would regulate important aspects of state family law: the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children; [58] and the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance. [59] The purpose of the first ***704** treaty is to protect children over whom citizenship, residency, and parental rights involve more than one state, and to "[avoid] conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children" through international cooperation and promotion of the "best interests of the child." [60] The second treaty aims to effectuate the "recovery of child support and other forms of family maintenance" in the international setting by establishing a system of cooperation between the contracting states, which will ensure that they make available applications for child support and other forms of family maintenance, recognize child support and other family maintenance orders, and effectively enforce the orders when necessary. [61] While it is certainly true that these treaties may be effected through adoption on a state-by-state basis, Congress would retain authority to adopt national legislation as non-uniform interpretation or other problems arise with disaggregated implementation.

C. The Hague Child Abduction Convention and the International Child Abduction Remedies Act

Drafted in response to the growing phenomenon of parents in domestic disputes taking children across international borders in order to prejudice custody determinations, the Hague Child Abduction Convention requires the return of a child who was living in one party state, but was removed to or retained in another party state in violation of the left-behind parent's custodial rights. [62] Once returned, child custody can then be resolved in the courts of that jurisdiction. [63] The Hague Child Abduction Convention does not authorize a court to determine the merits of the underlying custody claim. [64] The court is limited to deciding whether the child should be returned to his or her state of habitual residence. [65] The Hague ***705** Child Abduction Convention divides parental rights into "rights of custody" and "rights of access." [66] Article 3 of the treaty by its terms limits a "wrongful" removal to one violating "rights of custody." [67] The Hague Child Abduction Convention does not mandate any specific remedy when a noncustodial parent has established interference with rights of access. [68] Rather, nations are instructed in Article 21 to "promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject," as well as to "take steps to remove, as far as possible, all obstacles to the exercise of such rights." [69] Article 29 ***706** provides that:

> This Convention shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention. [70]

The Reagan Administration, which signed the treaty, argued that claims brought under the treaty belonged exclusively in state courts because key aspects of the treaty implicated state expertise and state interests. [71] The original House bill, H.R. 3971, gave state courts jurisdiction over all actions requesting the return of an abducted child and vested federal district courts with jurisdiction "to the extent" a question of treaty interpretation or diversity of citizenship arose. [72] The Senate, however, included concurrent, original federal and state jurisdiction both in its initial version of the law and as an amendment to the version eventually passed by both chambers. [73]

Both chambers were clear that the purpose of making state and federal courts equally available was to facilitate U.S. compliance with its obligations under the treaty. [74] Then-Representative Ben Cardin emphasized:

> [W]e have no intention of expanding Federal court jurisdiction into the realm of family law. In fact, Congress reaffirms its view that States have traditionally had, and continue to have, ***707** jurisdiction and expertise in the area of family law. Here we are not intruding into this jurisdiction. Rather, we are simply providing through simple and unambiguous language that in the special circumstance where international child abduction is alleged, both the Federal and State courts should be available to resolve the claims. As a matter of fact, the State courts will often provide the best fora for these cases because their backlogs are often substantially less than those of the Federal courts in many parts of the country. [75]

Senator Orrin Hatch noted the treaty's "custody-related questions" were "traditionally ... handled by the states," but encouraged passage of the law despite the "close question" of federal or state jurisdiction. [76] Congress appeared to embody this intent with 42 U.S.C. § 11603(g), which provides that:

> Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter. [77]

Congress also authorized courts to enter provisional remedies to prevent harm to children and prejudice to parental rights:

> Limitation on authority. No court exercising jurisdiction of an action ... may ... order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied. [78]

The implementing legislation additionally directed the president to establish a "Central Authority" for cooperating with other contracting states with respect to upholding treaty obligations, reporting to Congress and the Hague Conference,

and coordinating across agencies. [79] ICARA's principal purpose, however, is to regulate judicial proceedings under the treaty. [80]

***708** ICARA was unambiguous as to the availability of a right of action in a state or federal court for both return and access claims:

> (1) A petitioner in an action brought under [the treaty] shall establish by a preponderance of the evidence--
>
> (A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and
>
> (B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.
>
> (2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing--
>
> (A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and
>
> (B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies. [81]

Under ICARA, any person seeking the return of a child may commence a civil action by filing a petition in a court authorized to exercise jurisdiction in the place where the child is located. [82] ICARA grants to state courts and U.S. district courts "concurrent ***709** original jurisdiction of actions arising under the Convention." [83] The statute made only modest modifications to the treaty text, requiring simply that courts "shall decide the case in accordance with the Convention." [84]

Under the treaty, judges may refuse to order the return of a child through two principal means. Article 3 of the Hague Child Abduction Convention gives left-behind parents a right to have a child returned if: (1) a child's removal from a contracting state is "wrongful" and (2) the removal "is in breach of rights of custody." [85] Judges may therefore render the treaty inapplicable by determining that a removal was not "wrongful" or that a left-behind parent did not have "rights of custody," which are characterized (but not defined) in the treaty. For example, if a court determines that a left-behind parent's rights are actually rights of visitation, and not custody, then the parent would not have a right to have a child returned. Similarly, if a taking parent traveled to a foreign country with a child, a left-behind parent would not have a

right to have the child returned if a judge determined that the taking parent was traveling with the consent of the left-behind parent or pursuant to a custody agreement because the removal would not be "wrongful." [86]

Assuming the treaty applies and a left-behind parent has established a wrongful removal in breach of rights of custody, judges still might not order removal under one of the aforementioned affirmative defenses. For example, if a left-behind parent fails to prosecute a Hague Child Abduction Convention claim in a year and the court determines that the child had settled in his or her new environment, the treaty permits the court to refuse to return the child. [87] A judge may also refuse return where a parent shows by clear and convincing evidence that the other parent acquiesced in the removal, or that the removal would pose a grave risk of physical or psychological harm to the child of placing the child in an "intolerable situation," or would violate the repatriating ***710** state's view of human rights or fundamental freedoms. [88]

III. Federal Courts' Shaping of Jurisdiction Under the Hague Child Abduction Convention [89]

Hague Child Abduction Convention petitioners may file with the U.S. State Department as well as raise a treaty claim before a state and/or federal court. [90] Indeed, part of the problem with the treaty as it functions in the United States is that petitioners often file in all three of these uncoordinated fora. [91] In Part A, I summarize my previous work, which identified the mechanisms federal courts used to crowd out state court jurisdiction over return claims. In Part B, I analyze an aspect of federal court behavior raised in my previous article, but more fully developed here: the allocation of visitation claims to state courts.

A. Federal Courts' Extensive Reach over Removal Claims

ICARA invites jurisdictional tensions between state courts, where Hague Child Abduction Convention claims are brought in conjunction with divorce and child custody actions, and federal courts, where state court defendants may bring original actions as federal plaintiffs. [92] Litigants have exploited this procedural structure to introduce treaty claims at the state court level, and then use federal court litigation to re-litigate unfavorable state court orders. [93]

1. Rejection of District Court Abstention

Where Hague Child Abduction Convention claims appear in state litigation, federal district courts have used both formal and informal methods to decide whether to exercise jurisdiction. In ***711** *Aldogan v. Aldogan*, for example, the federal district court held a hearing in order to determine if either party objected to a state family court having the first opportunity to decide the Hague Child Abduction Convention claim because the court already had jurisdiction over the underlying child custody suit. [94] Both parties assented to the transfer. [95] Federal district courts have also applied formal abstention doctrines permitting, and in some circumstances requiring, deference to state court proceedings. [96] Based on the statutory scheme, and where other criteria are met, dismissal in favor of state adjudication would not appear to threaten federal interests under the treaty. [97] Certainly, where state court proceedings have advanced beyond the pleading stage, avoidance of duplication and waste as well as comity and federalism concerns would weigh in favor of dismissal. [98] These represent the contexts in which federal district courts have declined jurisdiction in favor of state family, juvenile, or general trial court proceedings, roughly corresponding to *Colorado River, Rooker-Feldman*, and *Younger* abstention (the U.S. Supreme Court extended *Younger* abstention to state civil proceedings in *Huffman v. Pursue, Ltd.*, [99] and state family law proceedings in *Moore v. Sims* [100]). [101]

***712** Federal district courts have often referred to state interests in child custody adjudication as the state interest justifying abstention. It is almost certainly true that a state's interest in an initial custody determination is insufficient to justify abstention. Child custody determinations are, by nature, case specific. In any event, the Hague Child Abduction Convention bars final decisions on the merits of custody disputes until the removal claim is resolved. [102] Yet arguably, child custody inquiries frequently implicate other more relevant state schemes for assessing a child's maturity and risk of psychological or physical harm as well as use of temporary or foster care pending resolution of Hague Child Abduction Convention or custody claims. [103] With respect to custody arrangements in which state courts have already established original and continuing jurisdiction, state interests in those determinations are more developed. [104] These factors matter because abstention decisions under *Younger* and *Colorado River* frequently turn on the presence of state interests or the application of state law in parallel state proceedings. [105] In addition to safeguarding state interests in family law schemes and in the administration of their judicial systems, ***713** abstention furthers treaty interests in the efficacious adjudication of removal claims. [106] Federal district courts have abstained under these doctrines to preserve state interests in maintaining the integrity of their judicial systems and their interests in using dependency systems to protect minors from abuse. [107]

While there are many examples of abstention in the treaty context, two serve to illustrate the reasons that federal district courts abstain, and the corresponding hostility federal appellate courts have shown toward those abstention orders. In *Barzilay v. Barzilay*, the Circuit Court of St. Louis County, Missouri, entered a divorce decree that dissolved the marriage between two Israeli citizens, Sagi and Tamar Barzilay, and provided joint custody for their three minor children. [108] The Barzilays had moved to Missouri in 2001 and divorced in 2005. [109] The children had lived in Missouri since 2001; the younger two had never lived in Israel. [110] During the children's visit to Israel in 2006, Sagi Barzilay secured an order from an Israeli court prohibiting the children's return to the United States. He then used the court order to secure a modified visitation schedule with the children and an agreement from Tamar to repatriate them to Israel by August 2009. [111] When she returned to the United States, she filed a petition with the Circuit Court of St. Louis County to modify the divorce decree to restrict Sagi's access to the minor children based in-part on the Hague Child Abduction Convention. [112] Sagi filed a motion to dismiss Tamar's state petition also based on the treaty. [113] One day *after* the state court determined ***714** that the children's habitual residence was the United States, denying Sagi's ICARA claim, Sagi filed a suit in the U.S. District Court for the Eastern District of Missouri, requesting return of the children to Israel. [114]

The federal district court dismissed the claim, concluding that the final state court order left Sagi's only available course of action to be an appeal in the Missouri courts. [115] Although the district court did not specifically invoke *Younger*, and, indeed, the procedural history suggests the application of the *Rooker-Feldman* doctrine, the district court focused on the presence of the Hague Child Abduction Convention issues in an ongoing state custody proceeding, the relatively flagrant attempt to undermine the state custody determination through the use of foreign judicial process, and Congress' clear intent that state courts share jurisdiction over Hague Child Abduction Convention claims with federal courts. [116]

The Eighth Circuit reversed, adopting a per se rule that abstention was inappropriate in Hague Child Abduction Convention cases. [117] The Eighth Circuit appeared aware of the tension between the state court judgment and its own refusal to affirm the abstention decision:

> Tamar stated that Sagi used the Israeli court system "to fraudulently procure a judgment giving Israel exclusive jurisdiction over the custody of the minor children ... in blatant defiance of ... the Hague Treaty

> on Child Abduction." She did not reference the terms of the Hague treaty or explain how Sagi's ***715** use of the Israeli court system implicated the treaty. In her motion for a temporary restraining order, Tamar argued that the Israeli judgment ... should have deferred to the Missouri court given its existing custody judgment and the habitual residence of the children. She also complained that Sagi's use of the Israeli court system "violated the spirit, if not the letter, of the Hague Convention. [118]

The decision turned in significant part on the role of federal courts in upholding international commitments:

> Moreover, given that Sagi obtained a custody determination from an Israeli court and Tamar has obtained a custody determination from a state court in this country, the federal district court is uniquely situated to adjudicate the question of whether Israel or Missouri is the habitual residence of the Barzilay children and whether they were wrongfully removed from that residence. Although the state clearly has an important interest in child custody matters, that interest has not been considered to be a significant factor in terms of abstention where ICARA is involved. [119]

It is not clear why a federal district court judge would be better "situated" to determine the habitual residence of children where domestic and foreign custody orders conflict--a situation state courts face with some frequency and to which federal courts hearing claims based on diversity of citizenship apply the "domestic relations" exception to federal jurisdiction over divorce, maintenance, and child custody. [120] In a separate action, the Eighth Circuit determined that *Rooker-Feldman*, which bars federal ***716** appellate review of state court orders, did not apply under the treaty. [121]

In *Holder v. Holder*, Jeremiah Holder sought the return of his children to Germany, where he was stationed with the U.S. Army. [122] His wife, Carla, had left Germany with their two sons during what he thought to be a vacation in Washington State. [123] Jeremiah filed for divorce and custody in California, where he and Carla had met and where their two children had been born. [124] The California court ordered mediation regarding a custody and visitation plan. [125] Jeremiah consented to the arrangement proposed by the mediator, which provided Carla with custody of the children in Washington and became part of the state trial court custody order on August 9, 2000. [126] Jeremiah then obtained new counsel and filed a motion to reconsider the California order. [127] At the hearing for reconsideration, Jeremiah's counsel informed the state court that he had filed a Hague Child Abduction Convention petition with the U.S. State Department, to which the state court judge noted that Carla would be allowed to brief and argue the Hague claim since Holder had raised it. [128] The trial court raised the Hague Child Abduction Convention issue four times in the course of the reconsideration hearing, and each time, Holder's counsel refused to discuss the claim. [129]

Jeremiah then filed a Hague Child Abduction Convention petition in the U.S. District Court for the Western District of Washington at the same time that he appealed the initial California ***717** custody order. [130] In the petition, he asserted that Germany was the children's habitual residence under the treaty and that therefore German courts should adjudicate custody. [131] The federal district judge abstained under *Colorado River*, determining that California state courts had obtained jurisdiction before the U.S. district court, and that the litigation of the Hague Child Abduction Convention claim in Washington would be both inconvenient and result in piecemeal litigation. [132] While the treaty was federal law, Congress had vested both federal and state courts with original jurisdiction over treaty claims. [133] Under California

waiver law, Holder had abandoned his treaty claim when he failed to bring it with his divorce and custody action. [134] "Comity and federalism" required deference to the California judgment because Holder had used the treaty to get a "second bite at the custody apple." [135]

The Ninth Circuit rejected the federal district court abstention order, even though the California state appellate panel had considered the views of the United States as amicus on the Hague Convention claim. [136] The decision forced litigation in both California state court and Washington federal court--a result that weighed against the convenience of the federal forum and consolidated litigation. [137] The Ninth Circuit determined that it need not apply "general res judicata principles" where "the implementation of federal statutes representing countervailing and compelling federal policies justifies departures from a strict application." [138] Similarly, the majority held that *Rooker-Feldman* ***718** did not apply in the Hague Child Abduction Convention context because "Congress has expressly granted the federal courts jurisdiction to vindicate rights arising under the Convention. Thus, federal courts must have the power to vacate state custody determinations and other state court orders that contravene the treaty." [139]

This conclusion sits uneasily with the statutory language. ICARA established concurrent original jurisdiction between federal and state courts. [140] The full faith and credit provision does not establish a hierarchy between federal and state courts; instead, it requires horizontal parity between state judgments and vertical parity between federal and state courts. [141] As the United States noted in its amicus brief in *Holder*, the full faith and credit provision was included because a court may exercise jurisdiction over a treaty claim even where the children are physically located elsewhere. [142] The statute simply confirmed that a second action was unnecessary. [143] Also, Congress vested federal district courts with original jurisdiction, leaving in place *Rooker-Feldmari*'s admonition to lower federal courts to not exercise appellate jurisdiction over state court judgments. [144]

The *Holder* dissent noted that the federal plaintiff, an American citizen, plainly used his federal petition to undermine an unfavorable custody judgment issued by the California forum he had chosen--a result not only inconsistent with the treaty's purpose, ***719** but also only justifiable by subordinating state courts to federal courts in the resolution of Hague Child Abduction Convention claims. [145]

Congress' plan to distribute treaty jurisdiction between state and federal courts mirrors several aspects of the distribution of authority that led to the U.S. Supreme Court's decision in *Colorado River*. [146] Particularly in cases that have been extensively adjudicated in state courts, *Colorado River* strongly suggests that federal courts should dismiss petitions filed by state court parties in parallel litigation. [147]

Whatever the balance federal district courts have attempted to strike while weighing state interests and judicial economy with federal interests in treaty commitments, federal appellate courts have been overwhelmingly hostile to abstention decisions. [148] Every ***720** federal appellate court before which *Younger* and *Rooker-Feldman* abstentions have been raised has rejected them. [149] Indeed, the Eighth and Ninth Circuit Courts of Appeal have adopted *per se* rules prohibiting the application of *Rooker-Feldman*. [150] The Seventh, Eighth, and Ninth Circuits have announced *per se* rules barring *Younger* abstention. [151] The Fourth Circuit Court of Appeals alone has affirmed a district court abstention decision based on *Colorado River*, but more recently has affirmed a district court decision to deny both *Colorado River* and *Younger* abstentions based on reasoning similar to that adopted by other federal appellate courts. [152]

To be sure, ICARA vests a party with the option to raise his or her claim in either federal or state court. [153] The treaty also prohibits a court from adjudicating the merits of a custody suit pending the resolution of the wrongful removal claim. [154] So, even if a state court plaintiff initiates divorce and child custody proceedings, the state court defendant may bring a separate action in federal court. These circumstances, without more, might not justify abstention. Indeed, the Third Circuit in *Yang v. Tsui* explained the pattern in federal appellate decisions not by which the sovereign was better able to enforce international obligations, but by whether or not a Hague Convention petition had been filed in state court. [155] In *Yang*, the Third Circuit could rightly point to the fact that not only had no party raised a Hague Convention petition in the underlying state custody proceeding, but that a final judgment had been entered resolving the entire custody dispute and thus no specter of a Hague ***721** claim in state court existed. [156]

2. Assertion of Federal Jurisdiction Based on Federal Judiciary's Role in Upholding International Obligations

Federal appellate decisions have rejected abstention even in cases where a left-behind parent initially selected a state forum or substantially engaged state judicial process in pursuance of a Hague Child Abduction Convention claim. [157] Article 8 of the Treaty specifies the information required of a return application to a central authority, but Congress made no association between those requirements and pleading under the Federal Rules of Civil Procedure. [158] Congress included only a permissive provision regarding a Hague Child Abduction Convention claim, noting that a claimant "may ... [file] a petition for the relief sought in any court which has jurisdiction ...." [159] The State Department's legal analysis suggests that applicants provide as much information to a court as Article 8 requires, but notes "the informal nature of the pleading and proof requirements; Article 8(c) merely requires a statement in the application to the Central Authority as to 'the grounds on which the applicant's claim for return of the child is based.'" [160] Federal appellate courts, however, have adopted fatal ***722** scrutiny in cases where a federal district court abstained without a Hague Child Abduction Convention claim being brought in the form recommended in Annex A to the State Department's legal analysis. [161]

The recurrent theme in federal appellate decisions is that--Congress's explicit grant of concurrent original jurisdiction notwithstanding-- responsibility for upholding international obligations is a fundamental function of the federal courts. [162] These decisions are relatively vague as to which federal treaty interests need protecting--uniformity in interpretation, reciprocity between contracting states, or the treaty provisions that federal courts are uniquely able to adjudicate and enforce. [163] The emphasis is instead on the general constitutional entrustment of treaty obligations to the federal courts and skepticism that state courts will respect the United States' international commitments.

In its one decision addressing abstention under the Hague Child Abduction Convention--a case in which the federal plaintiff was convicted of murdering the children's mother, fleeing to Mexico, and violating numerous state court orders regarding the custody of his children in the process--the Sixth Circuit did not engage in any extensive analysis of the appellants' abstention claim, but hinted ***723** that it would be disinclined to defer to state court proceedings. [164] "We find the circumstances surrounding the entry of this default, like the circumstances surrounding the Tennessee contempt orders, highly unusual, and suggestive of the home court advantage that the treaty was designed to correct." [165]

Similarly, the Seventh Circuit rejected district court abstention on the basis that:

> It was to curb [international parental kidnapping] that the United States assumed a treaty obligation to cooperate with other nations states to adopt a mutual policy in favor of restoring the status quo by

> means of the prompt return of abducted children to the country of their habitual residence and in this way depriving custody decrees of states to which a parent has removed a child "of any practical or juridical consequences." Indeed, although the state to which the child has been taken no doubt has an important interest in adjudicating the custody of a child within its borders, it now shares, with the other states of the Union, an even more important interest in ensuring that its courts are not used to escape the strictures of a custody decree already rendered by another nation-state or to otherwise interfere with the custody rights that a parent enjoys under the law of another country. We hold, therefore, in agreement with the other Circuits that have confronted the issue, that a Hague petition simply does not implicate the *Younger* abstention doctrine. [166]

While the Seventh, Eighth, and Ninth Circuits have adopted per se rules against the *Younger* abstention, the Eighth, Ninth, and Eleventh Circuit Courts of Appeals have implicitly foreclosed the *Colorado River* abstention. [167]

*724 *B. Federal Courts' Rejection of Visitation Claims*

While federal courts, especially appellate courts, have rejected the application of abstention doctrines in the case of parallel state proceedings and asserted their primacy with respect to federal law that implicates the United States' international obligations, they have allocated claims to enforce "access" or "visitation" rights to state courts and, to a lesser extent, the U.S. State Department, also in tension with the Congressional jurisdictional plan for the treaty. [168]

1. Allocation of Visitation Claims to State Courts

On November 23, 1998, ten years after the adoption of ICARA, Robert Paul Bromley filed a complaint in the U.S. District Court for the Middle District of Pennsylvania seeking enforcement of his visitation rights only. [169] Until that time, the fifty or so Hague Child Abduction Convention cases had involved only removal or associated actions like requests for attorneys' fees. Under the facts of that case, the plaintiff sought the enforcement of his visitation rights as decreed by a Texas court (the defendant, and custodial mother, had moved to Pennsylvania, while the plaintiff-father had moved to the United Kingdom). [170] The court emphasized Article 21 of the Convention, which specifies that "[a]n application to make arrangements for [organizing] or securing the effective exercise of rights of access may be presented to the Central Authorities of the Contracting States in the same way as an application for the return of a child." [171] While Article 21 suggests a prominent role for "Central Authorities" and international cooperation, it refers explicitly to that cooperation in "proceedings" aimed at ensuring access. [172] That access rights are available through judicial action is made clearer in Article 29, which provides that the Hague Child *725 Abduction Convention:

> shall not preclude any person, institution or body who claims that there has been a breach of custody or access rights within the meaning of Article 3 or 21 from applying directly to the judicial or administrative authorities of a Contracting State, whether or not under the provisions of this Convention. [173]

Convention text aside, Congress had clearly intended for federal courts to hear access claims under ICARA, requiring that "in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights." [174]

But the district court went further, implying that the plaintiff's complaint was inextricably intertwined with underlying custody issues under the Texas decree:

> From a policy perspective, the refusal of federal courts to hear child custody matters makes sense. This court finds that the arena of child custody matters, except for the limited matters of international abduction expressly addressed by the Convention, would better be handled by the state courts which are more numerous and have both the experience and resources to deal with this special area of the law. There is a growing trend towards establishing specialized state family courts which avoid a piecemeal approach to domestic relations matters and which instead deal with overall domestic relations problems. Such courts can address not only child custody and visitation, but also important related issues such as child support. We are a court of limited jurisdiction and we traditionally lack jurisdiction over domestic relation matters. The rationale underlying this domestic relations exception is a historically ingrained limitation because "domestic relations of husband and wife and parent and child were matters reserved to the States." We find no reason to deviate from this history and move domestic relations litigation to federal court. [175]

The reality is that, to the extent Bromley's complaint failed on a purely legal basis, it would have been his failure to establish rights of access or, as a factual matter, his appropriate exercise thereof ***726** under the Texas custody decree.

That, however, was not what guided the district court's reasoning. Instead, the district court imported the domestic relations exception to federal diversity jurisdiction into a case clearly involving a federal question. [176] In 1992, six years before *Bromley*, the U.S. Supreme Court had clarified that the so-called "domestic relations" exception was a rule of statutory interpretation, not an independent exception to federal jurisdiction that flowed through constitutional ratification and thereby imposing an unwritten limitation on Article Ill's jurisdictional grants. [177]

The district court nevertheless allocated the *Bromley* matter to state court based on the same rationales underlying the domestic relations exception to diversity jurisdiction and citing both Third Circuit and U.S. Supreme Court precedent on the issue. [178] It would be possible to interpret the order as a simple mistake. Federal judges, like state judges, do err on occasion. Even if it were a mistake, it would be difficult to square with the decisions that followed at both the district court and appellate level.

In *Teijeiro Fernandez v. Yeager*, the plaintiff father brought both return and access claims. [179] After determining that the plaintiff had acquiesced in the removal of his children, the district court determined that it had no jurisdiction to hear his access claims, specifically citing *Ankenbrandt*:

> Given the absence of any specific remedy for rights of access, this Court believes that matters relating to access are best left to the state courts, which are more experienced in resolving these issues. As courts of limited jurisdiction, federal courts have traditionally recognized an exception to diversity jurisdiction when an action involves the issuance of a divorce, alimony, or custody decree. *See Ankenbrandt v. Richards* .... The relief sought by Petitioner in this case comes directly within the "domestic relations exception" because Petitioner is seeking assistance in enforcing his custody rights. While federal courts undoubtedly have jurisdiction under the Convention and ICARA to act in cases where children have been wrongfully removed by ordering their return to their country of habitual residence, access issues, which ***727** require the court to weigh the children's interests, the parents' interests, and other familial considerations, are best

> left to the state courts, "which have both the experience and resources to deal with this special area of the law." Petitioner is not left without recourse to protect his right of access because Petitioner may seek relief in the matter pending in Kalamazoo County Circuit Court. That court has previously addressed visitation issues and has jurisdiction to determine the terms and conditions of Petitioner's right of access. [180]

In *Cantor v. Cohen*, the Fourth Circuit similarly declined to exercise jurisdiction over access claims, opining that:

> [F]ederal courts are courts of limited jurisdiction and generally abstain from hearing child custody matters. With the exception of the limited matters of international child abduction or wrongful removal claims, which is expressly addressed by the Convention and ICARA, other child custody matters, including access claims, would be better handled by the state courts which have the experience to deal with this specific area of the law. [181]

In *Croll v. Croll*, the Second Circuit implicitly adopted the rationale of *Bromley*, concluding that unless the plaintiff were exercising rights of custody, the district court had no authority to order the return of the child to Hong Kong. [182] In that case, the plaintiff father argued that his right under the Hong Kong custody decree to prevent the child from traveling was effectively a right of custody, [183] an assertion eventually vindicated by the U.S. Supreme Court in *Abbott v. Abbott*. [184] Even without the custody claim, ***728** however, the district court was premised in part on assuring his "reasonable access." [185] Instead of remanding the matter to the district court to tailor a remedy appropriate to the access claim, the Second Circuit dismissed the case altogether for lack of subject matter jurisdiction. [186] Yet the court noted that, under a Massachusetts state court case, *Viragh v. Foldes*, an appropriate remedy might be ordering the defendant to pay the plaintiff's cost to visit his child. [187]

To be sure, at least one federal district court has determined that "[g]iven the language of the statute, this Court finds that it has jurisdiction to enforce Petitioner's rights of access" as long as those children resided in the federal district. [188] The Second Circuit affirmed, but did so after ordering the return of the children to Turkey, thus arguably rendering the decision moot for the access issue itself (it analyzed the visitation issue in the course of resolving a fee dispute) and at best dicta if not. [189] In *Taveras v. Taveraz*, the Sixth Circuit rejected jurisdiction over access claims, but somewhat inexplicably suggested that the treaty did not impart judicially enforceable access rights, but ICARA did. [190] In any case, the overwhelming number of federal district and appellate courts considering the issue have resolved against federal jurisdiction over access claims largely citing state court familiarity with visitation orders. Although ICARA makes clear that a petitioner may pursue, ***729** in federal or state court, "an action for arrangements for organizing or securing the effective exercise of rights of access" and an action for return after a wrongful removal or retention, federal courts have determined that, because the treaty lacks a specific remedy for violation of access rights, the federal courts lack subject matter jurisdiction entirely. [191]

The treaty's provisions *do* speak at greater length to judicial conduct governing return actions than access actions. [192] Even if it were the case that the treaty exclusively committed access rights to "Central Authorities"--the U.S. State Department as opposed to judicial authorities-- that reading would apply equally to federal and state courts. [193] Federal

courts have not, however, ruled that ICARA does not vest courts with jurisdiction over access claims. Indeed, it would be difficult to do so given the statutory language.

2. The Abstention Dilemma

Federal court decisions to allocate visitation claims to state courts are in part a result of the strong position taken by federal appellate courts with respect to abstention in return cases. Because abstention is strongly disfavored, and in many cases a legal impossibility under binding circuit precedent, federal district courts assert jurisdictional grounds for refusing visitation claims, even though there are often parallel state proceedings and it would be more consistent with ICARA and the Constitution to abstain in favor of those proceedings where visitation claims under the treaty are already at issue. [194]

With respect to federal interests under the treaty, the application of abstention is consistent with the treaty's requirement that ***730** wrongful removal claims be adjudicated expeditiously. [195] The United States is among the slowest contracting states with respect to the resolution of claims. [196] Even in cases where the state's interests focus on a generalized concern with custody adjudications, *Colorado River* abstention may be the best way to promote the treaty's purpose of rapid adjudication. [197] Raising (or re-raising) a Hague Child Abduction Convention claim in federal court adds to the delay in a treaty that contemplates a six-week adjudication period. [198] The *Barzilay* and *Holder* cases provide good illustrations. The Eighth Circuit affirmed the district court's conclusion that the Barzilay children's habitual residence was Missouri on April 2, 2010, two and a half years after the state trial court had reached the same conclusion. [199] The Ninth Circuit affirmed the district court's conclusion that the Holder children were not habitual residents of Germany on December 9, 2004, nearly three years after the decision of the California appellate panel. [200]

State interests in Hague Child Abduction Convention cases take a stronger form than generalized interests in child custody. In *Witherspoon v. Orange County Department of Social Services*, the state agency participated in the litigation in its role of protecting children from domestic abuse. [201] The state plaintiff, losing her treaty claim in state court, filed her federal treaty claim after the state appellate court had vacated the trial court order. [202] Under current law, abstention alternatives available to the federal district court are limited and heavily scrutinized. [203] In the Seventh and ***731** Eighth Circuits, *Younger* abstention would not be available to safeguard the state's interest in protecting minors from abuse, and in the Ninth Circuit--where the suit originated--neither *Colorado River* nor *Rooker-Feldman* would permit abstention based on judicial economy, Congressional intent with adjudication of treaty claims in state court, or the existence of a state return order (because it had been vacated). [204]

The requirement that federal and state courts give full faith and credit to each other's grant or denial of return orders cannot mean that Congress intended federal courts to exercise jurisdiction over Hague Child Abduction Convention claims brought in state court up to the point that the trial court grants or denies a petition. [205]

Federal appellate courts' dicta that custody interests alone cannot justify abstention are almost certainly correct. [206] By its terms, the treaty separates habitual residence and custody determinations, despite the significant overlap between the factual findings necessary to determine both. [207] Federal appellate courts have used this distinction to suggest that *because* the treaty does not allow a court to adjudicate the merits of a custody dispute before a decision on return, the statutory scheme opens only a narrow window for state court jurisdiction. [208] The effect of this line of reasoning is to upend the legislative purpose behind state court jurisdiction in the first place. [209] Instead of using state courts' general

authority and expertise in child custody adjudications as a reason to vest them with original jurisdiction over Hague Child Abduction Convention claims, it is used to strip away treaty claims ***732** to federal court, often with the disruptive, dilatory, and fracturing effects abstention was fashioned to prevent. [210] In short, because state courts deal with child custody, they cannot be trusted to deal with child custody. [211] Unless, paradoxically, the treaty issue is one of access, in which case their expertise in child custody becomes a decisive issue for determining federal jurisdiction. [212]

3. ICARA and the Legacy of the Domestic Relations Exception

Because there is scant statutory basis under ICARA for federal courts to refuse to hear visitation claims, the best reading of federal courts' treatment of access claims is an invocation of the "domestic relations exception" to federal jurisdiction. [213] Indeed, many courts have explicitly referred to state courts' competency in "domestic relations" matters when declining jurisdiction and have cited *Ankenbrandt v. Richards*, the U.S. Supreme Court's last decision interpreting the source and scope of the so-called domestic relations exception. [214]

In *Ankenbrandt*, the mother of two minor children sued her ex-husband, the children's father, and his new spouse, in the U.S. District Court for the Eastern District of Louisiana, for abuse allegedly committed against the girls while in his care. [215] While the suit met the requirements for diversity jurisdiction, the district court dismissed the action under the "domestic relations exception" to federal jurisdiction and, in the alternative, abstained from adjudication based on the U.S. Supreme Court's decision in *Younger v. Harris*. [216] The Supreme Court determined that the "domestic relations exception"--which applies to divorce, maintenance, and child custody orders-- was a rule of interpretation ***733** of the federal diversity statute, 28 U.S.C. § 1332, not an independent exception to federal jurisdiction that flowed through constitutional ratification and thereby imposing an unwritten limitation on Article Ill's jurisdictional grants. [217] Nor was there a parallel state proceeding, which would justify abstention under *Younger* or, for that matter, any other abstention doctrine. [218] The suit was plainly an action in tort which met the requisite diversity requirements and happened to involve a divorced couple. [219]

The Supreme Court did not directly address the applicability of its decision to the federal question statute, 28 U.S.C. § 1331, although the phrase it interpreted in *Ankenbrandt*, "all civil actions" is precisely the same. [220] In a number of contexts like the Parental Kidnapping Prevention Act, habeas corpus, and 42 U.S.C. § 1983, federal courts are divided as to whether the "domestic relations exception" applies under Section 1331. [221] In each of the aforementioned contexts there is substantial ambiguity that ***734** necessarily accompanies broadly worded statutes meant to apply to a wide range of federally protected rights. [222] In the case of ICARA, by contrast, Congress could not have been clearer that "where international child abduction is alleged, both the Federal and State courts should be available to resolve the claims," providing that both federal and state courts equally had original, concurrent jurisdiction, and elaborating a specific scheme for both prima facie and subsequent evidentiary burdens. [223] Although there are some complicating factors in the treaty context, like the interpretation of the treaty by other states parties, the question as to whether the "domestic relations exception" is a function of Article III jurisdiction or a rule of statutory construction is now squarely posed by the behavior of federal courts under the Hague Child Abduction Convention and ICARA.

In *Ankenbrandt*, the Supreme Court noted that abstention might be useful for a "case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody" specifically noting *Burford* and *Colorado River* abstentions. [224] Despite this fairly straightforward way through the difficulties posed by concurrent state and federal jurisdiction in the Hague Child Abduction Convention context, federal courts have gone far toward closing

the door on all applicable abstention doctrines, as well as *Rooker-Feldman*, while declining jurisdiction ostensibly on the treaty but factually on the domestic relations exception. [225]

Despite what appears to be a ripe issue for U.S. Supreme Court review--a general split among federal appellate courts on the domestic relations exception to federal question jurisdiction generally and an application of that exception to an unambiguous federal statute specifically--the U.S. Supreme Court may have inadvertently delayed resolution of the issue. [226] In *Abbott v. Abbott*, the U.S. Supreme Court determined that a so-called *ne exeat* clause in a child custody decree--which gives the non-custodial parent the right to prevent a child's travel--constituted a "right of custody" ***735** under the convention. [227] Because many access claims intertwine such a right, federal courts now have more authority to assert that an action constitutes an action for "return" rather than access.

IV. The Latent Domestic Relations Exception to Federal Question Jurisdiction and the Future of US Participation in Family Law Treaties [228]

Yet resolution of the domestic relations exception in the federal question context generally--and treaty context specifically--is desirable, even necessary. The increasing role of Congress and the President in areas of family law has facilitated the U.S. government's engagement with at least three additional Hague Conference family law treaties. [229] The United States has ratified the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Hague Adoption Convention"). [230] Congress passed the implementing Intercountry Adoption Act ("IAA") in 2000 even though the State Department has only finalized implementing regulations relatively recently. [231] The IAA ***736** explicitly preempts state laws only to the extent they are inconsistent with the IAA, and acknowledges the particular role of state courts in regulating emigration of U.S. children to Convention countries. [232] There is no concurrent jurisdictional statute, and private rights of action are not authorized. The existence of an extensive federal regulatory scheme for intercountry adoption, including participation by state regulatory agencies in the comment process, suggests that federalism questions under the treaty are more likely to center around preemption than jurisdiction. [233]

The United States has also signed the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, [234] and the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance [235] --both of which will invite similar difficulties in drawing the boundary between national interests in the treaty's observance and state interests in the treaty's underlying legal problems (if there is legislation at the federal level). As Ann Laquer ***737** Estin has noted, harmonization of these treaties with domestic U.S. law will be difficult because of "our approach to federalism and the traditional role of state governments in family law." [236] This entire picture becomes even more muddled once we consider the potentially preemptive effect of federal common law, [237] which is now being developed with respect to the Hague Child Abduction Convention. [238]

The Hague Child Abduction Convention may be viewed, in part, as a victory for bicameral international lawmaking. [239] The large Congressional majorities behind the implementing legislation represent an underlying interest by states in increasing the tools available to reach abducted children. [240] Compared to federal judges, state judges have applied the treaty with an understanding of the importance of mutuality and reciprocity in making sure child ***738** custody is

adjudicated in the appropriate forum. [241] A similarly inclusive process governed the ratification of the Hague Adoption Convention. [242]

Yet the treaty has not been a story of the success of judicial federalism. Without wading into the much wider (and more perilous) debate surrounding the use of legislative history for purposes of statutory interpretation, it is fair to say that federal appellate courts have been relatively indifferent to the implicit Congressional admonition as to state family law interests and the explicit grant of *original* jurisdiction over petitions brought under the treaty. [243] This indifference appears motivated in substantial measure by a suggested but forceful view of the relationship between federal courts and the rights imparted by treaties. [244] If the United States is to continue to enter into treaties that fundamentally change or limit states' authority over family law--and assuming Congress means what it says about state interests--it will need to either structure Article III jurisdiction more carefully or consider other alternatives. [245]

Indeed, federal treaties may not even be preferable given some ***739** contracting states' poor records with respect to Hague Child Abduction Convention enforcement. [246] State executive agencies and law enforcement have successfully negotiated bilateral agreements with foreign sovereign states for some time--a practice that, at least impliedly, proceeds with Congressional approval. [247] If, however, federal treaties continue to dominate the future of transnational family dispute resolution, then greater attention to the jurisdictional divide between state and federal courts in implementing legislation is warranted.

V. Conclusion

The historical divisions between state and federal judicial competencies face mounting pressures as the legal dimensions to the American family continue to federalize. Even under *Abbott*, federal courts are obligated to undertake fairly searching analyses of the content of foreign and domestic child custody decrees and make difficult decisions as to the remedies available to parents once those analyses are concluded. It is no longer the case that federal judges may be free of issues related to child custody, family maintenance obligations, and divorce as long as Congress views federal courts as legitimate fora to adjudicate claims arising under U.S. treaties. One option is to squarely decide that Article III jurisdiction never contemplated matters traditionally handled by ecclesiastical courts, a matter of some historical debate. [248] A second option is for Congress to confine jurisdiction under future treaties ***740** to either federal or state courts, a course which would at least eliminate delays and costs associated with piecemeal and repetitive litigation, although it would also bring to the forefront the latent feud in Article III as to whether Congress may so deprive federal courts of rights arising under treaties. [249] A third option is for Congress to establish a specialized court to adjudicate petitions, as many other countries have done. [250] Whatever the future resolution, it is clear that Congress and the federal judiciary must squarely address whether those matters asserted to be "domestic relations" are fundamentally outside the province of federal courts and, if not, what that conclusion means for Congress' plan to ensure U.S. commitments under future family law treaties are upheld. [251]

Footnotes

d1 Associate Dean for Faculty Development and Associate Professor, The University of Tulsa College of Law. J.D. Harvard; MPhil (International Relations) Oxford; B.A., B.S., Kansas State University. This article benefited from helpful comments received at the William & Mary Federal Courts and Civil Procedure Workshop and the American Society of International Law's Domestic Courts Annual Workshop. Particular thanks are due to Marianne Blair, Curtis Bradley, John Coyle, Bill

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1 Sam F. Halabi, *Abstention, Parity, and Treaty Rights: How Federal Courts Regulate Jurisdiction Under the Hague Convention on the Civil Aspects of International Child Abduction*, 32 BERKELEY J. INT'L. L. 144 (2014).

2 *Id.* at 146.

3 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 Child Abduction Convention].

4 International Child Abduction Remedies Act, 22 U.S.C. § 9003 (2014) [hereinafter ICARA].

5 *Id.* § 9003(a).

6 Halabi, *supra* note 1.

7 *See* Burt Neubome, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004).

8 Halabi, *supra* note 1.

9 Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT'L L. 163, 183-84 (2004) (referring to the "neglect" of state court management of treaties).

10 *See* § 9003; Hague Child Abduction Convention, *supra* note 3, arts. 21, 26.

11 Ozaltin v. Ozaltin, 708 F.3d 355 (2d Cir. 2013).

12 *See, e.g.*, Cantor v. Cohen, 442 F.3d 196, 202 (4th Cir. 2006) (affirming a lower court finding that federal courts lacked the substantive basis for the resolution of access claims and that state courts have the experience to handle those cases better).

13 *In re* Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

14 *See, e.g., id.* (denying a habeas petition, holding that federal courts lack the jurisdiction to hear domestic relations cases since states are better-equipped to do so, and that diversity jurisdiction would not be enough for federal courts to resolve such issues).

15 *Id.*

16 To be sure, there may be meritorious reasons for deferring to state court processes. The Uniform Child Custody Jurisdiction and Enforcement Act (2013), 9(1A) U.L.A. 649 (1999), provides that a foreign country be treated as if it were a state for purposes of jurisdiction and enforcement (§105) thus providing a straightforward state court channel for enforcement of a foreign visitation order. No federal court has made any reference to this legal possibility when declining jurisdiction over access claims. Even if it were explicitly acknowledged, Congress adopted its own plan for visitation, made clear in ICARA's text.

17 NIGEL LOWE, A STATISTICAL ANALYSIS OF APPLICATIONS MADE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2007) ("It took far longer to conclude a case than the global average and this was found to be true for all outcomes in both return and access applications.").

18 Much of the material from Part II is drawn from my article: Halabi, *supra* note 1.

19 *See* Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 369-90 (1999).

20 Sam Foster Halabi, *The Supremacy Clause as Structural Safeguard of Federalism: State Judges and International Law in the Post-Erie Era*, 23 DUKE J. COMP. & INT'L. L. 63, 64 (2013).

21 The Articles of Confederation had also attempted to limit state authority over foreign affairs with relatively limited success. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446 (1987); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1050-51 (2002) ("Because state legislatures--not Congress--were the original repositories of legislative sovereignty transferred from Parliament by revolution, the dogma of exclusive sovereignty (in thirteen iterations) stood as an impediment to the creation of a 'more perfect Union.'").

22 Curtis A. Bradley & Jack L. Goldsmith, *Agora:* Breard--*The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM J. INT'L L. 675, 677-78 (1998) (noting limitations imposed on state foreign relations powers under the U.S. Constitution).

23 U.S. CONST. art. I, § 10.

24 *Id.* art. HI, § 2, cl. 2; Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 3 (2009) (discussing the "modern" position that "courts should recognize customary international law as a form of federal common law and treat it as ... sufficient to establish federal 'arising under' jurisdiction").

25 U.S. CONST. art. Ill, § 2, cl. 1.

26 *Id.* art. III, § 2.

27 *Id.* art. VI, cl. 2. In *United States v. Curtiss-Wright Export Corp.*, the U.S. Supreme Court ruled that federal authority over foreign affairs existed prior to and beyond the textual limits imposed by the U.S. Constitution. 299 U.S. 304 (1936). *Curtiss-Wright* has never been overruled, but Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* is now regarded as the most important precedent as to the extent of federal foreign affairs authority flowing from delegated powers under Article I and Article II. 343 U.S. 579 (1952).

28 *See, e.g.*, Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1189 (2005); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816).

29 Brannon P. Denning & Michael D. Ramsey, American Insurance Association v. Garamendi *and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 843 (2004).
The natural effect of making federal law supreme is that it overrides inconsistent state law. Indeed, preemption--and particularly foreign affairs preemption--was a central purpose of the clause, as explained in the founding era .... The inclusion of treaties, as well as statutes, in the Supremacy Clause shows the extent to which the Constitution's framers focused upon state interferences in foreign affairs under the Articles. Perhaps the single greatest foreign affairs challenge under the Articles was that states refused to implement and abide by treaties negotiated by the national government.
Id.; *see also* Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 573, 584 n.31 (2007) ("There is, perhaps unsurprisingly, a strong historical pattern of enforcement of treaties against the individual States of the United States.").

30 *See* Oona Hathaway et al., *The Treaty Power: Its History, Scope, and Limits*, 98 CORNELL L. REV. 239, 245 (2013) (identifying structural limits on the treaty power); JOHN YOO, THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11, at 272-73 (2005).

31 David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 STAN. L. REV. 1963 (2003). For the seminal contribution on the political safeguards of federalism, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

32 U.S. CONST. art. II, § 2.

33 David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 MICH. L. REV. 1075 (2000); Hathaway et al., *supra* note 30, at 248 ("Madison conceded that '[t]he exercise of the power must be consistent with the object of the delegation,' which was 'the regulation of intercourse with foreign nations,' and he agreed that the power did not include the power 'to alienate any great, essential right.'") (quoting THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 514 (Jonathan Elliot ed., 2d ed. 1937)).

34 Some treaties are "self-executing," which means no additional legislation from Congress is required to impart individually enforceable federal rights. Asakura v. City of Seattle, 265 U.S. 332, 341 (1924).
The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts.
Id.; see also Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 656 (2000) ("Courts vary to some extent in the precise test they use to determine whether a treaty is self-executing. Typically, courts consider a variety of factors, such as the treaty's language and purpose, the nature of the obligations that it imposes, and the domestic consequences associated with immediate judicial enforcement.").

35 Foster v. Nielson, 27 U.S. 253 (1829); Medellin v. Texas, 552 U.S. 491, 525-26 (2008) ("The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress."). Tim Wu traces the history of the non-self-execution doctrine in U.S. jurisprudence to a 1788 Pennsylvania state court decision. Camp v. Lockwood, 1 U.S. (1 Dall.) 393, 403-04; 1 Dall. 393 (Pa. Ct. Com. Pl. 1788); *see also* Wu, *supra* note 29, at 594-95 n.76.

36 *See e.g.*, Medellin, 552 U.S. at 525-26.

37 Halabi, *supra* note 1, at 153.

38 *Id.*

39 *See* United States v. Pink, 315 U.S. 203 (1942) (rejecting N.Y. State Insurance Commissioner's receivership over assets held by nationalized Russian insurance company based on the preemptive effect of a sole executive agreement); Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 398, 441-42 (1998) (describing areas where the federal government may use the treaty power to regulate in areas traditionally occupied by the states).

40 Missouri v. Holland, 252 U.S. 416 (1921), (deciding that the federal government's ability to make treaties, in that case, the Migratory Bird Treaty Act, is supreme over states' rights arising under the Tenth Amendment).

41 389 U.S. 429, 433 (1968).

42 539 U.S. 396, 420 (2003).

43 Bond v. United States, 134 S. Ct. 2077, 2080-82 (2014).

44 *See, e.g.*, Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995); Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1831 (1987).

45 *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 ("That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments.").

46 Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 269-70 (2009) [hereinafter Estin, *Sharing Governance*] ("Until recently, family law was viewed as the province of state governments. In the tradition of dual federalism, states were sovereign in this area, and the national government played a relatively minor role."); Ann Laquer Estin, *Families and Children in International Law*, 12 TRANSNAT'L L. & CONTEMP. PROBS. 271, 276 (2002) [hereinafter Estin, *Families and Children*] ("Although the United States has participated in the Hague Conference since 1964, it has not ratified any of the marriage and divorce treaties, most likely because family law is understood in the United States to be a subject of state jurisdiction while international treaty-making is the province of the federal government.").

47 HAGUE CONF. ON PRIV. INT'L L., https://www.hcch.net/en/home [https://perma.cc/R2LY-7L4U] (last visited Mar. 3, 2016) (using Statute of the Hague Conference on Private International Law, Jul. 15, 1955, 2997 U.N.T.S. 220, as its main source of international law).

48 Stephen Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1242 (2009).

49 MAUREEN DABBAGH, PARENTAL KIDNAPPING IN AMERICA: AN HISTORICAL AND CULTURAL ANALYSIS 18(2012).

50 Estin, *Sharing Governance, supra* note 46, at 279-80 ("State laws governing paternity, adoption, foster care, child support, and child protection now evolve based on a federal design, as do laws regulating family behavior of individuals who receive federally supported welfare benefits. The cost of these programs to the national government shows a substantial federal commitment to family policy and children's welfare.").

51 *Id.* at 275-76, 282 (citations omitted) ("Following its first ventures into family policy in the nineteenth and early twentieth centuries, Congress claimed a more significant role with the Aid to Dependent Children program ... this narrow focus began to widen in 1974 when Congress instituted a series of new programs to improve child support enforcement and paternity determination, protect children from neglect and abuse, and increase delinquency prevention efforts and improve state juvenile justice systems. Since 1974, these programs have expanded significantly, with Congress frequently drawing on sources of authority beyond its spending power to legislate in a range of family law contexts .... As the AFDC program expanded and national politics shifted, Congress began to search for ways to contain or reduce costs.").

52 Congress enacted the Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, 94 Stat. 3573 (codified as 28 U.S.C. 1738A (1980)), and the Uniform Child Custody Jurisdiction and Enforcement Act, Pub. L. No. 106-386, 114 Stat. 1512 (codified as amended 28 U.S.C. § 1738A (2000)), to assist parents to regain their children when unlawfully taken by the other parent. The PKPA reaffirms a court's duty to give full faith and credit to a decree rendered by a state court and provides that a court of another state must defer to the continuing jurisdiction of the state that rendered the original decree. 28 U.S.C. § 1738A. Congress specifically invoked its Article IV power to effect full faith and credit between the states.

53 28 U.S.C. § 1738A; 42 U.S.C. § 653 (1998) (establishing the Federal Parent Locator Service (FPLS)); Caroline LeGette, *International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, 25 TEX. INT'L. L.J. 287, 292-93 (1990) (describing Department of Health and Human Services' use of FPLS).

54 *See* Judith Resnik, *Categorical Federalism, Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619, 621 (2001) (challenging the assertion that family law is "truly" a subject of local jurisdiction and suggesting that globalization will engender greater U.S. engagement with international and transnational family law).

55 Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,497 (Mar. 26, 1986) ("This country's participation in the development of the Convention was a logical extension of U.S. membership in the Hague Conference on Private International Law and bipartisan domestic concern with interstate parental kidnapping, a phenomenon with roots in the high U.S. divorce rate and mobility of the population."); GLORIA DEHART, INTERNATIONAL CHILD ABDUCTIONS: A GUIDE TO APPLYING THE HAGUE CONVENTION, WITH FORMS 1 (2d. ed. 1993) ("This world-wide phenomenon is the consequence of ease of international travel and the multiplication of bi-national marriages, many of which suffer from cultural and religious friction, and the vulnerability of dual national children with two passports.").

56 Hague International Child Abduction Convention, 51 Fed. Reg. at 10,498.

57 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51, 1870 U.N.T.S. 167 (entered into force for the United States Apr. 1, 2008); *see also Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Status Table*, HAGUE CONF. ON INT'L PRIV. L., http://www.hcch.net/index_en.php?act=conventions.status&cid=69 [https://perma.cc/HZN7-VPN2] (last visited Mar. 3, 2016); Estin, *Families and Children, supra* note 46, at 283-84 (describing the long process involved in finalizing regulations and depositing the instrument of ratification). The United States signed the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption ("Convention") on March 31, 1994. The United States ratified the Convention on December 12, 2007, and the Convention entered into force on April 1, 2008. The implementing International Adoption Act's ("IAA") purpose is to "protect the rights of, and prevent abuses against children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests," and to "improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States." 42 U.S.C. § 14901 (2014).

58 Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, *opened for signature* Oct. 19, 1996, 2204 U.N.T.S. 97 [hereinafter Convention on Jurisdiction] (entered into force Jan. 1, 2002); *see also Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: Status Table*, HAGUE CONF. ON INT'L PRIV. L., http://www.hcch.net/index_en.php?act=conventions.status&cid=70 [https://perma.cc/7U2D-JGKV] (last visited Mar. 3, 2016) [hereinafter Hague Conference 1996].

59 Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, *opened for signature* Nov. 23, 2007, 2011 O.J. (L. 192) 51 (EU) [hereinafter Convention on the International Recovery of Child Support] (entered into force Jan. 1, 2013) (six signatories and no U.N.T.S. volume number assigned as of Apr. 24, 2016); *see also Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance: Status Table*, HAGUE CONF. ON INT'L PRIV. L., http://www.hcch.net/index_en.php?act=conventions.status&cid=131 [https://perma.cc/3J73-9RQD] (last visited Mar. 3, 2016) [hereinafter Hague Conference 2007].

60 Convention on Jurisdiction, *supra* note 58, pmbl.

61 Convention on the International Recovery of Child Support, *supra* note 59, pmbl.

62 Abbott v. Abbott, 560 U.S. 1, 3-4 (2010).

63 *Id.*

64 Hague Child Abduction Convention, *supra* note 3, art. 16; *see also* ICARA, 22 U.S.C. § 9001(b)(4) (2014).

65 *See* Karin Wolfe, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U. J. INT'L L. & POL. 285, 302 (2000) ("The child is then to be returned to the state of habitual residence-- not to the custody of the left-behind parent--for judicial determination of custody over the child. Of course, the return of the child to the forum of habitual residence does not automatically trigger the application of that state's law to the proceedings. Rather conflict of laws rules and the possibility of the presence of the doctrine of renvoi within the lex fori determine the applicable law. The Child Abduction Convention establishes only the forum."); *see also* Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention's Goals Being Achieved?*, 2 IND. J. GLOBAL LEGAL STUD. 553 (1995); Susan L. Barone, *International Parental Child Abduction: A Global Dilemma with Limited Relief--Can Something More Be Done?*, 95 N.Y. INT'L L. REV. 103, 104 (1995); Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L.Q. 547, 549-50 (2004). The determination of "habitual residence" itself has divided courts that have considered it. *See, e.g.*, Silverman v. Silverman, 338 F.3d 886, 895

(8th Cir. 2003) (ruling that "habitual residence" is a question of law); Mozes v. Mozes, 239 F.3d 1067, 1073 (9th Cir. 2001) (determining that "habitual residence" is focused on a factual analysis of parental intent subject to clear error review).

66 Hague Child Abduction Convention, *supra* note 3, art. 1 ("The objects of the present convention are ... to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.").

67 *Id.* art. 3.

68 *See, e.g.*, Viragh v. Foldes, 415 Mass. 96, 104-05 (1993). In *Viragh*, the custodial parent moved with her two children from Hungary to the United States notwithstanding a Hungarian court's award of visitation to the noncustodial parent. *Id.* at 99-100. When she informed her ex-husband that she would not return to Hungary with the children, he brought an action in Massachusetts Family Court seeking enforcement of a right of return under the Hague Child Abduction Convention. *Id.* at 102. The Family Court judge rejected the requested relief on the ground that the father's rights were "rights of access," not "rights of custody," under the treaty and therefore ineligible for the return remedy. *Id.* at 104-05.

69 Hague Child Abduction Convention, *supra* note 3, art. 21; *see also* Croll v. Croll, 229 F.3d 133, 138 (2d Cir. 2000) (citing Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,500 (Mar. 26, 1986)) ("One such remedy is a writ ordering the custodial parent who has removed the child from the habitual residence to permit, and to pay for, periodic visitation by the non-custodial parent with access rights."); *see also* Daniel M. Fraidstern, 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).

70 Hague Child Abduction Convention, *supra* note 3, art. 29.

71 *See International Child Abduction Act: Hearing on H.R. 2673 and H.R. 3971 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. On the Judiciary Comm.*, 100th Cong. 48-49 (1988) (statement of Stephen J. Markman, Assistant Att'y Gen. of the United States, Office of Legal Policy); *International Child Abduction Act: Hearing on H.R. 2673 and H.R 3971 Before the Subcomm. on Courts & Admin. Practice of the S. Comm. on the Judiciary*, 100th Cong. 68-69 (1988) (statement of Kevin R. Jones, Deputy Assistant Att'y Gen. of the United States, Office of Legal Policy); Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW & CONTEMP. PROBS. 209, 262-63 (1994). President Reagan signed the treaty on Dec. 23, 1981, transmitted it to the Senate on October 30, 1985, and the Senate gave its advice and consent on Oct. 9, 1986, subject to implementing legislation from Congress.

72 134 CONG. REC. S8558-59 (1988) (statement of Rep. Benjamin Cardin).

73 *Id.; see also* Ann Laquer Estin, *Families Across Borders: The Hague Childrens' Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 49(2010).

74 *See supra* note 69.

75 134 CONG. REC. 8559 (statement of Rep. Benjamin Cardin).

76 134 CONG. REC. 6484 (statement of Sen. Orrin Hatch).

77 ICARA, 22 U.S.C. § 9003(g) (2014).

78 *Id.* § 9004(b); *see also International Child Abduction Act of 1988: Hearing on H.R. 2673 and H.R 3971 Before the Subcomm. on Admin. Law & Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 30 (1988) (statement of Peter Pfund, Assistant Legal Advisor for Private International Law, Department of State) ("The federal legislation seeks to intrude as little as possible on relevant aspects of State law and procedure.").

79 22 U.S.C. § 9006; Hague Child Abduction Convention, *supra* note 3, art. 7.

80 While Congress viewed ICARA as an implementing statute, the State Department took the position that the treaty was self-executing and therefore ICARA was "facilitating" legislation. *See* John F. Coyle, *Incorporative Statutes and Borrowed Treaty Rule*, 50 VA. J. INT'L. L. 655, 667 n.45 (2010).

81 22 U.S.C. § 9003(e).

82 *Id.* § 9003(b). The most frequently claimed affirmative defense is that the child's return would result in grave danger of psychological harm. *Id.* § 9003(e)(1)(A)-(2)(A); Hague Child Abduction Convention, *supra* note 3, art. 13. Article 13b provides that a court may refuse to return a child where there is a grave risk of physical or psychological harm or placement of the child in an intolerable situation. *Id.*, art. 13b. Article 20 allows a court to refuse to return a child where doing so would violate the requested state's principles regarding human rights and fundamental freedoms. *Id.*, art. 20. Article 12 imposes a one-year time limit under which the remedy of return is most readily available, while the remaining exceptions under Article 13 apply to acquiescence in the removal or the child's objection where a sufficiently mature child meaningfully objects to the return. *Id.*, arts. 12-13. When Congress codified the treaty, it placed differing evidentiary burdens on parties seeking return or invocation of one or more exceptions. *See* 22 U.S.C. § 9003(b); Friedrich v. Friedrich, 78 F.3d 1060, 1063-64 (6th Cir. 1996); Feder v. Evans-Feder, 63 F.3d 217, 221 (3d Cir. 1995).

83 22 U.S.C. § 9003(a).

84 *Id.* § 9003(d).

85 Hague Child Abduction Convention, *supra* note 3, art. 3.

86 *See* Mozes v. Mozes, 239 F.3d 1067, 1073 (9th Cir. 2001) (outlining inquiries a court should undertake when determining whether a removal is wrongful).

87 Hague Child Abduction Convention, *supra* note 3, art. 12; Lozano v. Montoya Alvarez, 134 S. Ct. 1224, 1226 (2014).

88 Hague Child Abduction Convention, *supra* note 3, arts. 13a, 13b, 20.

89 Much of the material from Part III is drawn from my article: Halabi, *supra* note 1.

90 Hague Child Abduction Convention, *supra* note 3, arts. 8, 29.

91 *See* Eric Lesh, *Jurisdiction Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases Should Be Heard Exclusively by Federal Courts*, 49 FAM. CT. REV. 170, 174 (2011) (attributing the slowness of American adjudications to the frequent occurrence of parallel litigation).

92 ICARA, 22 U.S.C. § 9003 (2014).

93 Michael R. Walsh & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 37 (2006) ("All three of these issues (habitual residence, wrongful removal, and right of custody), may easily become inextricably tangled.").

94 89 F. App'x. 285, 285-86 (1st Cir. 2004).

95 *Id.*

96 *See* Colo. River Water Conservation Dist. V. United States, 424 U.S. 800 (1976).

97 Witherspoon v. Orange Cry. Dep't of Soc. Servs., 646 F. Supp. 2d 1176 (CD. Cal. 2009).

98 Ion Hazzikostas, Note, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421, 432 (2004).

99 420 U.S. 592, 611-13 (1969).

100 442 U.S. 415 (1979). In *Pennzoil v. Texaco*, the U.S. Supreme Court extended *Younger* abstention to a state's fundamental interest in "administering certain aspects of their judicial systems." 481 U.S. 1, 12-13 (1987). In 2013, the U.S. Supreme Court narrowed the applicability of *Younger* in *Sprint Communications, Inc. v. Jacobs*, although it appears that even within its narrower confines it would easily protect actions by state agencies to protect children as in *Witherspoon*. 134 S. Ct. 584 (2013).

101 While it has not yet come before a district court, *Burford* abstention may also be warranted given the specialized courts many states have established to adjudicate family law claims, the conditions under which state departments of child, family, and social services are authorized to intervene on behalf of children, and the allocation of jurisdiction between juvenile courts, family courts, and general jurisdiction trial courts. *See* Ankenbrandt *ex rel.* L.R. v. Richards, 504 U.S. 689, 705-06 (1992) ("It is not inconceivable, however, that in certain circumstances, the abstention principles developed in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This would be so when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'" (quoting *Colorado River*, 424 U.S. at 814)).

102 Hague Child Abduction Convention, *supra* note 3, art. 16; Centenaro v. Poliero, 901 N.Y.S.2d 905 (Sup. Ct. 2009).

103 Bouvagnet v. Bouvagnet, No. 01 C 4685, 2001 U.S. Dist. LEXIS 17095, at *9 (N.D. Ill. Oct. 22, 2001) ("Finally, the Court notes that the proceedings here are somewhat similar because the evidence that will be used to determine whether the children are settled in their new environment, a determination required by the Hague Convention under the present circumstances, will also be used for the required determination of the best interests of the children in the custody proceedings.").

104 *See, e.g.*, Von Kennel Gaudin v. Remis, 415 F.3d 1028, 1035-36 (9th Cir. 2005) (relying on the Hawaii Family Court and Hawaii Supreme Court's determinations that return of children to Canada would "pose a grave risk of psychological harm").

105 *See, e.g.*, Witherspoon v. Orange Cty. Dep't of Soc. Servs., 646 F. Supp. 2d 1176, 1180 (CD. Cal. 2009) ("Federalism gives states authority over matters of marriage, family, and child welfare. This case deals with those interests ... the state proceeding gives Ms. Witherspoon an adequate opportunity to raise the issues she seeks to raise here in federal court."); Cerit v. Cerit, 188 F. Supp. 2d 1239 (D. Haw. 2002) (ruling that it was appropriate to abstain from ruling on a Turkish man's ICARA petition when he had already made an ICARA argument in Hawaii state court); Grieve v. Tamerin, No. 00-CV-3824 (JG), 2000 U.S. Dist. LEXIS 12210 (E.D.N.Y. Aug. 25, 2000) (holding that *Younger* abstention was appropriate where the petitioner had filed a Hague Convention petition in state court prior to filing it in federal court). *Contra* Hazbun Escaf v. Rodriquez, 191 F. Supp. 2d 685, 688, 692 (E.D. Va. 2002) (criticizing *Cerit* and denying motion to dismiss based on abstention).

106 Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of* Pennzoil v. Texaco, 63 N.Y.U. L. REV. 1051, 1053 (1988) (arguing that abstention should be applied when it advances federal interests).

107 *See* Suzanna Sherry, *Judicial Federalism in the Trenches: The* Rooker-Feldman *Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1092 (1999) ("But what if the federal plaintiff does not seek to enjoin the state proceeding, and state appeals are still pending? In this case, as we have already seen, *Younger* does not apply, and in some states interlocutory or appealable orders are given no preclusive effect. Here the *Rooker-Feldman* doctrine, as it is generally used in the lower courts, seems both necessary and appropriate.").

108 No. 4:07CV01781 ERW, 2007 U.S. Dist. LEXIS 89304, at *2 (E.D. Mo. Dec. 4, 2007).

109 *Id.*

110 *Id.* at *1-2.

111 *Id.*

112 *Id.* at *4.

113 *Id.* at *5; *see also* Barzilay v. Barzilay, No. 2104FC-10567-01 (St. Louis Cty. Cir. Ct. Oct. 16, 2007) (Missouri Case.net).

114 *Barzilay*, 2007 U.S. Dist. LEXIS 89304, at *5.

115 *Id.* at *15.
[T]he state court held that the mere presence of the minor children on vacation in Israel is insufficient to establish a 'habitual presence' so as to fall under the purview of International Child Abduction Remedies Act .... While the state court does not specifically make a finding of whether the minor children were wrongfully removed to, or wrongfully retained in, the United States, it necessarily follows from a finding of habitual presence in the United States that the minor children were not wrongfully removed from Israel. If the Plaintiff is not satisfied with the state court ruling, then the Plaintiff's only available course of action is to appeal that decision."
Id. at *13-14.

116 *Id.* at *10.

117 Barzilay v. Barzilay, 536 F.3d 844, 850 (8th Cir. 2008) ("The controlling case in our circuit is *Silverman I*, which concluded that abstention was inappropriate in Hague Convention cases." (citing Silverman v. Silverman, 267 F.3d 788, 792 (8th Cir. 2001))).

118 *Id.* at 851.

119 *Id.* at 850 (citations omitted).

120 *See, e.g.*, Csibi v. Fustos, 670 F.2d 134 (9th Cir. 1982) (applying domestic relations abstention in a suit by Romanian citizens against California residents to determine marital status); *In re* D.M.T.-R, 802 N.W.2d 759, 764-65 (Minn. Ct. App. 2011). The Minnesota court noted:
For example, the domestic relations exception to federal diversity jurisdiction divests the federal courts of subject matter jurisdiction over child-custody decrees .... Thus, we conclude that the UCCJEA confers to state courts subject matter jurisdiction over child-custody proceedings, including the termination of parental rights involving a child who is not a United States citizen but who is in Minnesota."
In re D.M.T.-R., 802 N.W.2d at 764-65.; *see also* Maqsudi v. Maqsudi, 830 A.2d 929 (N.J. Super. Ct. Ch. Div. 2002) (adjudicating dispute between New Jersey and Uzbekistan custody decrees).

121 Silverman v. Silverman, 338 F.3d 886, 892 (8th Cir. 2003). State court orders under the treaty, it determined, were limited to those falling under 42 U.S.C. § 11603(g) (2006), now transferred to ICARA, 22 U.S.C. § 9003(g) (2014), which provides that "full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act." *Silverman*, 338 F.3d at 894.

122 305 F.3d 854, 859 (9th Cir. 2002).

123 *Id.* at 861.

124 *Id.*

125 *Id.*

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id. re* Holder, No. F036747, 2002 Cal. App. Unpub. LEXIS 2898, at * 13 (Cal. Ct. Ap. Mar. 20, 2002).

130 *Holder*, 305 F.3d at 862.

131 *Id.* at 873.

132 Holder v. Holder, No. C00-1927C, 2001 WL 34787138, at *7 (W.D. Wash. Apr. 16, 2001).

133 *Holder*, 305 F.3d at 860.

134 *Id.* at 866-67.

135 *Id.* at 867-68.

136 *Id.* In that brief, the United States argued that the Hague Abduction Convention was not meant to be used to give a litigant an opportunity to re-litigate custody. See In re Holder, No. F036747, 2002 Cal. App. Unpub. LEXIS 2898, at *3 (Cal. Ct. App. Mar. 20, 2002) ("[T]he Hague Convention was not intended to allow the 'left-behind parent' a second bite at the custody apple just because, after specifically electing to litigate custody in a forum that otherwise had jurisdiction the parent suffered an adverse result.").

137 Holder v. Holder, No. C001927C, 2003 WL 24091906 (W.D. Wash. June 13, 2003).

138 *Holder*, 305 F.3d at 864.

139 *Id.* at 865 (citing Mozes v. Mozes, 239 F.3d 1067, 1085 n.55 (9th Cir. 2001) ("It clearly follows that, if a prior state court custody order cannot bar a federal court from vacating the state court order, then it cannot bar federal adjudication of the Hague Convention claim.")).

140 *Id.* at 860.

141 *Id.* at 864-65.

142 *In re* Holder, No. F036747, 2002 Cal. App. Unpub. LEXIS 2898, at *10 (Cal. Ct. App. Mar. 20, 2002).

143 *See Holder*, 305 F.3d. at 864-65 ("[F]ederal courts adjudicating Hague Convention petitions must accord full faith and credit *only* to the judgments of those state or federal courts that actually adjudicated a Hague Convention claim in accordance with the dictates of the Convention and ICARA." (emphasis added)).
To hold that a left-behind parent is barred ... from raising a Hague Convention claim in a subsequent federal proceeding just because he or she did not raise it in the state custody proceeding would render the Convention an incompetent remedy for the very problem that it was ratified to address.
Id. at 865.

144 *Id.* at 865.

145 *Holder*, 305 F.3d at 875 (Thompson, J., dissenting) (quoting Brief of Amicus Curiae United States) (unpublished brief) ("The majority opinion ... gives the left-behind parent a windfall by providing him with *two* opportunities to litigate custody: once in state court, and if he is unhappy with the result, all over again in another forum under the Hague Convention. As the United States aptly has observed in its amicus brief filed in the state court of appeal, 'the Hague Convention was not intended to allow the "left-behind parent" a second bite at the custody apple just because, after specifically electing to litigate custody in a forum that otherwise had jurisdiction, the parent suffered an adverse result.'"); *see also* Hague Child Abduction Convention, *supra* note 3, art. 1 ("The objects of the present convention are ... to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."). The Judiciary Committee's House report noted: [Section 11603(g)] means, for example, that if a court in one jurisdiction has ordered the return of a child and the child is located in another jurisdiction in the United States before that order has been executed, the order shall be given full effect in the second jurisdiction without the need to initiate a new return action there pursuant to the Convention and [ICARA].

H.R. REP. NO. 100-525, at 12 (1988). In other words, the provision exists to reinforce the importance that a return order under ICARA be effected with haste and to close the door on any possible delay or manipulation by the allegedly abducting parent. It is unreasonable to assume that Congress intended to create a singular exception to a large body of statutory and common law but declined to mention this intent in any way.

146 *See Holder*, 305 F.3d at 867-70.

147 *Id.* at 867.

148 *See, e.g.*, Yang v. Tsui, 416 F.3d 199 (3d Cir. 2005); Von Kennel Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005); Silverman v. Silverman, 338 F.3d 886, 895 (8th Cir. 2003); Holder v. Holder, 305 F.3d 854 (9th Cir. 2002). Justice Ginsburg effectively advocates that position in her *Garamendi* dissent. Am. Ins. Ass'n v. Garamendi, 539 U.S. 396 (2003) (Ginsburg, J., dissenting); *see also* E1 A1 Israel Airlines v. Tseng, 525 U.S. 155, 175 (1999) ("Our home-centered preemption analysis, therefore, should not be applied, mechanically, in construing our international obligations.").

149 FED. PRACTICE MANUAL FOR LEGAL AID ATT'YS § 2.8 (SHRIVER CTR. 2015), http://federalpracticemanual.Org/node/15 [https://perma.cc/DL76-8EPS].

150 *Id.*

151 The Seventh Circuit announced its rule in an opinion issued on July 26, 2002, after the parties had settled, but before the court had received notice of the settlement. Therefore, the opinion is technically advisory, but should the Seventh Circuit revisit the issue, it is likely to accord the judgment significant weight. Bouvagnet v. Bouvagnet, 45 F. App'x. 535 (7th Cir. 2002).

152 Copeland v. Copeland, No. 97-1665, 1998 U.S. App. LEXIS 1670 (4th Cir. Feb. 6, 1998) (affirming district court *Colorado River* abstention); Hazbun v. Rodriguez, 52 F. App'x. 207 (4th Cir. 2002) (upholding district court rejection of *Colorado River* and *Younger* abstention).

153 ICARA, 22 U.S.C. § 9003 (2014); *see also* Sei Fujii v. California, 242 P.2d 617 (Cal. 1952) (rejecting rights asserted under the U.N. Charter).

154 Hague Child Abduction Convention, *supra* note 3, art. 16.

155 416 F.3d 199, 204 (3d Cir. 2005).

156 *Id.*

157 *See, e.g.*, Barzilay v. Barzilay, 536 F.3d 844, 850 (8th Cir. 2008) (reversing a district court abstention and holding that abstention was inappropriate with Hague claims and state judicial remedies need not be exhausted); Silverman v. Silverman, 267 F.3d 788, 792 (8th Cir. 2001) (reversing a district court abstention because abstention is only proper when the relief is equitable or discretionary, and relief under the treaty us mandatory); Silverman v. Silverman, 338 F.3d 886, 892 (8th Cir. 2003) (rejecting the application of *Rooker-Feldman* outside of the implementing statute's full faith and credit clause).

158 Hague Child Abduction Convention, *supra* note 3, art. 8 (requiring an application to a Central Authority to include information concerning the identity of the applicant, the child, and the person alleged to have removed or retained the child). Where available, the date of birth of the child, the grounds on which the applicant's claim for return of the child is based, and all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be should be included. The application may be accompanied or supplemented by an authenticated copy of any relevant decision or agreement, a certificate or affidavit emanating from a Central Authority, other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State, and any other relevant document. *Id.*

159 42 U.S.C. § 11603(b) (2006) (transferred to 22 U.S.C. § 9003(b) (2014)).

160 Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,498 (Mar. 26, 1986) (quoting Elisa Pérez-Vera, HCCH Explanatory Report on the 1980 Hague Convention on the Civil Aspects of International Child Abduction).

161 *See, e.g.*, Burns v. Burns, No. 96-6268, 1996 U.S. Dist. LEXIS 18116, *9-10 (E.D. Pa. Dec. 6, 1996) (rejecting the mother's attempt to re-litigate a Hague Child Abduction claim on the basis that "she clearly stated the source of her alleged custody rights and the date of the alleged wrongful retention, and requested in her prayer for relief that she be allowed to return to the United Kingdom with the four children").

162 *See, e.g.*, Grieve v. Tamerin, 269 F.3d 149, 153 (2d Cir. 2001) ("Grieve's claim implicates a paramount federal interest in foreign relations and the enforcement of United States treaty obligations. Deference to a state court's interest in the outcome of a child custody dispute would be particularly problematic in the context of a Hague Convention claim inasmuch as the Convention divests the state of jurisdiction over these custody issues until the merits of the Hague Convention claim have been resolved.").

163 Sanchez-Llamas v. Oregon, 548 U.S. 331, 383 (2006) ("[U]niformity is an important goal of treaty interpretation."); Trans World Airlines v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) ("The great object of an international agreement is to define the common ground between sovereign nations."); Vicki Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303, 356 (2006) ("A basic premise of the constitutional system has long been that appellate review of state court decisions is particularly important where treaty rights are asserted, both to assure a uniformity of interpretation and to minimize the possibilities of error in sensitive areas affecting foreign relations.").

164 March v. Levine, 249 F.3d 462 (6th Cir. 2001); *In re* S.L.M., 207 S.W.3d 288 (Tenn. Ct. App. 2006) (detailing how Perry March murdered his wife then fled to Mexico to escape criminal prosecution and civil liability, lost custody battles with the maternal grandparents in Illinois and Tennessee courts, and then used the Hague Child Abduction Convention to have the children returned to Mexico).

165 *Id.* at 472.

166 Bouvagnet v. Bouvagnet, No. 01-3928, 2002 U.S. App. LEXIS 17661 (7th Cir. July 26, 2002), *vacated pursuant to settlement agreement*, 45 F. App'x 535 (7th Cir. 2002).

167 Holder v. Holder, 305 F.3d 854 (9th Cir. 2002). The court noted:
In light of the Hague Convention policy that signatory countries should return wrongfully removed children expeditiously and through any appropriate remedy, we reject the claim that a left-behind parent is precluded or barred from raising his Hague Convention claim in the court of his choice, or that "wise judicial administration" is furthered by staying a federal Hague petition, simply because that left-behind parent has pursued the return of his children through multiple legal avenues. *Id.* at 863.

168 Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,514 (Mar. 26, 1986).

169 Bromley v. Bromley, 30 F. Supp. 2d 857, 860 (E.D. Pa. 1998) ("no federal court has yet addressed the right of access to children under the Convention as contrasted with ordering the return of children.").

170 *Id. at* 860-61.

171 *Id.* at 860 (quoting Hague Child Abduction Convention, *supra* note 3, art. 21).

172 Hague Child Abduction Convention, *supra* note 3, art. 21.

173 *Id.* art. 29.

174 ICARA, 22 U.S.C. § 9003(e)(1)(B) (2014).

175 *Bromley*, 30 F. Supp. 2d at 861-62 (citing Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 384 (1930)); *see also* Solomon v. Solomon, 516 F.2d 1018, 1021-24 (3d Cir. 1975); Gill v. Gill, 412 F.Supp. 1153, 1156-57 (E.D. Pa. 1976).

176 *Bromley*, 30 F. Supp. 2d at 862.

177 Ankenbrandt v. Richards, 504 U.S. 689, 699-701 (1992).

178 *Agler*, 280 U.S. at 383-84; *Solomon*, 516 F.2d at 1021-24.

179 121 F. Supp. 2d 1118, 1119 (W.D. Mich. 2000).

180 *Id.* at 1126 (citing *Ankenbrandt*, 504 U.S. at 693); *see also* Davis v. Strout, No. 07-CV-141-GZS, 2007 U.S. Dist LEXIS 75272, at *4 (D. Me. Oct. 9, 2007) ("These courts have indicated that state court is the appropriate forum to redress violations of rights of access under the Hague Convention."); Wiezel v. Wiezel-Tyrnauer, 388 F. Supp. 2d 206, 212 (S.D.N.Y. 2005) ("[S]tate courts are the preferred forum for resolving access issues."); Neng Nhia Yi Ly v. Heu, 296 F. Supp. 2d 1009, 1011 (D. Minn. 2003); Wiggill v. Janicki, 262 F. Supp. 2d 687, 689 (S.D. W. Va. 2003).

181 442 F.3d 196, 202 (4th Cir. 2006) (citing Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980)).

182 229 F.3d 133, 138 (2d Cir. 2000).

183 Id. at 139 ("Mr. Croll reasons that a *ne exeat* clause[, which grants a veto power over the child's place of residence,] gives an otherwise non-custodial parent a power that amounts to a 'right to determine the child's place of residence' and thereby creates a 'right of custody' that is protected by the Convention's return remedy.").

184 560 U.S. 1, 20-21 (2010) ("To interpret the Convention to permit an abducting parent to avoid a return remedy, even when the other parent holds a *ne exeat* right, would run counter to the onvention's purpose of deterring child abductions by parents who attempt to find a friendlier forum for deciding custodial disputes.").

185 *Croll*, 229 F.3d at 145 (Sotomayor, J., dissenting) (quoting Croll v. Chiu, No. 7211 of 1998, Order at 1 (Dist. Ct. H.K. Spec. Admin. Reg., Feb. 23, 1999)).

186 *Id.* at 135, 143-44.

187 *Id.* at 135, 137-38 (citing Viragh v. Foldes, 415 Mass. 96, 109-10 (1993)).

188 *In re* S.E.O., 873 F. Supp. 2d 536, 545-46 (S.D.N.Y. 2012) ("Given the language of the statute, this Court finds that it has jurisdiction to enforce Petitioner's rights of access to the Children, and orders Respondent to comply with the visitation rights set forth by the Turkish Court's May 13, 2011, Order, so long as the Children remain in the United States."). The Second Circuit affirmed the district court's conclusion in In re *S.E.O.*, but recast the case as a custody rights case. *See* Ozaltin v. Ozaltin, 708 F.3d 355 (2d Cir. 2013).

189 *See Ozaltin*, 708 F.3d at 378 (holding that due to the language of the statute, the Court has jurisdiction to grant Petitioner access to the Children in question based on the visitation rights mandated in the Turkish Court).

190 477 F.3d 767 (6th Cir. 2007). In an unpublished opinion, the Fourth Circuit implied that rights of access could be vindicated in federal district courts, but the court later clarified that no such remedy was available, in Cantor v. Cohen, 442 F.3d 196, 205-06 (4th Cir. 2006). Katona v. Kovacs, 148 F. App'x. 158, 160-61 (4th Cir. 2005).

191 *Croll*, 229 F.3d at 135 ("Because courts in the United States have jurisdiction to enforce the Convention by ordering a child's return to her habitual residence only if the child has been removed in breach of a petitioning parent's custodial rights, the district court lacked jurisdiction to order return in this case."); Cantor v. Cohen, 442 F.3d 196, 202-05 (4th Cir. 2006).

192 Hague Child Abduction Convention, *supra* note 3, arts. 12-20.

193 *Id.* art. 21.

194 Krehbiel v. Cooper No. 1:08CV276, 2008 U.S. Dist. LEXIS 98789 (M.D.N.C. Dec. 4, 2008) (parallel proceedings in North Carolina state court); Wagner v. Wagner, No. RWT 07-1347, 2007 U.S. Dist. LEXIS 45720 (D. Md. June 21, 2007) (parallel proceedings in Maryland state court); *In re* Adams *ex. rel.* Naik v. Naik, 363 F. Supp. 2d 1025 (N.D. Ill. 2005) (proceedings in Illinois state court).

195 *See* Hague Child Abduction Convention, *supra* note 3, art. 2.

196 Lesh, *supra* note 91.

197 Hazzikostas, *supra* note 98, at 424.

198 Halabi, *supra* note 1, at 184.

199 *See* Barzilay v. Barzilay, No. 2104FC-10567-01 (St. Louis Cty. Oct. 16, 2007) (Missouri Case.net) (rejecting Sagi Barzilay's request for return); Barzilay v. Barzilay, 600 F.3d 912 (8th Cir. 2010) (upholding district court determination that Israel was not children's habitual residence).

200 *See In re* Holder, No. F036747, 2002 Cal. App. Unpub. LEXIS 2898 (Cal. Ct. App. Mar. 20, 2002) (Cal. Ct. App. 2002) (holding that Jeremiah Holder waived his Hague Convention claim); Holder v. Holder, 392 F.3d 1009 (9th Cir. 2004) (upholding federal district court determination that Germany was not the Holder children's habitual residence).

201 646 F. Supp. 2d 1176, 1177 (CD. Cal. 2009).

202 *Id.* at 1178-79.

203 Yang v. Tsui, 416 F.3d 199, 202 ("[T]he federal court has generally found that abstention is not appropriate.").

204 In *Von Kennel Gaudin v. Remis*, which did not involve *Younger* abstention, the Ninth Circuit suggested that the doctrine would be inapplicable to Hague Child Abduction Convention claims. The district court in *Witherspoon* emphasized that the state interest justifying *Younger* abstention was dependency, not custody. Von Kennel Gaudin v. Remis, 415 F.3d 1028 (9th Cir. 2005).

205 Yang, 416 F.3d at 203 ("It is clear that if the state proceeding is one in which the petitioner has raised, litigated and been given a ruling on the Hague Convention claims, any subsequent ruling by the federal court on the same issues would constitute interference.").

206 *See id.* at *204*.

207 Friedrich v. Friedrich, 983 F.2d 1396, 1402 (6th Cir. 1993).

208 *See id.* at 1400.

209 KTLPATRICK TOWNSEND, LITIGATING INTERNATIONAL CHILD ABDUCTION CASES UNDER THE HAGUE CONVENTION 69 (2012), http://www.missingkids.com/en_US/HagueLitigationGuide/hague-litigation-guide.pdf [https://perma.cc/TW78-6R7D].

210 *Id.*

211 *Id.* The U.S. Supreme Court's only decision regarding the treaty, *Abbott v. Abbott*, was necessary because federal appellate courts determined with one exception that a non-custodial parent's right to prevent a custodial parent's foreign travel did not give the left-behind parent a right to demand return of a child. 560 U.S. 1 (2010).

212 *Id.*

213 Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669 (1995).

214 *See* Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131(2009).

215 Ankenbrandt v. Richards, 504 U.S. 689, 691 (1992).

216 *Id.* at 692.

217 *Id.* at 704.

218 *Id.* at 705.

219 *Id.* at 704.

220 *See id.* at 700.

221 28 U.S.C. § 1738A (2009); 42 U.S.C. § 1983 (2014); Ashmore v. New York, *aff'd sub nom*. Ashmore v. Prus, 510 F. App'x 47 (2d Cir. 2013) ("We expressly decline to address whether the domestic relations exception to federal subject matter jurisdiction applies to federal question actions."); Atwood v. Fort Peck Tribal Court Assiniboine, 513 F.3d 943, 947 (9th Cir. 2008) ("We therefore join the Fourth and Fifth Circuits in holding that the domestic relations exception applies only to the diversity jurisdiction statute"); Mandel v. Town of Orleans, 326 F.3d 267, 271 (1st Cir. 2003) ("[T]he courts are divided as to whether the doctrine is limited to diversity claims and this court has never decided that issue. The debate is esoteric but, as federal law increasingly affects domestic relations, one of potential importance."); Johnson v. Rodrigues, 226 F.3d 1103, 1111 n.4 (10th Cir. 2000) ("Some district courts in the Second Circuit have applied the domestic relations exception in federal question cases, but other Circuits have held that the exception is limited to diversity suits."); United States v. Johnson, 114 F.3d 476, 481 (4th Cir. 1997) ("The 'jurisdictional exception,' in the first place, is applied only as a judicially implied limitation on the diversity jurisdiction; it has no generally recognized application as a limitation on federal question jurisdiction."); McLaughlin v. Pernsley, 876 F.2d 308, 312 (3d Cir. 1989) (recognizing differences in some circuits); Flood v. Braaten, 727 F.2d 303, 305, 308 (3d Cir. 1984) ("[W]e cannot agree with the district judge that the PKPA can never support federal question jurisdiction in a lawsuit connected with a child custody dispute. Accordingly, we will remand for further proceedings .... [A]s a jurisdictional bar, the domestic relations exception does not apply to cases arising under the Constitution or laws of the United States."); Ruffalo v. Civiletti, 702 F.2d 710, 717-18 (8th Cir. 1983) ("It is unclear whether the domestic-relations exception applies to cases brought under the federal-question statute.").

222 *See* 28 U.S.C. § 1738A; 42 U.S.C. § 1983.

223 134 CONG. REC. 8558 (1988) (statement of Rep. Hughes).

224 *Ankenbrandt*, 504 U.S. at 705.

225 Silverman v. Silverman, 338 F.3d 886 (8th Cir. 2003).

226 *See* DAVID HITTNER, ET AL., PRACTICE GUIDE: FEDERAL CIVIL PROCEDURE BEFORE TRIAL ch. 2B, § 4(d)(2) (5th Cir. ed. 2014).

227 560 U.S. 1, 10 (2010).

228 Much of the material from Part IV is drawn from my article: Halabi, *supra* note 1.

229 Estin, *Sharing Governance, supra* note 46, at 279-80 ("State laws governing paternity, adoption, foster care, child support, and child protection now evolve based on a federal design, as do laws regulating family behavior of individuals shows a substantial federal commitment to family policy and children's welfare."); David F. Cavers, *International Enforcement of Family Support*, 81 COLUM. L. REV. 994, 1000-02, 1007-12 (1981); *see also* Gloria Folger DeHart, *Comity, Conventions, and the Constitution:*

State and Federal Initiatives in International Child Support Enforcement, 28 FAM. L.Q. 89, 110 (1994) (state governments are allowed to enter into compacts with foreign governments).

230 Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, S. TREATY DOC. NO. 105-51, 1870 U.N.T.S. 167 (entered into force for the United States Apr. 1, 2008), *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Status Table*, HAGUE CONF. ON INT'L PRIV. L., http://www.hcch.net/index_en.php?act=conventions.status&cid=69 [https://perma.cc/G5XR-PSGH] (last visited Mar. 3, 2016). The United States signed the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption ("Convention") on March 31, 1994. The United States ratified the Convention on December 12, 2007, and the Convention entered into force on April 1, 2008.

231 42 U.S.C. §§ 14901-14954(2014). The IAA's purpose is to "protect the rights of, and prevent abuses against children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests," and to "improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States." § 14901(b). The IAA accomplishes these goals by regulating the accreditation and approval of adoption agencies, recognizing Convention adoptions, and providing administrative and enforcement procedures to uphold the IAA. § 14921-14944.

232 Hague Convention on Intercountry Adoption, 68 Fed. Reg. 54,064 (proposed Sept. 15, 2003) (to be codified at 22 C.F.R. pt. 96); U.S. Dep't of State, *Hague Convention on Intercountry Adoption; Intercountry Adoption Act of 2000; Accreditation of Agencies; Approval of Persons; Preservation of Convention Records*, FED. REG. (Sept. 15, 2003), https://www.federalregister.gov/articles/2003/09/15/03-22650/hague-convention-on-intercountry-adoption-intercountry-adoption-act-of-2000-accreditation-of [https://perma.cc/PPE2-3BTZ].

233 Hague Convention on Intercountry Adoption, 68 Fed. Reg. 54,064 (stating that the regulations set forth a detailed dispute resolution procedure which contemplates final resolution in federal courts).

234 Convention on Jurisdiction, *supra* note 59; *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: Status Table*, HAGUE CONF. ON INT'L PRIV. L., http://www.hcch.net/index_en.php?act=conventions.status&cid=70 [https://perma.cc/DWM4-S35J] (last visited Mar. 3, 2016).

235 Convention on the International Recovery of Child Support, *supra* note 60; *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance: Status Table*, HAGUE CONF. ON INT'L PRIV. L., http://www.hcch.net/index_en.php?act=conventions.status&cid=131 [https://perma.cc/UTD9-LWJ8].

236 Estin, *supra* note 73, at 50.

237 Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 536 (2002); Jack L. Goldsmith, *Federal Courts, Foreign Affairs, and Federalism*, 83 VA. L. REV. 1617, 1620(1997).

238 *See, e.g.*, Samuel P. Jordan, *Reverse Abstention*, 92 B.U. L. REV. 1771 (2012) (analyzing circumstances under which federal procedural common law accompanying enforcement of a federal right is applicable only in a federal forum); Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1505-06 (2006). Bellia & Clark, *supra* note 24, at 9 ("Taken in historical context, the best reading of Supreme Court precedent dating from the founding to the present is that the law of nations does not apply as preemptive federal law by virtue of any Article III power to fashion federal common law, but only when necessary to preserve and implement distinct Article I and Article II powers ....").

239 Estin, *supra* note 73, at 67 (citing Peter H. Pfund, *Contributing to Progressive Development of Private International Law: The International Process and the United States Approach, in* 249 RECUIEL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 25-26, 73 (1994)); *id.* at 103 ("Whatever the outer limits of the foreign commerce and foreign relations powers, both Congress and the Executive Branch evaluate federalism concerns before enacting

legislation of this nature, and both branches have clearly understood the importance of coordinating our treaty obligations with the family law systems that exist in the states."); *see also* Bradley & Goldsmith, *supra* note 22 (noting treaty contexts in which the federal government safeguarded state interests).

240 Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,497-98 (Mar. 26, 1986) ("In reply to a State Department letter inquiring whether and how the states of the United States could assist in implementing the Convention if it were ratified by the United States, officials of many states welcomed the Convention in principle and expressed general willingness to cooperate with the federal Central Authority in its implementation.").

241 *See, e.g., Tahan v. Duquette*, 259 N.J. Super. 328, 334 (1992) ("Although we are not bound by the decisions of courts in other states or by the manner in which a treaty has been interpreted in other nations, a proper regard for promoting uniformity of approach in addressing a treaty of this kind requires that the views of other courts receive respectful attention." (citations omitted)).

242 Estin, *supra* note 73, at 75-76 (describing Congressional remedial action on the treaty).

243 Jeffrey Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013) (suggesting an uneasy convergence toward "textualism" in the interpretation of federal statutes).

244 *See, e.g.*, Furnes v. Reeves, 362 F.3d 702, 720 & n.15 (11th Cir. 2004) (adopting the reasoning of then Judge Sotomayor's *Croll* dissent); Fawcett v. McRoberts, 326 F.3d 491, 500 (4th Cir. 2003); Gonzalez v. Gutierrez, 311 F.3d 942, 949 (9th Cir. 2002); Linda Silberman, *Patching up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 49 (2003) ("Federal courts in the United States have held that they do not even have jurisdiction to hear a claim for enforcement of access rights.").

245 Not all treaties, of course, introduce these confrontations. The United States, for example, has ratified the Convention Providing a Uniform Law on the Form of an International Will, but has not adopted national implementing legislation in favor of state-by-state adoption through the National Conference of Commissioners on Uniform State Laws. *See* S. TREATY DOC. NO. 99-29 (1986), *reprinted in* 1973 U.S.T. LEXIS 321 (transmitting the president's letter to Congress on the Convention Providing a Uniform Law on the Form of an International Will).

246 Walsh & Savard, *supra* note 93, at 38 (noting cases in which European jurisdictions especially have not complied with treaty mandates).

247 Estin, *supra* note 73, at 80-81, 90-91 ("[I]ndividual states began to enter reciprocal arrangements with foreign governments to establish, recognize, and enforce child support orders, following a trail blazed by Gloria DeHart, who negotiated many of these agreements as Deputy Attorney General in California.").

248 As in the domestic context, uniformity is asserted as an important goal of federal court jurisdiction over treaties without that rationale having been tested to any significant extent. In *Medellin*, for example, the U.S. Supreme Court rejected individual enforceable remedies under the Vienna Convention on Consular Relations which was inconsistent with a "uniformity" rationale. Medellin v. Texas, 552 U.S. 491 (2008). The International Court of Justice had determined, in a case against the United States, that treaty claims required judicial authorities to evaluate any prejudice caused by a denial of treaty rights. For critical views of the uniformity rationale in the domestic context, see John Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247 (2007) (empirically questioning the validity of the uniformity justification); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (analyzing constitutional structure with respect to a purported federal interest in uniformity).

249 *See* Susan Block Leib, *The Costs of a Non-Article III Bankruptcy System*, 72 AM. BANKR. L.J. 529, 566 (1998) (advocating exclusive federal jurisdiction to resolve delays and costs associated with fragmented bankruptcy jurisdiction).

250 Bureau of Consular Affairs, *International Parental Child Abduction*, DEP'T STATE, http://travel.state.gov/content/childabduction/en/legal/for-judges.html [https://perma.cc/KQ37-X6WF] (last visited Apr. 1, 2016).

251 *See* Oona Hathaway, *Treaties' End: The Past, Present, and Future of International Lawmaking in the United States*, 117 YALE L.J. 1236 (2008) (advocating bicameral implementation of U.S. treaties).

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