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ABBOTT v. ABBOTT: REVIVING GOOD FAITH AND REJECTING AMBIGUITY IN TREATY JURISPRUDENCE

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In *Abbott v. Abbott*,[1] the Supreme Court of the United States considered whether *ne exeat* rights[2] constitute rights of custody under the Hague Convention on the Civil Aspects of International Child Abduction[3] ("the Hague Convention").[4] The Court held that *ne exeat* rights, which require parental consent when another parent removes a child abroad, are in fact rights of custody. Therefore, the non-removing parent had a right to seek a return remedy—that is, the return of the child to his habitual country of residence.[5] *Abbott*, as the post-Rehnquist Court's first case dedicated to treaty interpretation, provides a glimpse into the Court's evolving approach to treaty interpretation. As lower courts wrestle with increasing numbers of treaty cases, such a glimpse is invaluable.

Abbott reveals two significant points for treaty interpretation and one missed opportunity. First, *Abbott* suggests that the post-Rehnquist Court is reviving the canons of good faith and liberal interpretation,

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1. 130 S. Ct. 1983 (2010).

2. *Id.* at 1987 (recognizing a *ne exeat* right in the family law context as "the authority to consent before the other parent may take the child to another country"). *See also* Gonzalez v. Gutierrez, 311 F.3d 942, 947 n.8 (9th Cir. 2002) (defining a *ne exeat* clause as a "writ which forbids the person to whom it is addressed to leave the country, the state, or the jurisdiction of the court" (quoting BLACK'S LAW DICTIONARY 1031 (6th ed. 1990)) (internal quotation marks omitted)), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010). This term originates from the phrase "*ne exeat regno*," which translates to "let him not go out of the kingdom." WEBSTER'S REVISED UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE 968 (1913).

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 Convention].

4. *Abbott*, 130 S. Ct. at 1987.

5. *Id.* at 1997.

treaty-interpretation doctrines that had been ignored for nearly seventy years.[6] Second, the *Abbott* decision rejects ambiguity as a trigger for reference to extratextual sources as aids in interpretation.[7] Third, the *Abbott* Court missed an opportunity to clarify the distinction between treaty and statutory interpretation and inform lower court adjudication of treaty cases.[8]

I. THE CASE

On August 26, 2005, Jacquelyn Abbott removed her son, A.J., from their residence in Chile and took him to the United States without the knowledge or consent of A.J.'s father, Timothy Abbott.[9] The Abbotts had separated in March 2003 after ten years of marriage.[10] At the time of their separation, Mr. and Ms. Abbott lived in La Serena, Chile.[11] A Chilean family court awarded to Ms. Abbott "daily care and control" of A.J. and to Mr. Abbott "specific direct and regular visitation rights."[12] On January 13, 2004, the Chilean court granted Ms. Abbott's request for a *ne exeat* order, which prohibited either parent from removing A.J. from Chile without the other parent's consent.[13] This order supplemented the *ne exeat* right already imposed by a Chilean family-law statute.[14] Ms. Abbott subsequently removed A.J. from Chile without Mr. Abbott's consent.[15]

Mr. Abbott located A.J. in Texas with the help of a private investigator.[16] He then filed suit in U.S. federal court and requested that

6. *See infra* Part IV.A.

7. *See infra* Part IV.B.

8. *See infra* Part IV.C.

9. Abbott v. Abbott, 495 F. Supp. 2d 635, 637 (W.D. Tex. 2007), *aff'd*, 542 F.3d 1081 (5th Cir. 2008), *rev'd*, 130 S. Ct. 1983 (2010).

10. *Id.* Mr. Abbott is a British citizen, while Ms. Abbott is a U.S. citizen. Abbott v. Abbott, 542 F.3d 1081, 1082 (5th Cir. 2008), *rev'd*, 130 S. Ct. 1983 (2010). Their son, A.J., was born in Hawaii in 1995. *Abbott*, 495 F. Supp. 2d at 637.

11. *Id.* The Abbotts began their residence in Serena, Chile, in 2002. *Id.*

12. *Abbott*, 495 F. Supp. 2d at 637 (internal quotation marks omitted). The Chilean court granted Mr. Abbott visitation rights in January 2004. *Abbott*, 542 F.3d at 1082. In a November 2004 order, the court granted all custody rights to Ms. Abbott and denied Mr. Abbott's request for custody rights. *Id.* In February 2005, Mr. Abbott's visitation rights were expanded by court order to include visitation for a month during summer vacation. *Id.*

13. *Abbott*, 495 F. Supp. 2d at 637.

14. *See id.* at 638 n.3 (recognizing "the statute does not confer rights distinguishable in any significant way from those conferred by the Chilean court's *ne exeat* order").

15. *Abbott*, 542 F.3d at 1082. Ms. Abbott removed A.J. while motions were pending in the Chilean family court. *Id.*

16. *Id.*

A.J. be returned to Chile because his removal constituted a "wrongful removal" under the Hague Convention, which governs international child abduction.[17] The district court in Texas denied Mr. Abbott's request, finding that the Chilean court's *ne exeat* order did not grant Mr. Abbott custody rights.[18]

This finding proved fatal to Mr. Abbott's contention that A.J.'s removal was "wrongful" under the Hague Convention.[19] The district court emphasized that the Hague Convention establishes two kinds of rights: custody rights and access rights.[20] Only custody rights, the court held, may result in a "wrongful removal" under the Hague Convention and provide a remedy of a court-ordered return to the country of habitual residence.[21] The court also stated that the majority of federal courts deciding similar cases had held that a *ne exeat* order does not constitute a right of custody under the Hague Convention.[22]

The Fifth Circuit affirmed the district court's judgment that *ne exeat* rights are not rights of custody.[23] The Fifth Circuit, like the district court, identified the dispositive question to be whether Mr. Abbott possessed "rights of custody" under the Hague Convention.[24] To answer that question, the court examined the split in the circuits[25] and compared the Second Circuit's decision that *ne exeat* rights are not rights of custody under the Hague Convention with the Eleventh Circuit's decision that a "*ne exeat* right . . . is sufficient to constitute a custody right."[26] The Fifth Circuit also noted disagreement among

17. *Abbott*, 495 F. Supp. 2d at 637–38.

18. *Id.* at 641. However, the court noted in its denial that it "in no way condones Ms. Abbott's action. She clearly violated a proper order of the Chilean court—an order she herself sought." *Id.* at 640–41.

19. *Id.* at 641.

20. *Id.* at 639.

21. *Id.* *See* Hague Convention, *supra* note 3, art. 8–20 (describing the procedures for a return remedy only in those cases where a child's removal is in breach of rights of custody); *infra* Part II.A.2 (discussing Hague Convention).

22. *Abbott*, 495 F. Supp. 2d at 638–39.

23. Abbott v. Abbott, 542 F.3d 1081, 1082 (5th Cir. 2008), *rev'd*, 130 S. Ct. 1983 (2010).

24. *Id.* at 1083.

25. *Id.* at 1084 ("Three federal appellate courts have determined that *ne exeat* orders and statutory *ne exeat* provisions do not create 'rights of custody' under the Hague Convention. One federal appellate court . . . reached the opposite conclusion." (citations omitted)).

26. *Id.* at 1084–86 (describing Croll v. Croll, 229 F.3d 133 (2d Cir. 2000), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010), and Furnes v. Reeves, 362 F.3d 702 (11th Cir. 2004)).

foreign courts on whether *ne exeat* rights are custody rights.[27]

The court emphasized that while the *ne exeat* order gave Mr. Abbott a "veto right over his son's departure from Chile," this "veto right" did not constitute a right to determine where in Chile A.J. should live.[28] In fact, reasoned the Fifth Circuit, the Chilean court expressly denied Mr. Abbott any custody rights by granting all custody rights to Ms. Abbott.[29] The court held that "*ne exeat* rights, even when coupled with 'rights of access,' do not constitute 'rights of custody'" under the Hague Convention.[30] The Fifth Circuit denied Mr. Abbott's return request on the grounds that he held no custody rights and therefore no return right under the Hague Convention.[31] The Supreme Court of the United States granted Mr. Abbott's petition for certiorari to resolve the circuit court split on whether a *ne exeat* right constitutes a right of custody.[32]

II. LEGAL BACKGROUND

Interpretation of treaties has a long history in American jurisprudence.[33] Court precedent instructs that treaty interpretation begins with its text.[34] In the case of international parental abductions, the text to be consulted is that of the Hague Convention. Part II.A, therefore, begins with a discussion of relevant family-law terminology, the Hague Convention, and recent U.S. case law interpreting whether *ne exeat* rights constitute custody rights.[35] Part II.B provides a brief overview of relevant treaty interpretation philosophies—namely, the

27. *Id.* at 1086 (citing *Furnes*, 362 F.3d at 719) (noting that the United Kingdom, Australia, South Africa, and Israel recognize *ne exeat* rights as rights of custody while Canada and France do not).

28. *Id.* at 1087.

29. *Id.*

30. *Id.* The Fifth Circuit found the Second Circuit's reasoning in *Croll* particularly persuasive. *Id.* (emphasizing that the treaty "clearly distinguishes between 'rights of custody' and 'rights of access' and that ordering the return of a child in the absence of 'rights of custody' in an effort to serve the overarching purposes of the Hague Convention would be an impermissible judicial amendment of the Convention").

31. *Id.* at 1087–88. The Fifth Circuit noted, as the district court did, that Ms. Abbott "unquestionably violated [Mr.] Abbott's rights by removing their child from Chile without his consent," but could offer no remedy to Mr. Abbott under the Hague Convention as Mr. Abbott lacked rights of custody. *Id.*

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

33. *See, e.g.*, Ware v. Hylton, 3 U.S. (3 Dall.) 199, 201–09 (1796) (interpreting the 1783 Treaty of Peace between the United States and Great Britain).

34. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 506 (2008) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text.").

35. *See infra* Part II.A.

canons of good faith and liberal interpretation.[36] Part II.B concludes by discussing the mechanics of treaty interpretation in U.S. courts[37] and recent treaty decisions by the post-Rehnquist Supreme Court.[38]

A. Understanding the Terminology and Context of the Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention governs international parental child-abduction law and, therefore, whether a violation of a *ne exeat* right constitutes a wrongful removal and grants a corresponding right of return under the Convention.[39] Before delving into a discussion of the Hague Convention, this section begins with an overview of relevant family-law terminology. This section then describes the Hague Convention framework. The section concludes by discussing the split in U.S. circuit courts over whether *ne exeat* rights constitute custody rights under the Hague Convention.

1. Defining Rights of Custody and Access, as Well as Ne Exeat *Rights, in International Family Law*

A custody right usually connotes a responsibility for daily supervision and care of a child.[40] In the family-law context, Black's Law Dictionary defines custody as "care, control, and maintenance of a child awarded by a court to a responsible adult."[41] A custody right, however, may not always mean either sole physical custody of or decision-making responsibility for a child.[42] Parents may share custody rights. Additionally, a parent without custody rights may have a role in decision making or periodic physical custody of the child.[43] Such rights for the noncustodial parent constitute visitation rights or "rights of access."[44] These synonymous rights[45] generally provide a noncustodial parent with access to the child.[46]

36. *See infra* Part II.B.1.

37. *See infra* Part II.B.2.

38. *See infra* Part II.B.3.

39. Hague Convention, *supra* note 3. The United States recognizes the Hague Convention as binding domestic law, as stated in the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. § 11601 (2006) [hereinafter ICARA].

40. BARBARA STARK, INTERNATIONAL FAMILY LAW: AN INTRODUCTION 182 (2005).

41. BLACK'S LAW DICTIONARY 441 (9th ed. 2009).

42. STARK, *supra* note 40, at 182.

43. *Id.*

44. Visitation or access rights are not to be confused with joint custody rights. *Cf. id.* ("Visitation generally refers to briefer periods of time (during summer vacations, for example), while joint custody refers to a more equal balance of responsibility.").

The exact meaning of such legal terms, however, can vary depending on the national jurisdiction in question or the applicable legal instrument. For example, the Hague Convention provides explanations for both custody and access rights.[47] Although these explanations are not exhaustive definitions of the terms,[48] any court applying the Hague Convention must turn to them.[49] Custody rights, the treaty states, "shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[50] Access rights under the Hague Convention "shall include the right to take a child for a limited period of time to a place other than the child's habitual residence."[51]

A court order or national statute may condition established rights of custody or access. One type of condition is a *ne exeat* right. A *ne exeat* right prevents a person from going beyond the jurisdictional reach of a court unless certain conditions are met or the court grants permission.[52] In the context of family law, a *ne exeat* right prevents a parent from removing a child from a court's jurisdiction.[53] A *ne exeat* provision may be contained in either a court order or conveyed as a statutory right. Chile, for example, establishes a *ne exeat* right through

45. *See* BLACK'S LAW DICTIONARY, *supra* note 41, at 14 (defining access, in the family law context, as "visitation"). *See also* ICARA, 42 U.S.C. § 11602(7) (2006) ("[T]he term 'rights of access' means visitation rights.").

46. *See* BLACK'S LAW DICTIONARY, *supra* note 41, at 1707 (defining visitation as "[a] relative's, [especially] a noncustodial parent's, period of access to a child").

47. *See* Hague Convention, *supra* note 3, art. 5 (defining rights of custody and access).

48. ELISA PÉREZ-VERA, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION 451 (1982) [hereinafter PÉREZ-VERA REPORT] (emphasis added), *available at* http://www.hcch.net/upload/expl28.pdf ("The Convention, following a long-established tradition of the Hague Conference, does not define the legal concepts used by it. However, in this article [5], it does make clear the *sense* in which the notions of custody and access rights are used, since an incorrect interpretation of their meaning would risk compromising the Convention's objects.").

49. *Cf.* Croll v. Croll, 229 F.3d 133, 145 (2d Cir. 2000) (Sotomayor, J., dissenting) ("While traditional American notions of custody rights are certainly relevant to our interpretation of the Convention, the construction of an international treaty also requires that we look beyond parochial definitions to the broader meaning of the Convention, and assess the 'ordinary meaning to be given to the terms of the treaty in their context and in the light of [the Convention's] object and purpose.'" (alteration in original) (quoting Vienna Convention on the Law of Treaties, art. 31.1; May 23, 1969, 1155 U.N.T.S. 331)), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010).

50. Hague Convention, *supra* note 3, art. 5(a).

51. *Id.* art. 5(b).

52. Gonzalez v. Gutierrez, 311 F.3d 942, 947 n.8 (9th Cir. 2002), *abrogated by Abbott*, 130 S. Ct. at 1983.

53. *See* Abbott v. Abbott, 542 F.3d 1081, 1082 n.1 (5th Cir. 2008) ("'*Ne exeat*' is defined in the family law context as '[a]n equitable writ restraining a person from leaving, or removing a child or property from, the jurisdiction.'"), *rev'd*, 130 S. Ct. 1983 (2010).

a statutory provision.[54] This provision requires the non-removing parent's consent prior to a child's removal from Chile by the other parent.[55] This consent is required regardless of whether the removing parent is the custodial parent or a parent with access rights.[56]

2. The Hague Convention

Parental child abduction[57] is governed internationally by the Hague Convention. This multilateral agreement seeks to prevent and remedy the wrongful taking abroad of children by parents or guardians. As a private-law treaty, the Hague Convention provides non-removing parents with enforceable rights to either: (1) in the case of access rights, gain recognition of those rights in a foreign court or, (2) in the case of custody rights, have a child returned to her country of habitual residence.[58] The United States recognizes the Hague Convention as binding domestic law, as stated in the International Child Abduction Remedies Act ("ICARA").[59] United States courts therefore look directly to the treaty's text when reviewing Hague Convention cases.[60] U.S. circuit courts, however, differ in their interpretations of *ne exeat* rights under the Hague Convention.[61]

54. *See* Villegas Duran v. Arribada Beaumont, 534 F.3d 142, 145 n.1 (2d Cir. 2008) (providing an excerpt of the Chilean Minors Law describing the statutory *ne exeat* provision).

55. *See Abbott*, 542 F.3d at 1083–84 & n.4 (describing the Chilean Minors Law to require "that if a non-custodial parent has visitation rights, that parent's authorization is required before the custodial parent can take the child out of the country").

56. *Id.* at 1084 n.4.

57. PAUL R. BEAUMONT & PETER E. MCELEAVY, THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION 1 (1999) (distinguishing this "unilateral removal or retention of children" from third-party or "classic kidnappings" by emphasizing that a parental abductor seeks to "exercise . . . sole care and control . . . in a new jurisdiction" rather than obtaining "material gain"). "Child abduction," sometimes described as legal kidnapping, is a term of art in international private law and is distinguishable from third-party, or non-parental, kidnapping. *Id.* at 1, 3.

58. *See infra* notes 66–73 and accompanying text.

59. ICARA, 42 U.S.C. § 11603(a) (2006) ("The courts of the States and the United States district courts shall have concurrent original jurisdiction of actions arising under the Convention."); *id.* § 11601(b)(2) ("The provisions of this chapter are in addition to and not in lieu of the provisions of the Convention.").

60. *Id.* § 11601(b)(4) ("The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.").

61. *See infra* Part II.A.2.b.

a. The Hague Convention Is a Collaborative Framework to Resolve the Problem of Child Abduction and a Mechanism to Return Wrongfully Removed Children

The Hague Convention seeks to deter and remedy international child abduction and to ensure access in the event of lawful removal. Specifically, the Hague Convention's objectives are to "secure the prompt return of children wrongfully removed to or retained in any Contracting State; and . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States."[62] The Hague Convention's private rights—that is, the individual right to prompt return and respect for established custody and access rights—only apply among the Convention's contracting or member states.[63]

The Hague Convention provides a framework for foreign respect and restoration of rights rather than re-adjudication of the merits.[64] This framework envisions "a system of close co-operation among [member states'] judicial and administrative authorities."[65] Courts

62. Hague Convention, *supra* note 3, art. 1. As described in the Convention's preamble, respect for these private parental rights is premised on the "interests of children" and the need "to protect children internationally from the harmful effects of their wrongful removal or retention." *Id.* pmbl. The Hague Convention's development coincided with a changing familial dynamic worldwide. BEAUMONT & MCELEAVY, *supra* note 57, at 2 (describing child abduction as a "late twentieth century" issue resulting from increased personal mobility, international marriages and relationships, and subsequent divorces, as well as a general "breakdown in traditional family structure").

63. Currently, there are eighty-seven member states to the Hague Convention. *Status Table*, Hague Convention, HAGUE CONF. ON PRIVATE INT'L LAW, http://www.hcch.net/index_en.php?act=conventions.status&cid=24 (last visited Nov. 15, 2011). These members include both the United States and Chile. *Id.* The United States signed the Convention in 1981, and ratified it in 1988, the same year the Convention entered into force for the United States. *Id.* Chile acceded to the Hague Convention in 1994, and the treaty became law the same year. *Id.* The United States accepted Chile's accession in 1994 (as required by Article 38 of the Hague Convention). *Id.* In the event an abduction occurs to or from a non-member state, public-law treaties may provide recourse for parents if the involved countries are members to those public-law treaties. The most relevant public-law treaty is the United Nations Convention of the Rights of the Child, which imposes a duty on states, as described above, to "take measures to combat the illicit transfer and non-return of children abroad." U.N. Convention on the Rights of the Child art. 11, Nov. 20, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1448 (1989).

64. *See, e.g.*, ICARA, 42 U.S.C. § 11601(b)(4) (2006) ("The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.").

65. PÉREZ-VERA REPORT, *supra* note 48, at 435. A survey determined that at least 1,610 Hague Convention applications were processed in 2003. HAGUE CONF. ON PRIVATE INT'L LAW, A STATISTICAL ANALYSIS OF APPLICATIONS MADE IN 2003 UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 7, 10–11 (2007), *available at* http://www.hcch.net/upload/wop/abd_

hearing Hague Convention cases do not redistribute parental rights previously established in another member state but instead consider whether (1) a child's removal was wrongful and therefore requires return of the child to her habitual country of residence, or (2) parental rights have been violated through a child's removal or retention abroad.[66]

A child's removal is considered wrongful when the removal is in violation of custody rights that "were actually exercised, either jointly or alone, or would have been . . . but for the removal or retention."[67] Custody rights are defined as rights "relating to the care of the person of the child and, in particular, the right to determine the child's place of residence."[68] Such custody rights may result "by operation of law or by reason of a judicial or administrative decision."[69]

In contrast, removal by a custodial parent in violation of the non-removing parent's access rights does not constitute a wrongful removal under the Hague Convention; the treaty specifically limits wrongful removal to a breach of custody rights.[70] The Hague Convention defines access rights as including "the right to take a child for a limited period of time to a place other than the child's habitual residence."[71] The Convention seeks to protect these rights through member-state cooperation and recognition of established access rights.[72] Prompt

pd03e1_2007.pdf (describing questionnaire responses from fifty-eight member states). Of these 1,610 applications, approximately 1,355 were for return of a child and 255 were for access to a child. *Id.* at 10–11. In contrast, at least 1,280 applications were processed in 1999, with approximately 1,060 return applications and 220 access applications. *Id.* at 7, 10–11 (note that only thirty-nine member states responded in the 1999 survey). The scope of abductions and their resolutions is unknown. *See* BEAUMONT & MCELEAVY, *supra* note 57, at 1–2 ("The true extent of the phenomenon has been, and remains, a point of some conjecture.").

66. *See* PÉREZ-VERA REPORT, *supra* note 48, at 429 ("[S]ince one factor characteristic of the situations under consideration consists in the fact that the abductor claims that his action has been rendered lawful by the competent authorities of the State of refuge, one effective way of deterring him would be to deprive his actions of any practical or juridical consequences. The Convention, in order to bring this about, places at the head of its objectives the restoration of the *status quo*, by means of 'the prompt return of children wrongfully removed to or retained in any Contracting State.'" (quoting Hague Convention, *supra* note 3, art. 1(a))).

67. Hague Convention, *supra* note 3, art. 3(a), (b).

68. *Id.* art. 5(a).

69. *Id.* art. 3.

70. *See id.* (defining as "wrongful" the removal or retention of a child that occurs "in breach of rights of custody" but not in breach of access rights).

71. *Id.* art. 5(b).

72. *See id.* art. 21 (describing procedures for securing "effective exercise" of access rights, binding member states to "the obligations of co-operation . . . to promote the

return of a child is not required by the treaty, however, when removal or retention only violates access rights.[73]

Custody and access rights are the only terms given some explanation in the Hague Convention. The explanatory report for the Hague Convention, known as the Pérez-Vera Report, describes such an approach as consistent with treaties developed by the Hague Conference on Private International Law.[74] This same report suggests that the definitions for custody and access rights are not exhaustive.[75] *Ne exeat* rights, however, are not mentioned in the Hague Convention.

b. United States Circuit Courts Differ on Whether Ne Exeat *Rights Constitute Custody Rights Under the Hague Convention*

Over the last decade, five U.S. circuit courts examined, without achieving unanimity, whether *ne exeat* rights constitute custody rights under the Hague Convention. Four of the circuit courts concluded that *ne exeat* rights do not constitute custody rights,[76] while the fifth court determined that *ne exeat* rights are custody rights under the Hague Convention.[77] The Second Circuit's *Croll v. Croll* decision is the leading decision for courts holding that *ne exeat* rights are not custody rights, while the Eleventh Circuit's *Furnes v. Reeves* decision represents the alternative view that *ne exeat* rights are custody rights.

peaceful enjoyment of access rights," and requiring member states to remove "obstacles to the exercise" of access rights).

73. *See id.* art. 3 (limiting wrongful removal, which requires prompt return of child, to a breach of custody rights).

74. PÉREZ-VERA REPORT, *supra* note 48, at 451 ("The Convention . . . does not define the legal concepts used by it. However, in this article [5], it does make clear the sense in which the notions of custody and access rights are used, since an incorrect interpretation of their meaning would risk compromising the Convention's objects.").

75. *Id.* at 452 (stating that "[t]he Convention seeks to be more precise by emphasizing," in the definition of custody rights, that the right to determine a child's place of residence is "an example of . . . 'care'" while the definition for access rights does not exclude other methods of exercising access rights).

76. Abbott v. Abbott, 542 F.3d 1081, 1082 (5th Cir. 2008) (holding that *ne exeat* rights are not rights of custody), *rev'd*, 130 S. Ct. 1983 (2010); Fawcett v. McRoberts, 326 F.3d 491, 500 (4th Cir. 2003) (same), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010); Gonzalez v. Gutierrez, 311 F.3d 942, 949 (9th Cir. 2002) (same), *abrogated by Abbott*, 130 S. Ct. at 1983; Croll v. Croll, 229 F.3d 133, 139–40 (2d Cir. 2000) (same), *abrogated by Abbott*, 130 S. Ct. at 1983.

77. Furnes v. Reeves, 362 F.3d 702, 714 (11th Cir. 2004) (holding that a *ne exeat* right provides a custody right).

1. Croll v. Croll*:* Ne Exeat *Rights Are Not Rights of Custody Under the Hague Convention*

Croll began with the separation and divorce of two U.S. citizens living in Hong Kong.[78] A Hong Kong court issued a custody order that included a *ne exeat* clause.[79] Ms. Croll violated this clause when she took her daughter from Hong Kong to New York without Mr. Croll's consent.[80] The Second Circuit held that the *ne exeat* clause did not grant Mr. Croll the custody right necessary under the Hague Convention to require his daughter's prompt return to Hong Kong.[81]

The *Croll* court based this holding primarily on the treaty's text and the drafters' intent. The court observed that "[n]othing in the Hague Convention suggests that the drafters intended anything other than [an] ordinary understanding of custody," which in turn suggested to the circuit court that the ordinary United States' understanding of traditional custody rights would apply.[82] The court emphasized that the travel restriction imposed by the *ne exeat* order was insufficient to constitute a custody right in the non-custodial parent, since a Hong Kong court awarded "custody care and control *solely* to the mother."[83] The Second Circuit examined the Hague Convention's ratification history and found that the drafters' intent was consistent with the court's own determination that *ne exeat* rights are not custody rights.[84] The Fourth, Fifth, and Ninth Circuits looked to *Croll* for guidance and were persuaded similarly that a "single veto power" coupled with access rights was insufficient to constitute a custody right under the Hague Convention.[85]

78. *Croll*, 229 F.3d at 135.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 138-39 (relying on U.S. court cases and "American lexical sources").

83. *Id.* at 139–40 (emphasis added) (internal quotation marks omitted). Then-Circuit Judge Sotomayor dissented from this decision, noting in particular, "[i]nterpreting the text of the Convention in light of its object and purpose, and taking into account the relevant case law in this area, I reach the opposite conclusion. In my view, the majority seriously misconceives the legal import of the *ne exeat* clause and, in so doing, undermines the Convention's goal of 'ensur[ing] that rights of custody . . . under the law of one Contracting State are effectively respected in the other Contracting States.'" *Id.* at 144 (Sotomayor, J., dissenting) (quoting Hague Convention, *supra* note 3, art. 4).

84. *Id.* at 141–42 (majority opinion) (examining materials from the drafting chair, the official history, and the Department of State's transmittal of the treaty to the U.S. President).

85. Abbott v. Abbott, 542 F.3d 1081, 1087 (5th Cir. 2008), *rev'd*, 130 S. Ct. 1983 (2010); Fawcett v. McRoberts, 326 F.3d 491, 500 (4th Cir. 2003), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010); Gonzalez v. Gutierrez, 311 F.3d 942 (9th Cir. 2002), *abrogated by Abbott*, 130 S. Ct. at 1983.

2. Furnes v. Reeves*:* Ne Exeat *Rights Are Custody Rights Under the Hague Convention*

The Eleventh Circuit disagreed with the reasoning of the other circuit courts and instead determined that *ne exeat* rights do constitute custody rights under the Hague Convention.[86] In *Furnes v. Reeves*, the Eleventh Circuit decided that the characterization of a *ne exeat* right as "a mere veto right" was not fatal to finding a *ne exeat* right to be a custody right under the Hague Convention.[87] Under a settlement agreement, the parents in *Furnes* shared a "joint parental responsibility," where the American mother had physical custody of and the Norwegian father had regular access to their daughter during vacations and holidays.[88] Additionally, under Norwegian law, joint parental responsibility includes the right to make decisions regarding some aspects of a child's care and specifically requires the consent of both parents for a child to move abroad.[89] The Eleventh Circuit interpreted the latter right as constituting a *ne exeat* right for the Norwegian father, which the mother violated when she removed the daughter to the United States without the father's permission.[90]

After assessing the facts of the case, the Eleventh Circuit determined that the *ne exeat* right constituted a custody right under the Hague Convention. To the circuit court, the father's ability to determine whether his daughter lived outside of or within Norway was sufficient to qualify as a custody right under the Hague Convention.[91] The Eleventh Circuit disagreed with *Croll*'s reasoning because, consistent with the Hague Convention's definition of custody rights, a *ne exeat* right is not a mere limitation or veto right against foreign travel but rather a parental right to determine a child's place of residence within or outside the relevant country.[92]

Finally, the Eleventh Circuit also rejected *Croll*'s reasoning that *ne exeat* rights contravene the purpose of the Hague Convention because

86. *See* Furnes v. Reeves, 362 F.3d 702, 716, 719 (11th Cir. 2004) (holding that a *ne exeat* right provides a custody right and rejecting the *Croll* decision).

87. *Id.* at 716 (internal quotation marks omitted).

88. *Id.* at 706–07.

89. *Id.* at 707–08.

90. *Id.* at 714.

91. *Id.* (explaining that "violation of a *single* custody right suffices to make removal of a child wrongful," and as long as the parent possesses at least one custody right, "a parent need not have 'custody' of the child to be entitled to return of his child under the Convention").

92. *Id.* at 719–20.

they may result in return of a child to a non-custodial parent.[93] The purpose of the Hague Convention, the Eleventh Circuit observed, "is to prevent the international abduction of children" and *ne exeat* rights as custody rights are consistent with that purpose.[94] In contrast to previous circuit court decisions, the Eleventh Circuit ultimately held that the parental right to weigh in on a decision relating to a child's place of residence, even if in the form of a *ne exeat* right, was sufficiently related to the child's care to qualify as a custody right under the Hague Convention.[95]

B. Treaty Interpretation in the United States

Treaty interpretation in the United States involves constitutional considerations, philosophical differences, and use of basic interpretation tools. The Constitution grants treaties the force of federal law[96] and establishes the judicial branch as the primary authority to interpret treaties.[97] Once a treaty becomes U.S. law,[98] any private rights conveyed by that treaty may be enforced through litigation.[99] Although the creation of a treaty and its entry into U.S. law is under the authority of the political branches, courts interpret treaty language and apply these interpretations to the relevant case or controversy.[100]

93. *Id.* at 720–21.

94. *Id.* at 721.

95. *Id.* at 716.

96. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . . ."); *see also* Foster v. Nielson, 27 U.S. (2 Pet.) 253, 314 (1829) ("Our constitution declares a treaty to be the law of the land.").

97. U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . ."); *see also* Ware v. Hylton, 3 U.S. (3 Dall.) 199, 239 (1796) ("[T]he courts, in which the cases arose, were the only proper authority to decide, whether the case was within this article of the treaty, and the operation and effect of it.").

98. Treaties can be either self-executing or non-self-executing, which affects how they become U.S. law. A self-executing treaty automatically has the force of law when the treaty enters into force, which means that the treaty itself becomes U.S. law. *See* Medellin v. Texas, 552 U.S. 491, 504–05 (2008) (recognizing self-executing treaties as binding federal law). A non-self-executing treaty requires that Congress pass a statute to implement the terms of the treaty, which means that the statute is U.S. law rather than the treaty itself. *See id.* at 505–06 (recognizing that non-self-executing treaties cannot "create[] binding federal law in the absence of implementing legislation").

99. Maiorano v. Balt. & Ohio R.R., 213 U.S. 268, 272–73 (1909) ("A treaty . . . is the supreme law of the land, binding alike National and state courts, and is capable of enforcement, and must be enforced by them in the litigation of private rights.").

100. U.S. CONST. art. II, § 2, cl. 2; art. III, § 2, cl. 1.

Despite designating the judicial branch as the final authority on treaty interpretation, the Constitution provides no set approach to that interpretation.[101] Various philosophies of interpretation have guided U.S. treaty jurisprudence throughout the country's history.[102] However, certain guiding principles of interpretation—that is, certain basic mechanics or tools—remain consistent.[103] This section begins by describing, in Part II.B.1, the canons of good faith and liberal interpretation, which were the dominant treaty interpretation philosophy until the mid-twentieth century. Part II.B.2 discusses the mechanics of treaty interpretation. Part II.B.3 gives an overview of the post-Rehnquist Court's first three treaty-interpretation cases.

1. A Purposive Approach to Treaties: The Canons of Good Faith and Liberal Interpretation

There is no single philosophy guiding U.S. treaty interpretation: U.S. Supreme Court cases instead reference a number of different philosophies.[104] One of these philosophies is the philosophy of good faith and liberal interpretation, which influenced treaty interpretation throughout the nineteenth century and dominated treaty jurisprudence in the first half of the twentieth century[105] before seemingly dying out in the latter half of the twentieth century.

The canons of good faith and liberal interpretation provide a "prudential norm" to guard against judicial treaty breaches.[106] Under

101. *See* David J. Bederman, *Revivalist Canons and Treaty Interpretation*, 41 UCLA L. REV. 953, 957 (1994) [hereinafter Bederman, *Revivalist Canons*] (emphasizing that "no rules of treaty interpretation . . . are mandated by the Constitution itself, or are legitimately derived directly from constitutional allocations of authority").

102. *See infra* Part II.B.1.

103. *See infra* Part II.B.2.

104. Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. CIN. L. REV. 1243, 1247 (2005) ("[T]he Supreme Court lacks a coherent doctrine for interpreting treaties."). Examples of treaty interpretation approaches include emphasizing executive deference. *See, e.g.,* Hamdan v. Rumsfeld, 548 U.S. 557, 718–19 (2006) (Thomas, J., dissenting) ("But where, as here, an ambiguous treaty provision . . . is susceptible of two plausible, and reasonable, interpretations, our precedents require us to defer to the Executive's interpretation.").

105. *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 294 (1933) (noting that liberal construction of treaty obligations and good-faith considerations are principles "consistently recognized and applied by this Court"); Chew Heong v. United States, 112 U.S. 536, 540 (1884) ("Treaties of every kind . . . are to receive a fair and liberal interpretation, according to the intention of the contracting parties, and are to be kept in the most scrupulous good faith." (citations and internal quotation marks omitted)).

106. Michael P. Van Alstine, *The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection*, 93 GEO. L.J. 1885, 1932 (2005) [hereinafter Van Alstine, *Death of Good Faith*] ("If a court construes the domestic-law incidents of a treaty in a manner consistent with its

the liberal-interpretation canon, courts favor an interpretation of a treaty that is more, rather than less, protective of the rights laid out by the treaty.[107] Similarly, the good-faith doctrine recognizes that the unique nature of treaties requires courts to consider obligations to treaty partners and to interpret internationally-agreed-upon text as distinct from domestic legal understandings.[108] Liberal interpretations undertaken in good faith were intended to limit judicial breaches of international obligations.[109]

The canons of good faith and liberal interpretation focus on three key elements. First, these canons emphasize that interpretation should consider the "objects and purposes" of the treaty's member states.[110] Second, good faith and liberal interpretation recognize that reciprocity and equal obligation exist among member states.[111] Third, these interpretative canons reject strict adherence to the text at the expense of breaches in international obligations.[112] By recog-

international law obligations, no violation occurs. But . . . if the interpretation misfires, it is the court's action (not the international conduct of the executive branch) that breaches the treaty.").

107. *See* Shanks v. Dupont, 28 U.S. (3 Pet.) 242, 249 (1830) ("If the treaty admits of two interpretations, and one is limited, and the other is liberal; one which will further, and the other exclude private rights; why should not the most liberal exposition be adopted?"). Fifty years after *Shanks*, *Hauenstein v. Lynham* described *Shanks* as the "settled rule" when it virtually reiterated this *Shanks* language on liberal interpretation. 100 U.S. 483, 487 (1879).

108. *See In re* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 68 (1821) ("[The arguments] embrace the interpretation of a treaty which we are bound to observe with the most scrupulous good faith, and which our Government could not violate without disgrace, and which this Court could not disregard without betraying its duty. It need not be said, therefore, that we feel the responsibility of our stations on this occasion . . . ."). *See also* Van Alstine, *Death of Good Faith*, *supra* note 106, at 1888 (observing that this doctrine "served to remind courts of the special international law origins of treaties, of their fundamental difference with purely domestic legal norms, and of the need to show sensitivity for the views of our nation's treaty partners").

109. *See* Tucker v. Alexandroff, 183 U.S. 424, 437 (1902) ("As treaties are solemn engagements entered into between independent nations for the common advancement of their interests and the interests of civilization, . . . they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity . . . .").

110. Rocca v. Thompson, 223 U.S. 317, 331–32 (1912) (recognizing that treaties "are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes" of the member states).

111. *See, e.g.*, Factor v. Laubenheimer, 290 U.S. 276, 293 (1933) ("Considerations which should govern the diplomatic relations between nations, and the good faith of treaties, as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between.").

112. *See* United States v. Yen Tai, 185 U.S. 213, 220 (1902) ("[T]he court ought to hesitate to adopt any construction of the treaty that would tend to defeat the object each [member] had in view."). *See also* Michael P. Van Alstine, *Treaties in the Supreme Court, 1901–1945*, *in* INTERNATIONAL LAW IN THE U.S. SUPREME COURT 191, 213 (David L. Sloss

nizing that treaties "are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes" of the member states,[113] the Court embraced an interpretive philosophy that included consideration of international obligations and purpose, as well as treaty text and drafter intent.[114]

Reference to treaty objects and purposes often signaled the Court's use of good faith and liberal interpretation. For example, in *United States v. Yen Tai*, the Court cautioned against "adopt[ing] any construction of the treaty that would tend to defeat the object each [member state] had in view."[115] Similarly, *Sullivan v. Kidd* recognized that treaties "are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties."[116] By 1931, the Court called liberal interpretation "the familiar rule" that "is not necessary to invoke" when emphasizing that "regard should be had to the purpose of [a t]reaty."[117] This purposive approach was termed an "accepted canon" by the Court in the 1940 decision *Bacardi Corp. of America v. Domenech*.[118]

Subsequent international law integrated aspects of good faith and a purposive approach to treaty interpretation. Article 31 of the Vienna Convention on the Law of Treaties states that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[119] The Vienna Convention, while not ratified by the United States,[120] "represents generally accepted principles . . . the United States has also appeared willing to accept . . . de-

et al. eds., 2011) [hereinafter Van Alstine, *Treaties in the Supreme Court*] (observing that the "practical consequence of . . . liberal interpretation . . . was a profoundly flexible approach that was open to the broader purposes of a treaty and was not mindlessly bound to its text").

113. *Rocca*, 223 U.S. at 331–32.

114. Van Alstine, *Treaties in the Supreme Court*, *supra* note 112, at 213.

115. *Yen Tai*, 185 U.S. at 220.

116. 254 U.S. 433, 439 (1921).

117. *See* Santovincenzo v. Egan, 284 U.S. 30, 37, 40 (1931) (noting the proper construction of the treaty language).

118. 311 U.S. 150, 163 (1940).

119. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 331.

120. *The Status of Multilateral Treaties Deposited with the Secretary-General*, Vienna Convention on the Law of Treaties, AUDIOVISUAL LIBRARY OF INT'L LAW, http://untreaty.un.org/cod/avl/ha/vclt/vclt.html.

spite differences of nuance and emphasis."[121] At least one American scholar has suggested that citations to Article 31 by U.S. courts suggest an implicit endorsement of the good-faith canon.[122]

In the United States, however, the purposive approach fostered by good faith and liberal interpretation vanished in the latter half of the twentieth century. In the last seventy years, the Supreme Court used the signal phrase "objects and purposes" only six times. None of these references, however, signaled use of a purposive approach or a return to good faith and liberal interpretation; more often, the references were simply quotes of an earlier case.[123] By the twenty-first century, U.S. scholars lamented the "death of good faith" and liberal interpretation.[124]

2. Mechanics of Treaty Interpretation

Regardless of the philosophic approach applied, interpretation

121. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325 cmt. a (1987) (discussing Articles 31(1) and (3) of the Vienna Convention on Treaties, which are restated in § 325); *see also* Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 VA. J. INT'L L. 281, 294, 299 (1988) (stating that the text of the Vienna Convention was adopted by the United States). *But see* Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 AM. J. COMP. L. 455, 470 n.58 (2010) ("American courts rarely make reference to the Vienna Convention's rules on treaty interpretation.").

122. David Sloss, *United States*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT 504, 518–19, 524 (David Sloss ed., 2009) (identifying nineteen cases referencing Article 31 out of 254 treaty-related cases decided by the U.S. Supreme Court between 1970 and 2006, and categorizing these cases as using good faith).

123. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 346 (2006) ("An international agreement is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in the context and in the light of its object and purpose." (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1986)); Sale v. Haitian Ctrs. Council, 509 U.S. 155, 169 (1993) (discussing the lower court's reading, as supported by the "object and purpose" of the treaty, and referencing the drafters' intent, as represented by the negotiating history), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-626 (1996); United States v. Stuart, 489 U.S. 353, 372–73 (1989) (Scalia, J., concurring) (quoting Rocca v. Thompson, 223 U.S. 317, 332 (1912)); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 711 (1988) (Brennan, J., concurring) (quoting *Rocca*, 223 U.S. at 331–32); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) (quoting *Rocca*, 223 U.S. at 331–32); Maximov v. United States, 373 U.S. 49, 52 (1963) (rejecting petitioner's argument that the treaty's "purposes and objectives" require a certain interpretation).

124. *See* Van Alstine, *Death of Good Faith*, *supra* note 106, at 1885, 1887 (observing that "good faith has died" and that liberal interpretation "has suffered a similar, if less stark, fate").

begins with a treaty's text and its context.[125] The text represents the "shared expectations" of the treaty's member states[126] and therefore is a reasonable basis for interpretation.[127] In reading the text, courts often apply tools from contract law[128] and general rules of construction.[129] Courts also may look beyond the text and consider extratextual sources, such as the negotiation and drafting history, the postratification conduct of treaty member states,[130] the postratification interpretations by the courts of other member states,[131] and similar classes and types of treaties.[132]

Reference to extratextual sources recognizes the unique nature of treaties and is well-established in Supreme Court treaty jurisprudence.[133] The use of extratextual sources ensures a better understanding of U.S. legal obligations to other treaty member states and

125. *See Schlunk*, 486 U.S. at 699 (stating that treaty interpretation begins with the treaty's text and "the context in which the written words are used" (quoting Société Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 534 (1987)) (internal quotation marks omitted)).

126. Olympic Airways v. Husain, 540 U.S. 644, 650 (2004) (quoting Air France v. Saks, 470 U.S. 392, 399 (1985)) (internal quotation marks omitted).

127. *Cf. In re* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 72 (1821) ("[T]this Court is bound to give effect to the stipulations of the treaty in the manner and to the extent which the parties have declared, and not otherwise.").

128. *See, e.g.*, *Société Industrielle Aérospatiale*, 482 U.S. at 533 ("In interpreting an international treaty, we are mindful that it is in the nature of a contract between nations, to which general rules of construction apply." (citations and internal quotation marks omitted)). *But see* E. Airlines, Inc. v. Floyd, 499 U.S. 530, 535 (1991) (rejecting exact similarity between treaty and contract law by recognizing that "treaties are construed more liberally than private agreements" (quoting *Saks*, 470 U.S. at 396) (internal quotation marks omitted)).

129. *See, e.g.*, *Schlunk*, 486 U.S. at 700 (stating that "general rules of construction may be brought to bear on difficult or ambiguous passages" in treaty interpretation).

130. Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996) ("Because a treaty ratified by the United States is not only the law of this land, but also an agreement among sovereign powers, we have traditionally considered as aids to its interpretation the negotiating and drafting history (*travaux préparatoires*) and the postratification understanding of the contracting parties." (citation omitted)).

131. *Husain*, 540 U.S. at 658 (Scalia, J., dissenting) ("When we interpret a treaty, we accord the judgments of our sister signatories 'considerable weight.'" (quoting *Saks*, 470 U.S. at 404)).

132. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 633 (2006) (using Article 75 of Protocol I to the Geneva Conventions of 1949 to define a phrase used in Article 3 of the Geneva Convention (III) Relative to the Treatment of Prisoners of War).

133. *See, e.g.*, Choctaw Nation of Indians v. United States, 318 U.S. 423, 431–32 (1943) ("[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties.").

prevents judicial breaches of treaty obligations.[134] Numerous rationales support the use of extratextual sources and explain why such sources inform the U.S. legal obligation. For example, courts rely on a treaty's drafting history to better understand member-state intent at the time the treaty was written.[135] Similarly, courts give "great weight" to the executive branch's interpretations of treaty provisions.[136] Foreign judicial decisions also help U.S. courts to understand how a treaty is subsequently interpreted by member states.[137] While not dispositive, these foreign decisions may provide guidance on how other member states interpret the treaty, which in turn gives further context for how the treaty should be interpreted by a U.S. court.[138]

Despite the importance of extratextual sources to treaty interpretation, the last thirty years have seen a debate in the Supreme Court about whether reference to extratextual sources is triggered only by ambiguous text.[139] The reasoning advanced in cases such as *Chan v. Korean Air Lines, Ltd.*[140] resembled both a textualist approach to statutory interpretation and the approach put forth by the Vienna Convention on the Law of Treaties.[141] Specifically, *Chan* stated that inter-

134. *Cf.* Medellin v. Texas, 552 U.S. 491, 507 (2008) ("Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the postratification understanding' of signatory nations.").

135. *Saks*, 470 U.S. at 400 ("In interpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation.").

136. Kolovrat v. Oregon, 366 U.S. 187, 194 (1961). The executive branch perspective provides insight both into the member states' intent at the time of drafting and, through the executive branch's postratification conduct, into the member states' subsequent interpretation of the treaty. *Cf.* Van Alstine, *Death of Good Faith*, *supra* note 106, at 1943–44 (recognizing that respect for executive branch interpretations "is properly directed not at the formal content of the law, but rather at the international implications of particular interpretive outcomes").

137. *Cf.* Olympic Airways v. Husain, 540 U.S. 644, 658 (2004) (Scalia, J., dissenting) (recognizing that the Court "accord[s] the judgments of our sister signatories considerable weight" and such respect is relevant as the foreign courts "adopted [the treaty] jointly" with the United States (citation and internal quotation marks omitted)).

138. *Id.*

139. *Compare* Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180 (1982) (recognizing that "[t]he clear import of treaty language controls" the interpretation), *with* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 136 (1989) (Brennan, J., concurring) (arguing for consideration of the executive branch's view, which "deserves at least to be stated in full, and to be considered without the self-affixed blindfold that prevents the Court from examining anything beyond the treaty language itself").

140. 490 U.S. 122 (1989).

141. *Id.* at 134. The Vienna Convention on the Law of Treaties states that extratextual sources are to be used only when the text is ambiguous or results in an unreasonable interpretation. Vienna Convention on the Law of Treaties, *supra* note 119, art. 32 (recognizing reference to "supplementary means of interpretation, including the preparatory work

pretation begins and ends with the treaty's text, unless that text is ambiguous.[142]

Justice Scalia elaborated on the reasoning for such an approach in his concurrence to *United States v. Stuart*.[143] He emphasized that a treaty's members "carefully framed and solemnly ratified expression of [their] intentions and expectations" in the treaty's text.[144] Thus, in Justice Scalia's opinion, unambiguous treaty text expresses the parties' intentions, and ambiguous text is the only "appropriate" reason "to give authoritative effect to extratextual materials."[145]

Similarly, Justice Blackmun indicated in his dissenting opinion in *Sale v. Haitian Centers Council, Inc.* that reference to a particular extratextual source—specifically a treaty's negotiating history—"is a disfavored alternative of last resort, appropriate only where the terms of the document are obscure or lead to 'manifestly absurd or unreasonable' results."[146]

Yet the same cases, as well as other contemporaneous cases, offer a divergent perspective. The *Stuart* majority, in fact, noted that extratextual sources "often assist us in giving effect to the intent of the Treaty parties."[147] Two months later in his *Chan* concurrence, Justice Brennan cautioned against blind allegiance to the treaty's text alone.[148] The Court also recognized the importance of extratextual sources in *Air France v. Saks*, in which the Court noted that "[i]n in-

of the treaty" only when a textual reading leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable"). *But see id.* art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.").

142. *Chan*, 490 U.S. at 134–35.

143. 489 U.S. 353, 371 (1989) (Scalia, J., concurring).

144. *Id.*

145. *Id.* at 373.

146. 509 U.S. 155, 194–95 (1993) (Blackmun, J., dissenting) (citing Vienna Convention on the Law of Treaties, *supra* note 119, art. 32), *superseded by statute*, Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA"), Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-626 (1996). Similarly, *United States v. Alvarez-Machain* rejected consideration of extratextual sources when the relevant treaty was silent on whether certain extradition provisions applied. 504 U.S. 655, 664–66 (1992) (observing that, although pertinent language was drafted by legal scholars for possible use in the relevant treaty, there is no text specifically addressing the respondent's argument).

147. *Stuart*, 489 U.S. at 366 (citing Sumitomo Shoji Am. v. Avagliano, 457 U.S. 176, 185 (1982) (highlighting extratextual sources, "such as a treaty's ratification history and its subsequent operation").

148. *See* Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 136 (1989) (Brennan, J., concurring).

terpreting a treaty it is proper, of course, to refer to the records of its drafting and negotiation."[149]

Other contemporaneous cases, such as *Volkswagenwerk Aktiengesellschaft v. Schlunk*,[150] did little to clarify whether textual ambiguity is necessary for reference to extratextual sources. *Volkswagenwerk* stated that treaty interpretation begins with the treaty's text and "the context in which the written words are used," but left unsaid what constitutes "context."[151] Adding confusion, the Court went on to say that "[o]ther general rules of construction may be brought to bear on difficult or ambiguous passages" and subsequently referenced the relevant treaty's drafting history.[152]

Recent cases are similarly ambivalent about whether ambiguity is a trigger for use of extratextual sources in treaty interpretation. In *Medellin v. Texas*, the Court noted that treaty interpretation begins with the treaty's text.[153] The Court then stated that, because of a treaty's unique nature, it considers extratextual sources to aid its interpretation.[154] Yet no mention was made of textual ambiguity as a trigger for referencing these extratextual sources. When subsequently discussing the relevant treaty, however, the Court acknowledged that the treaty's text was silent on the question before it.[155] This acknowledgement could suggest the Court's tacit acceptance of ambiguous text. The Court's failure to clearly state the need for ambiguity as a trigger for reference to extratextual sources, however, left open the debate over ambiguity.

149. 470 U.S. 392, 400 (1985).

150. 486 U.S. 694 (1988).

151. *Id.* at 699 (quoting Société Industrielle Aérospatiale v. U.S. Dist. Court for the S. Dist. of Iowa, 482 U.S. 522, 534 (1987)) (internal quotation marks omitted)).

152. *Id.* at 700. This broad description is echoed by the Court in *Eastern Airlines, Inc. v. Floyd* and with the same failure to clarify if such context may be provided by extratextual sources. 499 U.S. 530, 534–35 (1991). The Vienna Convention on the Law of Treaties describes "context for the purpose of the interpretation of a treaty" as including treaty preambles and annexes, as well as "agreement[s] relating to the treaty . . . made between all the parties in connection with the conclusion of the treaty." Vienna Convention on the Law of Treaties, *supra* note 119, art. 31.

153. 552 U.S. 491, 506 (2008) (citing *Saks*, 470 U.S. at 396–97).

154. *Id.* at 507 ("Because a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the negotiation and drafting history of the treaty as well as the postratification understanding of signatory nations." (quoting Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996)) (internal quotation marks omitted)).

155. *Medellin*, 552 U.S. at 507–08. The treaty the Court discussed was the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 325, 500 U.N.T.S. 241 [hereinafter Optional Protocol].

3. Treaty Interpretation in the Post-Rehnquist Court

The post-Rehnquist Supreme Court is in a period of transition following the stable years of the Rehnquist Court.[156] At the same time, the number of treaty cases in the lower courts is increasing.[157] In the initial post-Rehnquist years, the Court undertook three cases that provide insight into the Court's view of treaty interpretation. *Sanchez-Llamas v. Oregon,*[158] *Hamdan v. Rumsfeld,*[159] and *Medellin v. Texas*,[160] though not exclusively treaty-interpretation cases, involved aspects of treaty interpretation relating to private-law treaties[161] and U.S. sovereign obligations to private parties. As a result, these cases exited the realm of "purely" private-law treaty cases—meaning treaties enforcing rights among private parties—to enter the realm of treaty cases implicating sovereign obligations to private parties.

a. Sanchez-Llamas*: Deference to the Executive in Treaty-Enforcement Cases*

Sanchez-Llamas v. Oregon[162] marked the post-Rehnquist Court's first foray into treaty law. The case involved U.S. authorities' failure to allow foreign nationals to notify their consulates upon detention.[163] Such a failure, the foreign national petitioners argued, violated "individually enforceable right[s]"[164] granted by Article 36 of the Vienna Convention on Consular Relations[165] and warranted suppression of

156. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 4 (2007) (observing that the final eleven years of Chief Justice Rehnquist's tenure represented the longest period in U.S. history without changes to the Supreme Court bench).

157. *See* Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 781 (2008) (recognizing the "dramatic proliferation of international treaties").

158. 548 U.S. 331 (2006).

159. 548 U.S. 557 (2006).

160. 552 U.S. at 491.

161. Private law is "[t]he body of law dealing with private persons and their property and relationships." BLACK'S LAW DICTIONARY, *supra* note 41, at 1316. In contrast, public law is "[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself." *Id.* at 1351.

162. *Sanchez-Llamas*, 548 U.S. at 331.

163. *Id.* at 331–32.

164. *Id.* at 342.

165. Art. 36, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. Article 36 provides that for a foreign national detained by authorities, "if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner." *Id.* Additionally, Article 36 states that officials are to inform the detained foreign national of these rights. *Id.*

any statements made while in detention.[166] Additionally, the petitioners argued that the United States is bound by decisions made by the International Court of Justice ("ICJ").[167]

The Court, despite suggesting that the case was not a treaty interpretation case,[168] nevertheless indulged in some interpretation of Article 36 and its application in the United States. For example, the Court began by looking to the treaty's text and noting that the treaty leaves Article 36 implementation to each member state's domestic law.[169] The Court also pointed to the postratification conduct of Vienna Convention member states, and found persuasive the lack of acceptance for the exclusionary rule exhibited by the 139 other member states.[170] Similarly persuasive for the Court was the fact that no other country allowed for judicial remedies of Article 36 violations through domestic courts.[171] Ultimately, however, because the Court saw the case as an issue of treaty enforcement rather than interpretation, it held that whether the United States is bound by ICJ decisions and interpretations is an issue for the executive branch.[172]

Thus, *Sanchez-Llamas* suggested the doctrine of executive deference lives on, at least for private-law treaties implicating sovereign obligations. *Sanchez-Llamas* focused on this doctrine to the exclusion of a purposive approach—there was no concern expressed for the effect of the interpretation on international obligations or any attempt to construe provisions for more liberal protection of individual rights.

b. Hamdan*: Preferencing Drafter Intent, as Demonstrated in Extratextual Sources, Over Executive Deference*

Hamdan v. Rumsfeld[173] encompassed a broad range of legal issues involving the use of military commissions and the laws of war. Hamdan was a Yemeni national who was designated an al Qaeda operative

166. *Sanchez-Llamas*, 548 U.S. at 340.

167. *Id.* at 333–34.

168. *Id.* at 360. The Court, in fact, stated at the beginning of the opinion that it was unnecessary to resolve whether the Vienna Convention grants individuals an enforceable right, although the Court gave some consideration to this issue later in the opinion. *Id.* at 343–44, 347.

169. *Id.* at 343.

170. *Id.* at 343–44.

171. *Id.* at 347.

172. *Id.* Justice Breyer, in his dissent, joined by Justices Stevens and Souter, argued that the Court failed to "rise to the interpretive challenge," which resulted in a de facto interpretation at odds with the Vienna Convention. *Id.* at 365, 398, 386 (Breyer, J., dissenting). Justice Breyer instead argued for an examination of the treaty's text and intent. *Id.* at 379.

173. 548 U.S. 557 (2006).

by U.S. officials and brought before a U.S. military commission.[174] The specific issues of treaty interpretation focused on how to interpret three clauses in Article 3 of the Third Geneva Convention.[175]

Justice Stevens, writing for the majority on the first two of the three clauses under consideration, used a different approach for the interpretation of each of the clauses. First, in rejecting the government's argument that "conflict not of an international nature" did not apply to an al Qaeda operative,[176] the Court looked to the treaty's official commentary and the treaty's previous drafts.[177] The Court determined that the treaty applied to U.S. efforts against al Queda operatives on the basis of the commentary's admonition that the Article 3 scope was to be "as wide as possible."[178]

Second, the Court interpreted the clause "regularly constituted court" and determined that Hamdan's commission deviated from that standard.[179] Since neither the text nor the commentary to the Third Geneva Convention defined a "regularly constituted court," in reaching that conclusion the Court looked to a similar provision contained in a related treaty, the Fourth Geneva Convention, and further described in the official commentary of that related treaty.[180]

Third, Justice Stevens addressed the clause on "judicial guarantees," but his interpretive approach to this clause did not gain the ma-

174. *Id.* at 566–68.

175. *See id.* at 630 (referencing Geneva Convention (III) Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, [1955] 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]). The Convention's three clauses under consideration were "armed conflict not of an international character," "a regularly constituted court," and "all the judicial guarantees which are recognized as indispensable by civilized peoples." *Id.* Treaty interpretation was one issue among many others, including discussion of the Uniform Code of Military Justice and separation of power concerns amidst questions of national security. *See, e.g.*, *id.* at 590 (discussing the history of the military commission in the United States).

176. *Id.* at 630. The government argued that efforts against al Qaeda were "international in scope" and therefore did not constitute a "conflict not of an international character" that falls under Third Geneva Convention Article 3. *Id.* Additionally, the government argued that efforts against al Qaeda did not involve "High Contracting Parties," as required to be considered under the Convention's Article 2. *Id.* at 628–30.

177. *Id.* at 630–31.

178. *Id.* Also persuasive for the Court was the fact that previous drafts of the treaty contained language limiting the scope of application of this article, and that such language was subsequently removed. *Id.*

179. *Id.* at 632.

180. *Id.* The official commentary to the Fourth Geneva Convention recognized "regularly constituted courts" as including ordinary military courts and excluding special tribunals. *Id.* The Court found further support in a related Red Cross treatise, which described such courts as established consistent with a country's existing laws and procedures. *Id.*

jority of the Court.[181] Justice Stevens first noted that, similar to the other two clauses, "[j]udicial guarantees" is not defined in the treaty's text.[182] Contrary to his approach with the other two clauses, however, Justice Stevens did not look to any extratextual aids in interpretation. Instead, he stated that the text must be read as incorporating the "barest . . . trial protections" international law recognizes.[183]

Hamdan demonstrated a variety of interpretive approaches, primarily grounded in the text and reference to extratextual sources. Yet even the philosophy of executive deference was discussed in a dissenting opinion.[184] However, no reference was made to any type of purposive approach or reliance on good faith and liberal interpretation.

c. Medellin: *Consideration of Treaty Text, Drafting History, and Postratification Conduct of Signatories*

Medellin v. Texas, like the cases preceding it, is not a "pure" treaty interpretation case. *Medellin*, like *Sanchez-Llamas*, involved the failure of U.S. authorities to notify a foreign national detainee of his ability to contact his consulate upon arrest.[185] Medellin was one of fifty-one Mexican nationals named in an ICJ decision,[186] which held that these nationals "were entitled to review and reconsideration of their [U.S.] state-court convictions and sentences" because the failure to notify their consulate was a violation of their rights under the Vienna Convention on Consular Relations.[187]

To determine that the ICJ decision was not directly enforceable—that is, self-executing[188]—as domestic law in U.S. state courts, the

181. *Id.* at 566. Justice Kennedy did not join this portion of the opinion. *Id.*

182. *Id.* at 633 (plurality opinion).

183. *Id.*

184. Justice Thomas, in his dissent, which was joined in full by Justice Scalia and in part by Justice Alito, addressed the Court's treaty interpretation on two primary points. First, Justice Thomas found Hamdan's claims under Article 3 of the Geneva Convention to be without merit because deference is owed to the executive branch's interpretation of "armed conflict not of an international character." *Id.* at 718–19 (Thomas, J., dissenting). Second and similarly, Justice Thomas rejected as without merit Hamdan's claims that the Geneva Convention even applies to al Qaeda. *Id.* at 724–25. According to the President, whose authority as the Commander in Chief "this Court is bound to respect," this group is not a "High Contracting Party" to the treaty. *Id.*

185. Medellin v. Texas, 552 U.S. 491, 497–98 (2008).

186. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (Mar. 31).

187. *Medellin*, 552 U.S. at 497–99. The state of Texas argued that Medellin had forfeited his notification right by failing to comply with state rules on challenges to criminal convictions. *Id.* at 501–04.

188. *See supra* note 98.

Court interpreted the provisions of three international agreements.[189] The Court's decision resulted from reading the treaties' text and examining the context surrounding these agreements.[190] The Court refrained from applying a purposive approach and only glancingly referenced any of the relevant treaties' purposes.[191]

Justice Breyer's dissent, however, briefly touched on a purposive approach to treaty interpretation despite arguing that the case posed questions of domestic law only. Specifically, Justice Breyer argued that the Court's reference to treaty text was inappropriate for determining an issue that should only be resolved through reference to domestic case law.[192] Justice Breyer then suggested the Court's resort to treaty interpretation would impact individual rights and have negative consequences in a globalized society.[193] Justice Breyer's observation suggests a consideration of the wider implications of the Court's interpretation; for example, how the interpretation impacts relations with other nations and the global protection of individual rights.

III. THE COURT'S REASONING

In *Abbott v. Abbott*, the Supreme Court of the United States held that a *ne exeat* right granted by a Chilean statute conveyed a Hague Convention custody right to a parent who otherwise held only access

189. *Id.* at 498–99. The three agreements that the Court interpreted were (1) the Optional Protocol Concerning the Compulsory Settlement of Disputes, which requires that Vienna Convention disputes be settled by ICJ, (2) the United Nations Charter, which creates an obligation for member states to comply with ICJ decisions, and (3) the ICJ Statute, which is an annex of the U.N. Charter and sets out the procedures for the ICJ. Optional Protocol, *supra* note 155; U.N. Charter art. 92, 59 Stat. 1051, T.S. No. 993, 3 Bevans 1153 (1945); Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993, 3 Bevans 1153, 1179 (1945) [hereinafter ICJ Statute].

190. *Medellin*, 552 U.S. at 523 ("Nothing in the text, background, negotiating and drafting history, or practice among signatory nations suggests that the President or Senate intended the improbable result of giving the judgments of an international tribunal a higher status than that enjoyed by 'many of our most fundamental constitutional protections.'" (quoting Sanchez-Llamas v. Oregon, 548 U.S. 331, 360 (2006)). This context included (1) the existence of other procedures to enforce ICJ decisions, *id.* at 507–08; (2) the executive branch's view that the relevant provisions were not self-executing, *id.* at 513; (3) separation of powers concerns, *id.* at 516; and (4) the fact that no member states made ICJ decisions directly enforceable in their domestic courts, *id.* at 517.

191. *See id.* at 511 (describing the ICJ Statute's "principal purpose" as dispute arbitration between national governments).

192. *Id.* at 549 (Breyer, J., dissenting).

193. *Id.* at 562 ("Hunting for what the text cannot contain, [the Court] takes a wrong turn. It threatens to deprive individuals . . . of the workable dispute resolution procedures that many treaties . . . provide. In a world where commerce, trade, and travel have become ever more international, that is a step in the wrong direction.").

rights.[194] The majority, in an opinion written by Justice Kennedy and joined by five other Justices,[195] based its conclusion on a broad reading of the Convention's text. The majority noted support for such a conclusion from the Convention's objects and purposes, as well as from extratextual sources of interpretation.[196] In contrast, the dissent, by Justice Stevens,[197] argued that the text of the Convention clearly and unambiguously indicated that *ne exeat* rights are access rights and to find otherwise would contradict the treaty's purpose.[198]

A. The Court Held That Ne Exeat *Rights Constituted Custody Rights Under the Hague Convention*

The Hague Convention's text provided the primary basis for the majority's holding that *ne exeat* rights are custody rights. The Court began with an analysis of the text, then discussed the extratextual sources supporting the Court's reading of the text, and concluded by assessing the treaty's objects and purposes. In the reference to the extratextual sources and purposive analysis, the Court found support for its initial textually based conclusion that *ne exeat* rights are custody rights.

The Court began its analysis by determining that the *ne exeat* right conveyed to Mr. Abbott by a Chilean statute gave him the right to jointly decide his son's country of residence.[199] The Court noted the Convention's recognition of jointly held custody rights.[200] The Court then concluded that, because the Hague Convention defines custody rights to include "the right to determine the child's place of residence," Mr. Abbott's right to determine his son's country of residence through his statutory *ne exeat* right constituted a joint custody right.[201] The Court found dispositive Mr. Abbott's power to determine his son's residence, regardless of whether this power is to decide

194. 130 S. Ct. 1983, 1990 (2010).

195. Chief Justice Roberts and Justices Scalia, Ginsburg, Alito, and Sotomayor joined in Justice Kennedy's opinion. *Id.* at 1987.

196. *See infra* Part III.A.

197. Justices Breyer and Thomas joined Justice Stevens's dissenting opinion. *Abbott*, 130 S. Ct. at 1997 (Stevens, J., dissenting).

198. *See infra* Part III.B.

199. *Abbott*, 130 S. Ct. at 1990 (majority opinion). The Court did not rely on the *ne exeat* order issued by the Chilean court in assessing whether *ne exeat* rights are custody rights, as this judicial order did not contain a parental-consent provision. *Id.* at 1992. The statutorily granted *ne exeat* right does contain a parental-consent provision, which the Court found to be sufficient grounds for its reading of *ne exeat* rights as custody rights. *Id.*

200. *Id.* at 1990 (citing Hague Convention, *supra* note 3, art. 3(a)).

201. *Id.* at 1990–91 (citing Hague Convention, *supra* note 3, art. 5(a)).

a street address or the country where his son lives, because "determine" can be defined as setting limits and boundaries.[202] After recognizing that *ne exeat* rights may not fit within traditional ideas of custody rights, the Court emphasized that a "uniform, text-based approach [to treaty interpretation] ensures international consistency."[203]

The Court next turned to extratextual sources of treaty interpretation and found these sources supported the Court's textually based conclusions. First, the Court discussed the U.S. Department of State's understanding of *ne exeat* rights as rights of custody.[204] After recognizing the "well-established canon of deference" to the executive branch's interpretation, the Court found little reason to reject such deference in this case, where "the diplomatic consequences" of judicial treaty interpretation might include adverse reactions by a treaty's member states and impact U.S. efforts to reclaim children abducted from the United States.[205] Second, the Court discussed the judicial decisions of six Hague Convention member states that all held *ne exeat* rights to be rights of custody under the Hague Convention.[206] In its discussion of member-state interpretation, the Court emphasized again that "'uniform international interpretation of the Convention' is part of the Convention's framework."[207] Third, the Court highlighted scholarly agreement finding an "emerging international consensus" for *ne exeat* rights as custody rights, citing several articles in support of this consensus.[208] Additionally, the Court emphasized that the Pérez-Vera Report detailed a definition of custody rights that encompassed a broad, flexible interpretation of all possible rights of custody and reasoned that *ne exeat* rights fell under such an approach.[209]

Finally, the Court reasoned that the "objects and purposes" of the Hague Convention supported the Court's textually based conclu-

202. *Id.* at 1991.

203. *Id.* According to the Court, such an approach prevents courts from relying on local definitions or legal traditions, such as traditional ideas of custody. *Id.*

204. *Id.* at 1993.

205. *Id.*

206. *Id.* at 1993–94 (referencing cases in Australia, United Kingdom, Israel, Austria, South Africa, and Germany). The Court noted a split in the French courts, but minimized, as factually distinct, the more restrictive view held by Canadian courts that *ne exeat* rights are access rights and not custody rights. *Id.* at 1994.

207. *Id.* at 1993 (quoting ICARA, 42 U.S.C. § 11601(b)(3) (2006)).

208. *Id.* at 1994–95.

209. *Id.* at 1995.

sion that *ne exeat* rights constitute custody rights.[210] The Court recognized that the Convention's purpose is to prevent parents from seeking friendlier forums outside the child's country of habitual residence.[211] The return of wrongfully removed children is a deterrent and remedy for such conduct. Therefore, denial of a return remedy required by other countries—that is, return when the removing parent violated *ne exeat* rights—would run counter to the Convention's purpose.[212]

The Court concluded by noting that a parent with a *ne exeat* right has a custody right and may seek a judicial order requiring the child's return to the country of habitual residence.[213] The Court emphasized, however, that this right to a return remedy is not absolute, as the Convention recognizes certain exceptions.[214] The Court therefore reversed and remanded the case for further consideration by the lower court.[215]

B. The Dissent Argued That the Convention's Text and Purpose Unambiguously Indicate Ne Exeat *Rights Are Access Rights, and Thus Consideration of Extratextual Sources Was Inappropriate*

Justice Stevens's dissent began by distinguishing between Ms. Abbott's and Mr. Abbott's rights: Ms. Abbott has "daily care and control" of the child, while Mr. Abbott has "only visitation rights."[216] The *ne exeat* right, the dissent stated, is a restriction on Ms. Abbott's custodial rights, but does not by itself constitute a custody right.[217] According to the dissent, holding a restriction on custody rights to be a custody right in itself contradicts the Hague Convention's text and purpose.[218]

The dissent then described the context in which the Convention was drafted and concluded that the Convention's purpose was to remedy ongoing abuses by noncustodial parents seeking more favorable forums abroad.[219] In the dissent's view, the drafters determined that a

210. *Id.*

211. *Id.* at 1996.

212. *Id.*

213. *Id.* at 1997.

214. *Id.* These exceptions include if the child would be exposed to physical or psychological harm, or if the child would be placed in an "intolerable situation." *Id.*

215. *Id.*

216. *Id.* (Stevens, J., dissenting).

217. *Id.* at 1997–98.

218. *Id.* at 1998 (discussing the reasoning used by the majority).

219. *Id.*

child should be returned to her country of habitual residence when she was removed by a noncustodial parent; however, no remedy should be granted when a custodial parent removes a child from her country of habitual residence in violation of a non-custodial parent's access rights.[220] Return of a child, the dissent emphasized, was intended only for custodial parents and not parents with mere access rights.[221]

The dissent then turned to the Convention's text to support its reasoning. It began by noting that custody rights are those rights relating to the care of the child,[222] and found dispositive Mr. Abbott's lack of affirmative power to affect his son's care.[223] The majority's "broad reading" of the Convention text, the dissent noted, would destroy the drafters' distinction between custody rights and access rights, while also "convert[ing] every noncustodial parent" in Chile to a custodial parent because of the statutorily granted *ne exeat* provision.[224]

The dissent also rejected the majority's separation of the right to determine a child's "place of residence" from rights relating to the child's care.[225] It reasoned that, under the Pérez-Vera Report, determining a child's place of residence is an example of the rights relating to the child's care.[226] Accordingly, the dissent argued, determining the place of residence was an example of how to assess what types of rights a custodial parent has.[227] Even if this clause is divisible from rights relating to care, the dissent then reasoned, a travel restriction is not an affirmative right to determine a child's place of residence.[228]

Finally, the dissent argued that the Court's reliance on extratextual aids in interpretation, such as the executive branch's interpretation and foreign court decisions, was inappropriate as the Convention's language is unambiguous.[229] Even if the text had not been clear, the dissent reasoned, the Court gave too much weight to the executive branch's interpretation.[230] The dissent similarly cautioned

220. *Id.*
221. *Id.*
222. *Id.*
223. *Id.* at 1999–2000.
224. *Id.* at 2000.
225. *Id.* at 2001.
226. *Id.*
227. *Id.*
228. *Id.*
229. *Id.* at 2006–07.
230. *Id.* at 2007. The dissent noted that great weight is given to the executive branch's interpretation in the following three instances: (1) in avoidance of international conflict,

against "substitut[ing]" foreign court interpretations for U.S. court interpretations when insufficient consensus existed among those foreign court decisions and factual distinctions existed between cases.[231] Thus the dissent found the Court's reading of the Convention to be atextual and at odds with the Convention's purpose.[232]

IV. ANALYSIS

The *Abbott* case provides insight into the post-Rehnquist Court's approach to treaty interpretation. Such insight is needed as increasing globalization and treaties impact domestic law.[233] Among the most interesting aspects of *Abbott* is the seeming revival of the canons of good faith and liberal interpretation, at least for interpretation of purely private-law treaties.[234] Another intriguing aspect of *Abbott* is the Court's rejection of the requirement for textual ambiguity as a trigger to reference extratextual sources of interpretation.[235] These two points suggest an evolution in the Court's treaty-interpretation approach in a global twenty-first century. In addition, the Court also missed an opportunity to distinguish between treaty and statutory interpretation and thereby reduce lower courts' misconceptions on treaty interpretation.[236]

A. Abbott v. Abbott *Suggests a Revival of Good Faith and Liberal Interpretation in Purely Private-Law Treaties*

Abbott represents the first pure treaty-interpretation decision by the post-Rehnquist Supreme Court. This status alone justifies an examination of the Court's approach. The significance of this case is further enhanced by the Court's reference to the Hague Convention's "objects and purposes." The *Abbott* Court's use of this phrase is the first substantive reference in over seventy years to this signal of

(2) when the executive branch's interpretation is particularly illuminating, and (3) if the executive branch's postratification conduct gives greater understanding of ambiguous treaty terms. *Id.* at 2007–08. According to the dissent, however, these circumstances did not apply to the current case. *Id.* at 2008. The dissent also cautioned against "abdicat[ing]" to the executive the judicial responsibility to interpret treaty language. *Id.*

231. *Id.* at 2008–09.

232. *Id.* at 2010.

233. Sullivan, *supra* note 157, at 781 ("As the substantive field covered by treaties grows, the importance of treaties as instruments of domestic law is enhanced.").

234. *See infra* Part IV.A.

235. *See infra* Part IV.B.

236. *See infra* Part IV.C.

good faith and liberal interpretation.[237] Such a reference suggests a revival of these two canons of interpretation or at least an endorsement of a purposive approach to treaty interpretation. A comparison with the post-Rehnquist Court's previous three treaty cases, however, suggests that any revival of good faith and liberal interpretation likely is limited to purely private-law treaty cases.[238]

1. Reviving Good Faith and Liberal Interpretation Through Reference to a Treaty's "Objects and Purposes"

Among the most significant statements in *Abbott*, at least from a treaty-interpretation perspective, is the Court's reference to the Hague Convention's objects and purposes. Specifically, the Court stated that "[a]dopting the view that the Convention provides a return remedy for violations of *ne exeat* rights accords with its *objects and purposes*."[239] In the long history of Supreme Court treaty jurisprudence, such a statement is hardly revolutionary.[240] In fact, such a purposive approach was common in the Court's treaty jurisprudence throughout the first half of the twentieth century.[241] The significance of the *Abbott* Court's statement lies instead in the fact that recent Supreme Court jurisprudence largely ignored good faith and liberal interpretation and rarely referenced a treaty's objects and purposes.[242]

The *Abbott* decision represents the Supreme Court's first substantive reference to a treaty's "objects and purposes" in seventy years. A review of the Supreme Court decisions from 1940 to 2010[243] identifies

237. *See infra* Part IV.A.1.

238. *See infra* Part IV.A.2.

239. Abbott v. Abbott, 130 S. Ct. 1983, 1995 (2010) (emphasis added).

240. *See, e.g.*, Rocca v. Thompson, 223 U.S. 317, 331–32 (1912) (stating that treaties "are to be read in the light of the conditions and circumstances existing at the time they were entered into, with a view to effecting the objects and purposes" of the member states); Sullivan v. Kidd, 254 U.S. 433, 440 (1921) (rejecting a party's argument as "inconsistent with the general purpose and object" of the relevant treaty).

241. *See supra* notes 106–118 and accompanying text.

242. *Cf.* Van Alstine, *Treaties in the Supreme Court*, *supra* note 112, at 215 (noting that the Court referred to "substantive liberal interpretation canon in only one opinion [*United States v. Stuart*, 489 U.S. 353 (1989)] over the last sixty years").

243. The author conducted multiple searches in Westlaw and Lexis to determine whether the Supreme Court referenced a treaty's "objects and purposes" in decisions issued between January 1, 1940, and December 31, 2010. In Lexis, the author used the search terms "object w/2 purpose" to search within (1) the core term (treaty), (2) the treaty interpretation subtopic of the international law topic, and (3) the results of a "treaty interpretation" natural language search. In Westlaw, the author used the terms "object and purpose" to search within (1) the treaties headnote and subtopic of construction and operation, (2) the Supreme Court Cases ("SCT") database, and (3) decisions located by a

only six decisions that reference a treaty's "objects and purposes."[244] Similarly, a targeted review of the last twenty years reveals little effort by the Court to pursue a purposive approach in treaty interpretation.[245] In fact, during the period of 1982 to 2010, references to a treaty's "purpose" are used most often as alternate language for describing the treaty drafters' intent.[246]

The Court referenced a treaty's objects and purposes in six decisions from 1940 to 2010, and those references were marginal and, for the most part, contradictory to good faith and liberal interpretation. Three of these decisions use the language of "objects and purposes" to bolster an argument for textualism in treaty interpretation. For example, the *Sanchez-Llamas* decision quoted the Restatement (Third) of Foreign Relations Law of the United States, which states that a treaty should be interpreted according to its object and purpose, to support the Court's statement that interpretation was based on the terms of the treaty.[247] The *Sanchez-Llamas* Court continued by cautioning against "supplementing" the treaty's terms and cited the historic precedence of *The Amiable Isabella* as authority that a domestic court

Di (treaty) search in the SCT database. As of April 25, 2011, six decisions referenced "objects and purposes."

244. *See* Sanchez-Llamas v. Oregon, 548 U.S. 331, 346 (2006) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1987)); Sale v. Haitian Ctrs. Council, 509 U.S. 155, 169 (1993); United States v. Stuart, 489 U.S. 353, 372–73 (1989) (Scalia, J., concurring) (quoting *Rocca*, 223 U.S. at 332); Volkswagenwerk Aktiengesellschaft v. Schlunk, 486 U.S. 694, 711 (1988) (Brennan, J., concurring) (quoting *Rocca*, 223 U.S. at 331–32); Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) (quoting *Rocca*, 223 U.S. at 331–32); Maximov v. United States, 373 U.S. 49, 52 (1963).

245. David Sloss, in an empirical analysis of U.S. treaty-interpretation approaches, determined that between 1970 and 2006 there were approximately thirty-five U.S. Supreme Court decisions that substantively addressed treaty analysis. *See* Sloss, *supra* note 122, at 514–17. The author of this Note examined the text of those Supreme Court decisions occurring in the last twenty-eight years (1982 to 2010, which included approximately twenty-five cases referenced by Sloss, as well as the 2008 case, *Medellin v. Texas*) to see whether the Court included a discussion of the relevant treaties' purpose and, if yes, how purpose was described by the Court.

246. *See, e.g.*, Medellin v. Texas, 552 U.S. 491, 499 (2008) (referencing the preamble of the Vienna Convention on Consular Rights in order to describe what the drafters intended for the treaty's purpose); Air France v. Saks, 470 U.S. 392, 407 (1985) (describing a provision of the Montreal Agreement as representing the drafters' intent "to speed settlement and facilitate passenger recovery"); El Al Israel Airlines v. Tseng, 525 U.S. 155, 169 (1999) (describing the purpose of the Warsaw Convention as providing uniform rules to govern air transportation claims, as demonstrated by the preamble of the treaty).

247. *Sanchez-Llamas*, 548 U.S. at 346 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 325(1) (1986)) ("The United States ratified the [Vienna] Convention [on Consular Relations] with the expectation that it would be interpreted according to its terms.").

should not "amend" a treaty through its interpretation.[248] Similarly, in *United States v. Stuart*, Justice Scalia cited in his concurrence the principle of effectuating a treaty's "objects and purposes," yet rejected any inquiry that examined the "intent or expectations of the signatories beyond those expressed in the text" when the text was unambiguous.[249] In *Trans World Airlines, Inc.* Justice Stevens followed a similar approach in his dissent, referencing a treaty's "objects and purposes" while arguing for interpretation based on the "literal meaning" of the treaty's text.[250]

The remaining three cases referencing "objects and purposes" also failed to embrace good faith and liberal interpretation. For example, Justice Brennan's concurrence in *Volkswagenwerk Aktiengesellschaft v. Schlunk* focused on the treaty's purpose rather than its text, but still failed to apply the "objects and purposes" reference consistently with good faith and liberal interpretation.[251] Specifically, Justice Brennan used the Court's "duty to read the Convention 'with a view to effecting the objects and purposes of the States thereby contracting'" to question the majority's failure to interpret the treaty consistently with its primary purpose.[252] Yet this reference focused on analyzing the drafters' intent rather than as a flexible, forward-looking standard of interpretation embracing liberal protection of treaty-granted rights. The fifth and earliest of these cases, *Maximov v. United States*, flatly rejected the petitioner's argument to consider the treaty's objects and purposes and instead relied simply on the plain meaning of the text to interpret the treaty.[253] In the last case, *Sale v. Haitian Centers Council, Inc.*, the Court referenced treaty "objects and purposes" when describing the lower court's interpretation of the United Nations Convention Relating to the Status of Refugees.[254] The Court's own inter-

248. *Id.* (quoting The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty." (alteration in original)).

249. *Stuart*, 489 U.S. at 372–73.

250. Trans World Airlines, Inc. v. Franklin Mint Corp., 466 U.S. 243, 262 (1984) (Stevens, J., dissenting). Justice Stevens emphasized that "the literal meaning" takes precedence in treaty interpretation. *Id.*

251. 486 U.S. 694, 711 (1988) (Brennan, J., concurring).

252. *Id.* (quoting Rocca v. Thompson, 223 U.S. 317, 331–32 (1912)).

253. 373 U.S. 49, 52 (1963) (rejecting petitioner's argument that the "purposes and objectives" of the Income Tax Convention between the United States and the United Kingdom require tax exemption for trust beneficiaries because the petitioner's argument would result in an outcome "contrary" to the language of the treaty).

254. 509 U.S. 155, 169 (1993).

interpretation, however, focused on the drafters' intent rather than taking a purposive approach.[255]

In contrast to these six cases, the *Abbott* decision not only referenced the objects and purposes of the Hague Convention but proceeded to take a purposive approach to justify its conclusion that *ne exeat* rights are rights of custody. The Court first based its conclusion on a plain reading of the treaty's text and the drafters' intent.[256] The Court then stated that "[a]dopting the view that the Convention provides a return remedy for violations of *ne exeat* rights accords with its *objects and purposes*."[257] The Court emphasized that treating *ne exeat* rights as custody rights is consistent with the foundational principle of a child's best interests and the Convention's purpose to deter child abductions by parents seeking "a friendlier forum."[258] Ultimately, the Court suggested that the Convention's objects and purposes are to prevent "devastating consequences" to an abducted child.[259] The Court did not reference the Convention itself for this reasoning, though the Convention preamble clearly recognizes the child's interests as "paramount" and seeks to prevent abduction.[260] Instead, the Court focused on the potential harmful consequences to the abducted child in the event the child remains with the abductor.[261]

The Court's purposive approach to the Hague Convention's interpretation is particularly interesting given the understanding of the abduction problem at the time of the Convention's drafting compared with the reality of abductions as it is understood today. The Hague Convention drafters intended to remedy child abductions involving noncustodial fathers taking a child abroad.[262] However, abduction by a custodial mother is now the more frequent abduction scenario.[263] Given these changing circumstances, a purposive approach to treaty interpretation appropriately allowed the Court to consider the evolving family context at the heart of these cases and to address the complication of *ne exeat* rights.

In general, the *Abbott* Court's use of "objects and purposes" suggests a renewed willingness by the Court to consider aspects of the

255. *Id.* at 183.
256. *See supra* Part III.A.
257. Abbott v. Abbott, 130 S. Ct. 1983, 1995 (2010) (emphasis added).
258. *Id.* at 1995–96.
259. *Id.* at 1996.
260. Hague Convention, *supra* note 3, pmbl.
261. *Abbott*, 130 S. Ct. at 1996.
262. BEAUMONT & MCELEAVY, *supra* note 57, at 3–4.
263. *Id.*

good faith and liberal interpretation canons in some treaty cases. This usage, however, is seemingly at odds with the treaty cases immediately preceding *Abbott*, as discussed in the next section.

2. *Any Revival of Good Faith and Liberal Interpretation Is Limited to Purely Private-Law Treaty Cases, and Not Extended to Private-Law Treaty Cases Involving U.S. Sovereign Obligations*

A comparison between *Abbott* and the post-Rehnquist Court's earlier treaty-related cases suggests that any revival of good faith and liberal interpretation is limited to purely private-law treaties. Absent from the previous three cases of *Sanchez-Llamas*, *Hamdan*, and *Medellin* is *Abbott*'s unique reference to "objects and purposes," as well as a purposive approach to interpretation. Although *Medellin* and *Sanchez-Llamas* make minor references to treaty purpose, these decisions focused on member-state intent at the time of drafting rather than assessing whether the treaty's objects and purposes accord with an interpretation more protective of the affected individual's rights and the shared understanding of member states.[264] Also absent from the three previous decisions is a consideration of the potential ramifications of the decision on individual rights, specifically the rights of U.S. citizens abroad.[265] In contrast, *Abbott* embraced a purposive interpretation that protected individual rights and sought uniformity with the international understanding of the treaty.

The distinction in interpretation philosophy is likely premised on the fact that *Abbott* is a "purely" private-law treaty case while its three predecessors involved private-law treaty cases implicating sovereign obligations. A "purely" private-law treaty case requires that a court interpret a treaty to determine the distribution of private individual rights.[266] In contrast, private-law treaty cases implicating sovereign obligations address how government actors or domestic laws affect private individual rights.[267]

264. *See supra* Parts II.B.3.a, II.B.3.c.

265. *Abbott*, 130 S. Ct. at 1993 (discussing the potential impact of its interpretation on the U.S. Department of State's ability to reclaim children wrongfully removed from the United States). *But see* Medellin v. Texas, 552 U.S. 491, 537 & n.4 (2008) (Stevens, J., concurring) (referencing an Oklahoma decision to commute a death sentence in response to the ICJ *Avena* decision, in part out of an interest in protecting U.S. citizens abroad); Sanchez-Llamas v. Oregon, 548 U.S. 331, 398 (2006) (Breyer, J., dissenting) (recognizing protection of U.S. citizens abroad as one of the Vienna Convention's purposes and stressing that improper treaty interpretation can lessen the fair treatment of these same citizens abroad).

266. *See supra* note 161.

267. *See infra* notes 275–279 and accompanying text.

Distinguishing between purely private-law treaties and private-law treaties implicating sovereign obligations for the purpose of treaty interpretation is a reality in U.S. courts.[268] A recent empirical study by David Sloss indicated that courts are more likely to take a treaty-interpretation approach that recognizes and defers to the political branches when the case involves private parties opposing U.S. government actors.[269] *Medellin*, *Hamdan*, and *Sanchez-Llamas* all fall into this category. In contrast, Sloss found that purely private-law treaty cases, like *Abbott*, are more likely to result in interpretations consistent with international understandings.[270]

Such distinctions likely result from the reality of treaty enforcement. Protection of purely private rights requires reciprocity between contracting parties.[271] For the Hague Convention cases, the individual right to a return remedy depends on cooperation among the authorities in the country from which and to which a child was wrongfully removed.[272] Therefore, a judicial decision interpreting this purely private-law treaty is the only avenue for ensuring that disputed rights are protected. The goal of private-law treaties is to establish uniformity in private law, and a purposive approach aids courts in reach-

268. *Cf.* Sloss, *supra* note 122, at 504 (stating that "[a]nalysis of judicial decision making in treaty cases is problematic because U.S. courts apply two mutually inconsistent models," which are "nationalist" and "transnationalist").

269. *Id.* at 504–05. Sloss terms such an approach the "nationalist" model, which holds "that only self-executing treaties have the force of law, that courts should interpret treaties in accordance with the shared understanding of the U.S. political branches, and that there is a background presumption that treaties do not create judicially enforceable individual rights." *Id.* at 504.

270. *Id.* Sloss calls this approach the "transnationalist" model, which holds "that treaties generally have the force of law in the United States, that courts should interpret a treaty in accordance with the internationally agreed understanding of its terms, and that individuals are ordinarily entitled to judicial remedies for violations of their treaty-based individual rights." *Id.*

271. Ann Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 52 (2010) (stating that the efficacy of the Hague Convention "depends on a strong principle of reciprocity between contracting states"). *But see id.* at 49 (suggesting that the Hague Convention may be a "hybrid of public and private international law . . . depend[ing] on . . . cooperation of government authorities in contracting states").

272. *Cf.* U.S. DEP'T OF STATE, REPORT ON COMPLIANCE WITH THE HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 6 (2010), *available at* http://travel.state.gov/pdf/2010ComplianceReport.pdf (describing U.S. Department of State coordination with the central authorities in other countries and reporting that, of the 436 children returned to the United States after being "abducted to or wrongfully retained in other countries," the Hague Convention member states returned 324, or 74 percent, of these children to the United States).

ing decisions consistent with prevailing international private law.[273] Also relevant is a belief that such individual adjudications have limited policy impacts.[274]

In contrast, private-law treaties implicating sovereign obligations can stretch beyond concern for an individual's rights and can encompass a country's stance on international law[275] or a broader policy conflict.[276] For example, the Court in *United States v. Alvarez-Machain* determined that U.S. agents' abduction of a Mexican national did not violate a bilateral extradition treaty with Mexico despite submission of an amicus brief by Mexico stating that Mexico's interpretation of the treaty held such an abduction to be a breach of the treaty.[277] The Court's decision allowed the U.S. government to take a contrarian view of international law to benefit U.S. interests.[278] Similarly, the *Medellin* Court focused less on the implications of interpretation and more on the domestic conflict among U.S. laws and separation of powers.[279]

Concerns relating to separation of powers and a belief that executive branch diplomacy is better-suited to resolving conflicts between sovereigns are legitimate.[280] However, resolution of treaty disputes involves not just the adjudication of individual rights in dispute

273. *See* Van Alstine, *Death of Good Faith*, *supra* note 106, at 1892 (noting the "rapid expansion of private-law treaties designed to secure international uniformity"). *But see* Bederman, *Revivalist Canons*, *supra* note 101, at 1015 (suggesting that a search for a treaty's purpose may lead to a subjective and "standardless" assessment).

274. *See* Sloss, *supra* note 122, at 505 ("In litigation between private parties, there is little risk of creating friction between the judicial and executive branches . . . .").

275. *See, e.g.*, Bederman, *Revivalist Canons*, *supra* note 101, at 1011 (suggesting that in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992) the Supreme Court willingly colluded with the U.S. government to violate a treaty obligation).

276. *See, e.g.*, David J. Bederman, *Agora:* Medellin*:* Medellin*'s New Paradigm for Treaty Interpretation*, 102 AM. J. INT'L L. 529, 539–40 (2008) [hereinafter Bederman, *Agora*] (recognizing the "high-profile federalism conflict" and separation-of-powers concerns present in *Medellin*).

277. 504 U.S. 655, 657, 675 n.14 (1992).

278. Bederman, *Revivalist Canons*, *supra* note 101, at 1013 (recognizing that the result of *Alvarez-Machain* was to allow the United States to maintain "a peculiar view as to a background principle of customary international law").

279. Bederman, *Agora*, *supra* note 276, at 539 (suggesting that *Medellin*, which may only be "tangentially about treaty interpretation," focused on conflicts between state criminal procedures and federal foreign-relations concerns, as well as separation of powers).

280. *See* Sloss, *supra* note 122, at 505 ("[I]n cases where private parties are adverse to government actors, the private parties are generally invoking a treaty as a constraint on executive action. In these circumstances, courts might create friction with the executive branch if they zealously pursued the goal of treaty compliance."). *See also* United States v. Alvarez-Machain, 504 U.S. 655, 669 n.16 (1992) (lauding "[t]he advantage of the diplomatic approach to the resolution of difficulties between two sovereign nations, as opposed to unilateral action by the courts of one nation . . . .").

or cross-border diplomacy but also implicates the unique nature of treaties as shared obligations among nations.[281] A court's failure to recognize the shared obligations of member states risks judicial breaches of treaties, which may impact a broader set of individual rights and diplomatic relations than those currently before the court. The canons of good faith and liberal interpretation recognize this unique nature of treaties and guard against judicial breaches.[282] Such safeguards are as relevant today as they were a century ago.

A revival of good faith and liberal interpretation would provide a unifying interpretive philosophy for lower courts and guard against inadvertent treaty breaches. The *Abbott* decision suggests the Court's willingness to revive a unifying theme of interpretation at least for purely private-law treaties. Such an approach may reduce lower-court confusion over the unique role of treaties in domestic law.[283] *Medellin*, *Hamdan*, and *Sanchez-Llamas* indicate, however, that application of good faith and liberal interpretation is likely limited to purely private-law treaty cases. Unfortunately, this dichotomy in interpretation will continue the "schizophrenic attitude toward treaty cases" that characterized treaty law in the latter half of the twentieth century,[284] and likely limit any clarification that the purposive approach might otherwise provide were it more widely accepted.

B. Abbott *Allows Reference to Extratextual Sources for Treaty Interpretation Regardless of Lack of Ambiguity in the Treaty's Text*

Abbott's implicit rejection of textual ambiguity as a trigger for reference to extratextual sources in treaty interpretation should conclude the debate on the use of these sources initiated nearly thirty years ago. This rejection is consistent with treaty interpretation precedent and recognizes the unique nature of treaties. The rejection of ambiguity resulted from the Court's interpretive approach to the Hague Convention. In deciding whether *ne exeat* rights constitute rights of custody under the Hague Convention, the Court began with

281. Carlos M. Vázquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082, 1082 (1992) (recognizing that treaties, "[a]s instruments of international law, . . . establish obligations with which international law requires the parties to comply").

282. Van Alstine, *Death of Good Faith*, *supra* note 106, at 1888 (stating that the doctrine of good faith "served to remind courts of the special international law origins of treaties, of their fundamental difference with purely domestic legal norms, and of the need to show sensitivity for the views of our nation's treaty partners").

283. *Id.* at 1887 (suggesting that "confusion in the lower courts" is "the consequence" of "a rudderless drift in treaty interpretation").

284. Sloss, *supra* note 122, at 553 (stating that U.S. courts manifest such an attitude in domestic litigation).

an examination of the treaty's text and from this concluded that *ne exeat* rights are rights of custody.[285] The Court then turned to extratextual sources to "support" and "inform" its textually based conclusion that Mr. Abbott has a right of custody by virtue of his statutory *ne exeat* right.[286]

The Court's ability to conclude from the Hague Convention's text that *ne exeat* rights are rights of custody implies that the Court found the treaty's text to be unambiguous. Yet, despite finding that the treaty's text clearly supported its interpretation, the Court referenced extratextual sources and thereby disregarded recent Rehnquist Court cases requiring ambiguity for reference to extratextual aids in interpretation.[287] Justice Stevens questioned this approach in his *Abbott* dissent, noting that "the Court turns to authority we utilize to aid us in interpreting ambiguous treaty text" even though "the Convention's language is plain."[288]

Despite Justice Stevens's dissent, the Court's reference to extratextual sources as confirmation of its textual reading is consistent with precedent and with the unique nature of treaties. *Chan v. Korean Air Lines, Ltd.*[289] and *United States v. Stuart*[290] provide the primary authority[291] for ambiguity as a trigger to reference extratextual sources. Interestingly, little mention is made of ambiguity as a trigger in treaty-interpretation cases preceding and following *Chan* and *Stuart*. From *Choctaw*[292] to *Medellin*,[293] the Court recognized that the unique nature

285. Abbott v. Abbott, 130 S. Ct. 1983, 1990–93 (2010).

286. *Id.* at 1993 (observing, among other things, that the Court's conclusion "is supported and informed by the State Department's view on the issue" and " is further informed by the views of other contracting states").

287. *See supra* text accompanying notes 139–146.

288. *Abbott*, 130 S. Ct. at 2006–07 (Stevens, J., dissenting) (citing Sumitomo Shoji Am., Inc. v. Avagliano, 457 U.S. 176, 180 (1982)). Justice Stevens's use of *Sumitomo* is odd. Justice Stevens cites *Sumitomo* as the authority supporting textual ambiguity as a trigger for use of extratextual sources to aid treaty interpretation. The language cited in *Sumitomo*, however, focuses not on ambiguity but instead on whether the treaty language is inconsistent with signatory intent or expectations. *See Sumitomo*, 457 U.S. at 180 ("The clear import of treaty language controls 'unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.'" (quoting Maximov v. United States, 373 U.S. 49, 54 (1963)).

289. 490 U.S. 122 (1989).

290. 489 U.S. 353 (1989).

291. In turn, these cases cite as authority *Air France v. Saks*, 470 U.S. 392 (1985), and V*olkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988). Yet neither of these cases clearly state that ambiguity is the trigger. *See supra* Part II.B.2.

292. Choctaw Nation of Indians v. United States, 318 U.S. 423 (1943).

293. Medellin v. Texas, 552 U.S. 491 (2008).

of treaties as a "shared agreement among sovereign powers"[294] warrants use of extratextual sources to ensure that the treaty drafters' intent is followed and judicial breaches of treaty obligations are avoided.[295] Reference to such sources is not akin to amending a treaty, as suggested in the *Chan* opinion.[296] Instead, judicial consideration of these extratextual sources is well within the "just rules of interpretation" referenced by Justice Story nearly two centuries ago.[297] Reference to extratextual sources, regardless of treaty ambiguity, allows a court to confirm its interpretation by referencing international practice. This ensures a good-faith interpretation in accordance with the treaty's purpose. Such an approach recognizes the unique nature of treaties and limits judicial breaches of treaty obligations.

C. Abbott v. Abbott Represents a Missed Opportunity by the Supreme Court to Distinguish Treaty from Statutory Interpretation

Abbott, as one of the few recent Supreme Court decisions dedicated solely to treaty interpretation, gave the Court an opportunity to definitively remove treaty interpretation from the ideological debate embroiling statutory interpretation. The Court failed to take this opportunity when it repeated *Medellin*'s statement that "[t]he interpretation of a treaty, like the interpretation of a statute, begins with its text,"[298] yet omitted *Medellin*'s subsequent reference to the unique nature of treaties.[299] Instead, the Court's incomplete statement suggests

294. *Id.* at 507.

295. *See Choctaw*, 318 U.S. at 431–32 (recognizing that the unique nature of treaties supports "look[ing] beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties"); *Medellin*, 552 U.S. at 507 (stating that, because a treaty "is an agreement among sovereign powers," consideration of "negotiation and drafting history" and "postratification understanding of signatory nations" is appropriate (quoting Zicherman v. Korean Air Lines Co., 516 U.S. 217, 226 (1996)) (internal quotation marks omitted)).

296. Chan v. Korean Air Lines, Ltd., 490 U.S. 122, 134 (1989) (stating that while drafting history "may of course be consulted to elucidate a text that is ambiguous, ... where the text is clear, as it is here, we have no power to insert an amendment" (citation omitted)).

297. *See In re* The Amiable Isabella, 19 U.S. (6 Wheat.) 1, 71 (1821) ("We are to find out the intention of the parties by just rules of interpretation applied to the subject matter; and having found that, our duty is to follow it as far as it goes, and to stop where that stops—whatever may be the imperfections or difficulties which it leaves behind.").

298. Abbott v. Abbott, 130 S. Ct. 1983, 1990 (2010). The dissent also referenced the *Medellin* statement. *Id.* at 1999 (Stevens, J., dissenting).

299. *See Medellin*, 552 U.S. at 507 (internal quotation marks omitted) ("Because a treaty ratified by the United States is an agreement among sovereign powers, we have also considered as aids to its interpretation the negotiation and drafting history of the treaty as well as the postratification understanding of signatory nations.").

an inapt analogy between two disparate canons of interpretation.[300] Such an analogy provides little guidance to lower courts, which already appear to meld these two canons of interpretation.[301]

Similar omissions have occurred before.[302] Other Supreme Court cases that omitted this crucial distinction between treaties and statutes were subsequently used by lower courts as the basis for relying on statutory construction tools and theories to interpret treaties.[303] For example, *Croll v. Croll* cited the 1992 Supreme Court case *United States v. Alvarez-Machain* as an introduction to the Second Circuit's interpretation of the Hague Convention.[304] The *Croll* court then relied on "American lexical sources" and domestic law understandings to interpret what constitutes a custody right under the Hague Convention.[305] The dissent appropriately questioned such an approach, noting that the unique nature of a treaty "requires [looking] beyond parochial definitions to the broader meaning" of that treaty.[306] Such failures to look to the broader international context demonstrate why textualism and other statutory approaches are ill suited to treaty interpretation.

Treaties arise out of an international consensus process that allows few opportunities to correct misguided domestic interpretations by member states.[307] Such a result contrasts starkly with interpretation of domestic statutes, for which the legislative process provides

300. *See* Van Alstine, *Death of Good Faith*, *supra* note 106, at 1887 (highlighting the Supreme Court's "rhetorical ambiguity" and inattention as reasons for lower court confusion in treaty interpretation).

301. *See id.* at 1921–22 (recognizing that, in recent cases, lower courts explicitly comment on a presumed similarity between treaty and statutory interpretation and that this conduct is the result of the Supreme Court's ambiguity and silence on the distinction between two different canons of interpretation).

302. *See, e.g.*, United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992) (stating "[i]n construing a treaty, as in construing a statute, we first look to its terms to determine its meaning," and omitting any language distinguishing between the two canons of interpretation).

303. *See, e.g.*, Croll v. Croll, 229 F.3d 133, 136, 138-39 (2d Cir. 2000) (citing United States v. Alvarez-Machain, 504 U.S. 655, 663 (1992)) (referencing *Alvarez-Machain* before looking to domestic usage to define custody rights as they pertain to the Hague Convention), *abrogated by* Abbott v. Abbott, 130 S. Ct. 1983 (2010).

304. *Id.* at 136.

305. *Id.* at 138–39.

306. *Id.* at 145 (Sotomayor, J., dissenting).

307. Van Alstine, *Death of Good Faith*, *supra* note 106, at 1927 (footnote omitted) (emphasizing that the consensual nature of treaties can make "renegotiation . . . difficult and . . . practically impossible for multilateral treaties").

opportunity to correct unintended judicial interpretations.[308] Treaty drafters and the domestic courts that eventually interpret the treaties bring different legal and linguistic traditions to the tasks of creating and implementing these international agreements.[309] The intended meaning of terms used in treaties can be distinct from the meaning applied to those same terms by domestic law.[310] Errors in interpretation, therefore, may occur when domestic courts apply statutory construction tools, such as textualism, to a treaty.[311] A textualist approach would ignore, *inter alia*, member state intent at drafting as well as post-ratification understanding of the treaty.[312] Instead, as Justice Scalia recently noted, "considerable respect" should be given to judicial interpretations by member states as "[o]therwise the whole object of the treaty, which is to establish a single, agreed-upon regime governing the actions of all the signatories, will be frustrated."[313]

Despite the Supreme Court's acceptance of the distinction between treaty and statutory interpretation,[314] statutory approaches continue to influence lower court interpretations of treaties.[315] This trend is likely to continue if the Court fails to make use of decisions like *Abbott* to distinguish treaty interpretation from statutes. This

308. *See* Bederman, *Revivalist Cannons*, *supra* note 101, at 1022–24 (comparing the legislative process of statutes with the consensual process of treaties, and noting that, in this consensual process "there is no guarantee that a reconciliation could occur").

309. *See* Michael P. Van Alstine, *Dynamic Treaty Interpretation*, 146 U. PA. L. REV. 687, 704 (1998) (recognizing that the "adjudicators charged with filling in gaps and resolving ambiguities are themselves products of differing cultural, legal, and political traditions").

310. *See* Van Alstine *Death of Good Faith*, *supra* note 106, at 1928 (recognizing that the distinct international legal system from which treaties result means that "treaties must be interpreted free from the influence of norms of a purely domestic origin").

311. *See* Bederman, *Revivalist Cannons, supra* note 101, at 1022–23 (cautioning against applying statutory interpretation to treaties because of the concern, among others, that the two lawmaking processes are distinct).

312. *But cf.* Van Alstine *Death of Good Faith*, *supra* note 106, at 1929 ("More specifically, through the recent emphasis on shared intent and explicit reliance on drafting history and subsequent agreed practice, the Court has seemingly accepted that the judicial application of treaties requires the application of independent interpretive principles.")

313. Antonin G. Scalia, Assoc. J., Supreme Court of the United States, Keynote Address at the Ninety-Eighth Annual Meeting of the American Society of International Law: Foreign Legal Authority in the Federal Courts (April 2, 2004), *in* "A DECENT RESPECT TO THE OPINIONS OF MANKIND…": SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN AND INTERNATIONAL LAW 109, 110–11 (Christopher J. Borgen ed., 2007).

314. *Cf.* Bederman, *Agora*, *supra* note 276, at 540 ("The proxy bouts of old—in which treaty interpretation cases were used as a form of 'shadowboxing' for the 'main event' of statutory construction jurisprudence—are now at an end. . . . A new eclecticism in the selection of extrinsic sources for treaty interpretation is confirmed.").

315. Bederman, *Revivalist Canons*, *supra* note 101, at 1019–20 (highlighting, in a survey of Rehnquist-era treaty interpretation cases, that "recent trends in treaty construction have been subliminally influenced by currents in the statutory interpretation debate").

melding of doctrines by lower courts may cause serious consequences in U.S. international relations as the lower court confusion risks judicial breaches in international obligations.[316] *Abbott* thus represents a missed opportunity in which the Supreme Court could have provided better guidance to treaty interpretation for the lower courts.

V. CONCLUSION

In *Abbott v. Abbott*, the Supreme Court of the United States properly held a child's removal from Chile to Texas to be a violation of custody rights under the Hague Convention.[317] In so holding, the Court demonstrated two significant aspects of treaty interpretation and missed one opportunity. First, the Court applied a purposive approach consistent with good faith and liberal interpretation and thereby signaled a revival of these long dormant canons of interpretation.[318] Second, the Court rejected ambiguity as a trigger for reference to extratextual aids in interpretation.[319] Third and finally, the Court missed an opportunity to highlight the unique nature of treaties and reduce lower court confusion about the similarities between treaty and statutory interpretation.[320]

316. *Cf.* Vázquez, *supra* note 281, at 1082 ("As instruments of international law, [treaties] establish obligations with which international law requires the parties to comply.").

317. 130 S. Ct. 1983, 1993 (2010).

318. *See supra* Part IV.A.

319. *See supra* Part IV.B.

320. *See supra* Part IV.C.