

cedural federal rules to displace substantive state provisions, the Court could have promoted the federalism interests around which the *Erie* line of cases revolves. Instead, the Court's fractured holding — and even more fractured reasoning — will continue to frustrate litigants and disempower state legislatures.

### C. Status of International Law

*Deference to the Executive — Hague Convention on the Civil Aspects of International Child Abduction.* — The Hague Convention on the Civil Aspects of International Child Abduction,<sup>1</sup> implemented in the United States via the International Child Abduction Remedies Act<sup>2</sup> (ICARA), mandates that a child who is “wrongfully” removed from his country of habitual residence be returned to that country.<sup>3</sup> This return remedy, however, applies only in cases where the child's removal violates a parent's “rights of custody.”<sup>4</sup> In contrast, removals that violate a parent's “rights of access”<sup>5</sup> merely authorize that parent to seek a contracting state's assistance in enforcing his or her visitation rights.<sup>6</sup> Last Term, in *Abbott v. Abbott*,<sup>7</sup> the Supreme Court held that a parent's *ne exeat* right — the right to prohibit one parent from removing a child from his country of habitual residence without the other parent's consent — constitutes a right of custody within the meaning of the Convention.<sup>8</sup> Although the Court reached a plausible result and resolved the circuit split over the import of *ne exeat* rights, it missed an important opportunity to clarify how much deference courts should give to the Executive's interpretation of a treaty's meaning. The Court's cursory invocation of executive views in *Abbott* threatens to move its treaty interpretation jurisprudence toward an ultimately undesirable position of greater deference to the Executive.

Timothy Abbott, a British citizen, married Jacquelyn Vaye Abbott, an American citizen, in 1992.<sup>9</sup> Their son, A.J. A., was born in Hawaii

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<sup>1</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, 1343 U.N.T.S. 49 [hereinafter Hague Convention]. For background on the Convention and its post-ratification history, see Linda Silberman, *The Hague Child Abduction Convention Turns Twenty: Gender Politics and Other Issues*, 33 N.Y.U. J. INT'L L. & POL. 221 (2000).

<sup>2</sup> 42 U.S.C. §§ 11601–11611 (2006).

<sup>3</sup> Hague Convention, *supra* note 1, arts. 1, 3.

<sup>4</sup> *Id.* art. 3. The Convention defines rights of custody to “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.” *Id.* art. 5.

<sup>5</sup> Rights of access, according to the Convention, “include the right to take a child for a limited period of time to a place other than the child's habitual residence.” *Id.* art. 5.

<sup>6</sup> *Id.* art. 21.

<sup>7</sup> 130 S. Ct. 1983 (2010).

<sup>8</sup> *Id.* at 1991.

<sup>9</sup> *Id.* at 1988.

three years later.<sup>10</sup> The family moved to La Serena, Chile, in 2002, but Mr. and Ms. Abbott separated shortly thereafter.<sup>11</sup> Chilean family courts awarded the mother daily care and control of A.J. A. and granted the father “direct and regular” visitation rights.<sup>12</sup> Under Chilean law,<sup>13</sup> Mr. Abbott’s visitation rights also entitled him to a right of *ne exeat*, which required Ms. Abbott to obtain Mr. Abbott’s consent before removing their son from Chile.<sup>14</sup> Proceedings in the Chilean courts were still ongoing when, in August of 2005, Ms. Abbott removed A.J. A. from Chile without Mr. Abbott’s permission.<sup>15</sup> A private investigator traced mother and child to Texas, where Mr. Abbott subsequently filed an action in state court seeking visitation rights and an order requiring Ms. Abbott to show cause.<sup>16</sup> After the state court denied Mr. Abbott’s requested relief, he initiated an action in federal district court seeking an order requiring A.J. A. to be returned to Chile in accordance with the Hague Convention and the ICARA.<sup>17</sup> The district court denied the return request, finding the father’s *ne exeat* rights insufficient to qualify as rights of custody under the treaty.<sup>18</sup>

The Fifth Circuit affirmed.<sup>19</sup> In an opinion by Judge Elrod, the unanimous panel held that although Ms. Abbott’s actions had “unquestionably violated” Mr. Abbott’s *ne exeat* rights, those rights amounted only to rights of access within the terms of the treaty.<sup>20</sup> The father was therefore not entitled to a return remedy. The Fifth Circuit relied in large part on the reasoning of the Second Circuit’s decision in *Croll v. Croll*.<sup>21</sup> The *Croll* court had looked to the text, purpose, and design of the Convention — and in particular, the “ordinary meaning” of the word “custody” — in determining that a *ne exeat* right was not a right of custody under the Convention.<sup>22</sup> Holding otherwise, the Second Circuit stated, would ignore the Convention’s “explicit textual distinction between rights of custody and rights of access.”<sup>23</sup>

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* Mr. Abbott’s rights included visitation every other weekend and for one month during A.J. A.’s summer vacation. *Id.*

<sup>13</sup> Law No. 16618 art. 49, Mayo 30, 2000, DIARIO OFICIAL [D.O.] (Chile) (“Minors Law”).

<sup>14</sup> *Abbott*, 130 S. Ct. at 1988.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *See Abbott v. Abbott*, 495 F. Supp. 2d 635, 640–41 (W.D. Tex. 2007).

<sup>19</sup> *Abbott v. Abbott*, 542 F.3d 1081 (5th Cir. 2008).

<sup>20</sup> *Id.* at 1087–88.

<sup>21</sup> 229 F.3d 133 (2d Cir. 2000). Both the Fourth and Ninth Circuits followed the *Croll* decision. *See Fawcett v. McRoberts*, 326 F.3d 491 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942 (9th Cir. 2002). In contrast, the Eleventh Circuit adopted the reasoning of the *Croll* dissent, written by then-Judge Sotomayor. *See Furnes v. Reeves*, 362 F.3d 702, 720 n.15 (11th Cir. 2004).

<sup>22</sup> *Croll*, 229 F.3d at 138–43.

<sup>23</sup> *Id.* at 142.

The Supreme Court reversed and remanded. Writing for the Court, Justice Kennedy<sup>24</sup> began his analysis by examining the Convention's text. Mr. Abbott's *ne exeat* rights, the Court held, conferred "a joint right to decide his child's country of residence," which under the Convention was "best classified as a joint right of custody."<sup>25</sup> Specifically, Mr. Abbott's *ne exeat* rights "g[ave] him both the joint 'right to determine the child's place of residence' and joint 'rights relating to the care of the person of the child,'"<sup>26</sup> two of the elements of the definition of rights of custody in the Convention.<sup>27</sup> Citing a dictionary definition of the word "determine," the Court explained that "even if 'place of residence' refers only to the child's street address within a country," Mr. Abbott's ability "to set bounds or limits to" A.J. A.'s residence fell within the ambit of the Convention's protected custodial rights.<sup>28</sup> At the same time, the father's *ne exeat* right entitled him to make decisions relating to his son's care because of the profound impact the child's country of residence would have on the formation of his identity.<sup>29</sup> The Court further noted that it was of little import that a *ne exeat* right "does not fit within traditional notions of physical custody"; the Convention's definition of rights of custody controlled, not the definition commonly used by local law.<sup>30</sup>

According to the Court, the contrary holding adopted by the Fifth Circuit that *ne exeat* rights were merely rights of access "would render the Convention meaningless in many cases where it is most needed."<sup>31</sup> Unlike rights of access, to which a right of return does not attach, effective exercise of *ne exeat* rights requires the child's presence in the country of habitual residence.<sup>32</sup> Moreover, the argument that *ne exeat* rights were rights of access was "illogical and atextual."<sup>33</sup> The Court noted that the Convention and the ICARA define rights of access as "the right to take a child for a limited period of time to a place other than the child's habitual residence," or "visitation rights."<sup>34</sup> These definitions, the Court stated, demonstrated that a *ne exeat* right cannot be a right of access because it conveys no right to actually access the child.<sup>35</sup> Ms. Abbott's contention that the *ne exeat* order at issue had

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<sup>24</sup> Justice Kennedy was joined by Chief Justice Roberts and Justices Scalia, Ginsburg, Alito, and Sotomayor.

<sup>25</sup> *Abbott*, 130 S. Ct. at 1990.

<sup>26</sup> *Id.* (quoting Hague Convention, *supra* note 1, art. 5).

<sup>27</sup> Hague Convention, *supra* note 1, art. 5.

<sup>28</sup> *Abbott*, 130 S. Ct. at 1991.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 1992.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (internal quotations omitted).

<sup>35</sup> *Id.*

merely protected the Chilean court's jurisdiction was likewise rejected, since even an order issued only for jurisdictional purposes was consistent with granting a parent power to object to his child's removal.<sup>36</sup>

The Court next cited the views of a number of authorities in support of its conclusion that Mr. Abbott's *ne exeat* right amounted to a right of custody. An amicus brief from the United States indicated that the State Department "has long understood the Convention as including *ne exeat* rights among the protected 'rights of custody.'"<sup>37</sup> Previous decisions had established "that the Executive Branch's interpretation of a treaty 'is entitled to great weight,'" and the Court concluded that such deference was appropriate in this case.<sup>38</sup> "The Executive," stated the Court, "is well informed concerning the diplomatic consequences resulting from this Court's interpretation of 'rights of custody,' including the likely reaction of other contracting states and the impact on the State Department's ability to reclaim children abducted from this country."<sup>39</sup> The Court drew additional support for its holding from the jurisprudence of other contracting states.<sup>40</sup> The Court acknowledged that some courts in other contracting states had issued contrary decisions,<sup>41</sup> but its review of international decisions "confirm[ed] broad acceptance of the rule that *ne exeat* rights are rights of custody."<sup>42</sup> Justice Kennedy also observed that a growing scholarly consensus aligned with the Court's conclusion.<sup>43</sup>

The Court concluded by emphasizing that classifying *ne exeat* rights as rights of custody, and thus granting a return remedy, "accords with [the Convention's] objects and purposes."<sup>44</sup> "Ordering a return remedy," the Court stated, "does not alter the existing allocation of custody rights . . . but does allow courts of the home country to decide what is in the child's best interests."<sup>45</sup> The Court noted that denying a return remedy for violations of *ne exeat* rights might have the perverse

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<sup>36</sup> *Id.* The Court further argued that it was unnecessary to decide the precise scope of the Chilean court's *ne exeat* order because Mr. Abbott derived custody rights from the Chilean Minors Law. The consent provisions of that law gave Mr. Abbott a "joint right to determine his child's country of residence," and thus "a right of custody under the Convention." *Id.* at 1993.

<sup>37</sup> *Id.* at 1993 (quoting Brief for the United States as Amicus Curiae Supporting Petitioner at 21, *Abbott*, 130 S. Ct. 1983 (No. 08-645), 2009 WL 3043970).

<sup>38</sup> *Id.* (quoting *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-85 n.10 (1982)).

<sup>39</sup> *Id.*

<sup>40</sup> The Court explained that the general principle that "[t]he 'opinions of our sister signatories' . . . are 'entitled to considerable weight,'" *id.* (quoting *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155, 176 (1999)), applied with "special force" in this case because Congress had emphasized the importance of "uniform international interpretation of the Convention," *id.* (citing ICARA, 42 U.S.C. § 11601(b)(3)(B) (2006)).

<sup>41</sup> *Abbott*, 130 S. Ct. at 1994.

<sup>42</sup> *Id.* at 1993.

<sup>43</sup> *Id.* at 1994-95.

<sup>44</sup> *Id.* at 1995.

<sup>45</sup> *Id.*

incentive of encouraging abducting parents to relocate to the United States.<sup>46</sup> The Court reasoned that its holding was necessary to avoid undermining the Convention and “legitimiz[ing] the very action — removal of the child — that the home country . . . sought to prevent.”<sup>47</sup>

Justice Stevens dissented.<sup>48</sup> He argued that Mr. Abbott’s *ne exeat* rights were in reality only an “opportunity to veto Ms. Abbott’s decision to remove A.J. A. from Chile.”<sup>49</sup> Granting Mr. Abbott access to the Convention’s “powerful return remedy” was therefore “contrary to the Convention’s text and purpose.”<sup>50</sup> Reviewing the Convention’s drafting history and text, Justice Stevens noted the importance of the difference between rights of custody and rights of access.<sup>51</sup> It was the latter category of rights that Justice Stevens concluded applied to Mr. Abbott.<sup>52</sup> He argued that the Court’s contrary reading of the Convention, which relied on an expansive interpretation of rights relating to the care of the child, “obliterate[d] the careful distinction the drafters drew between the rights of custody and the rights of access.”<sup>53</sup>

Justice Stevens next took issue with the majority’s invocation of sources other than the Convention’s text. In this case, the views of the State Department were both “newly memorialized” and possibly contrary to the position expressed “at the time of the [Convention’s] signing and negotiation.”<sup>54</sup> Justice Stevens expressed doubt as to the relevance of the Executive’s views on the interpretation of the Convention, since neither foreign policy concerns nor the Department’s understanding of the treaty’s drafting history appeared particularly significant.<sup>55</sup> In addition, the Department’s failure to disclose whether it had undertaken similar return efforts in the past gave the Court “no informed basis to assess the Executive’s postratification conduct.”<sup>56</sup> Finally, Justice Stevens criticized the majority’s reading of cases from

<sup>46</sup> *Id.* at 1996.

<sup>47</sup> *Id.* (quoting *Croll v. Croll*, 229 F.3d 133, 147 (2d Cir. 2000) (Sotomayor, J., dissenting)) (internal quotation marks omitted). Although the Court concluded that the *ne exeat* right entitled Mr. Abbott to seek his son’s return, the Court noted that this return remedy was not automatic. *Id.* at 1997. The Court therefore remanded the case for further proceedings to determine whether one of the Convention’s recognized exceptions to the return remedy applied. *Id.*

<sup>48</sup> Justice Stevens was joined by Justices Thomas and Breyer.

<sup>49</sup> *Abbott*, 130 S. Ct. at 1997 (Stevens, J., dissenting).

<sup>50</sup> *Id.* at 1997–98.

<sup>51</sup> *Id.* at 1998–99. Drawing on the Convention’s drafting history, Justice Stevens explained that “[t]he drafters’ primary concern was to remedy abuses by noncustodial parents who attempt to circumvent adverse custody decrees.” *Id.* at 1998. Thus, he concluded the return remedy should apply only to abductions by noncustodial parents. *Id.*

<sup>52</sup> *See id.* at 1999.

<sup>53</sup> *Id.* at 2000.

<sup>54</sup> *Id.* at 2007.

<sup>55</sup> *Id.* at 2007–08.

<sup>56</sup> *Id.* at 2008.

foreign jurisdictions, stating that he “fail[ed] to see the international consensus” on *ne exeat* rights that the majority had claimed to find.<sup>57</sup>

The *Abbott* Court should be applauded for clarifying the meaning of rights of custody under the Convention. However, it left unaddressed an even more important question: namely, what weight courts should give the executive branch’s interpretation of a treaty. The Court’s failure to clarify its analysis is particularly troubling given the inconsistency of prior precedent and the weak argument for deference to the State Department’s views in the case at hand.

That the judicial branch owes at least some deference to the Executive in matters of foreign affairs is a long-established tenet of American jurisprudence.<sup>58</sup> The exact scope of that deference, however, remains a subject of controversy.<sup>59</sup> This controversy is particularly salient with respect to the role of courts in interpreting treaties. Indeed, the deference problem is exacerbated by the hybrid nature of treaties — part foreign policy agreement, part domestic legislative enactment<sup>60</sup> — because their structure and function implicates both the Executive’s constitutionally mandated role as the primary organ of foreign affairs<sup>61</sup> and the judiciary’s authority “to say what the law is.”<sup>62</sup>

While the Supreme Court may have at one time used a uniform standard for executive branch treaty deference,<sup>63</sup> in the modern era — beginning with the decision in *Kolovrat v. Oregon*<sup>64</sup> — its approach has been inconsistent.<sup>65</sup> The Court’s varied application of the deference doctrine has led at least one commentator to suggest that, in reali-

<sup>57</sup> *Id.* at 2008–10.

<sup>58</sup> *See, e.g.,* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319–20 (1936).

<sup>59</sup> *See* Jonathan I. Charney, *Judicial Deference in Foreign Relations*, 83 AM. J. INT’L L. 805 (1989) (discussing and critiquing a variety of competing theories of judicial deference to the Executive in foreign policy).

<sup>60</sup> *See* Michael P. Van Alstine, *The Judicial Power and Treaty Delegation*, 90 CALIF. L. REV. 1263, 1269–74 (2002).

<sup>61</sup> U.S. CONST. art. II.

<sup>62</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>63</sup> Based on a review of the Court’s decisions from 1789–1983, Professor David Sloss has concluded that the early Court adopted a nondeferential approach in treaty interpretation cases. David Sloss, *Judicial Deference to Executive Branch Treaty Interpretations: A Historical Perspective*, 62 N.Y.U. ANN. SURV. AM. L. 497, 506–07 (2007).

<sup>64</sup> 366 U.S. 187, 194 (1961) (stating that although “courts interpret treaties for themselves, the meaning given [to treaties] by the departments of government particularly charged with their negotiation and enforcement is given great weight”).

<sup>65</sup> *See* Robert M. Chesney, *Disaggregating Deference: The Judicial Power and Executive Treaty Interpretations*, 92 IOWA L. REV. 1723, 1758 (2007). For example, in *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006), a case involving interpretation of the Vienna Convention on Consular Relations, the Court invoked the *Kolovrat* standard, stating that executive treaty interpretations are owed “great weight.” *Id.* at 355 (quoting *Kolovrat*, 366 U.S. at 194). Yet, just one day later, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), the Court resolved a dispute over the application of Common Article 3 of the Geneva Conventions without once mentioning the concept of deference to the Executive’s views.

ty, “the decision of whether or not to invoke the [deference] standard itself may be less of an analytic exercise than results justification.”<sup>66</sup>

Scholars are similarly divided on the appropriate level of deference due executive treaty interpretations. Some, like Professor John Yoo, argue that courts should adopt a rule of absolute deference to the Executive’s views.<sup>67</sup> Yoo draws on a mix of textual, historical, structural, and functional arguments to support his view that the “power to interpret treaties . . . must remain within the President’s control.”<sup>68</sup> Others adopt the contrary position, advocating a rule of near-total nondeference.<sup>69</sup> The nondeferential position emphasizes the judiciary’s responsibility to act as a check on executive power.<sup>70</sup>

Most academic commentators agree that some level of intermediate deference is appropriate, but disagree as to both the precise standard to be applied and the normative justification for that level of deference.<sup>71</sup> Professor Curtis Bradley<sup>72</sup> suggests that courts should adopt the deference doctrine first developed in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>73</sup> Under Bradley’s theory, courts would “defer to the reasonable constructions of foreign affairs statutes [including treaties] by [the] executive branch agencies charged with their administration.”<sup>74</sup> A competing theory also draws from administrative law scholarship, but instead suggests that the “persuasiveness” standard first articulated in *Skidmore v. Swift & Co.*<sup>75</sup> provides the appropriate framework for understanding treaty deference. According to Professor Evan Criddle, interpretive deference under the *Skidmore* standard would hinge on a number of factors, including “the agency’s relative expertise, the cogency of the agency’s reasoning, evidence of

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<sup>66</sup> Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 790 n.70 (2008); see also Chesney, *supra* note 65, at 1757 (“[O]ne cannot dismiss the possibility that the deference doctrine, as a practical matter, does little or no actual work in treaty-interpretation cases . . .”).

<sup>67</sup> John C. Yoo, *Treaty Interpretation and the False Sirens of Delegation*, 90 CALIF. L. REV. 1305, 1342–43 (2002).

<sup>68</sup> John C. Yoo, *Politics as Law?: The Anti-Ballistic Missile Treaty, the Separation of Powers, and Treaty Interpretation*, 89 CALIF. L. REV. 851, 870 (2001) (book review).

<sup>69</sup> See, e.g., Alex Glashauser, *Difference and Deference in Treaty Interpretation*, 50 VILL. L. REV. 25, 27 (2005).

<sup>70</sup> *Id.* at 41–46.

<sup>71</sup> See Chesney, *supra* note 65, at 1765–71 (reviewing several theories of intermediate deference).

<sup>72</sup> Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 701–07 (2000).

<sup>73</sup> 467 U.S. 837, 842–43 (1984).

<sup>74</sup> Bradley, *supra* note 72, at 663. Bradley suggests that *Chevron* deference offers particular benefits in the area of foreign affairs because it “focuses attention on the source of the law in question” and offers a flexible middle ground between the “total deference” and “total non-deference” alternatives. *Id.* at 674.

<sup>75</sup> 323 U.S. 134, 140 (1944).

state and private reliance upon the agency's interpretation, and the interpretation's potential to promote transnational legal order."<sup>76</sup>

In comparison to other recent treaty interpretation decisions, *Abbott* is notable for the ambiguity of its discussion of executive deference.<sup>77</sup> At times, the Court appeared to suggest that its conclusion was predicated solely on its reading of the Convention's text,<sup>78</sup> a statement that implies that the majority's discussion of the State Department's views is dicta. The Court's claims of an entirely textual conclusion, however, are contradicted by two subsequent portions of the opinion. First, the majority stated that its conclusion was "supported and informed by the State Department's view on the issue."<sup>79</sup> Second, and more importantly, the Court noted that "[i]t is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight,'" and that there was "no reason to doubt that this well-established canon of deference is appropriate here."<sup>80</sup>

It seems clear, then, that the executive branch's views were a factor in the majority's holding; but it is difficult to determine the precise level of deference the Court applied. Criddle's *Skidmore* standard is an unlikely candidate, since as Justice Stevens persuasively argued, there were multiple reasons for the majority to have adopted a more skeptical stance toward the State Department's views. First, the State Department's determination that rights of custody included *ne exeat* rights had not been memorialized before the filing of its amicus brief in the case.<sup>81</sup> Second, the Department's view was possibly contradicted by its prior statements on the matter. Justice Stevens noted that during the treaty's negotiation, "the United States characterized a *ne exeat* right as one with 'the purpose of preserving the jurisdiction of the state in the custody matter and of safeguarding the visitation rights of the other parent.'"<sup>82</sup> This characterization — and in particular, the Department's emphasis on visitation rights — is arguably inconsistent with the Department's expressed view in *Abbott*. Moreover, while the

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<sup>76</sup> Evan Criddle, Comment, *Chevron Deference and Treaty Interpretation*, 112 YALE L.J. 1927, 1934 (2003).

<sup>77</sup> Cf. Van Alstine, *supra* note 60, at 1300 (discussing the Supreme Court's decision in *El Al Israel Airlines, Ltd. v. Tsui Yuan Tseng*, 525 U.S. 155 (1999), and describing the "careful, measured" nature of the Court's characterization of the deference doctrine).

<sup>78</sup> See *Abbott*, 130 S. Ct. at 1990–93 (stating that the Court's analysis of the Hague Convention "begins with the [treaty's] text," *id.* at 1990, and concluding, solely on the basis of the text, that a *ne exeat* right is a right of custody under the Convention, *id.* at 1993).

<sup>79</sup> *Id.* at 1993.

<sup>80</sup> *Id.*

<sup>81</sup> See Brief for the United States as Amicus Curiae Supporting Petitioner at 21 n.13, *Abbott*, 130 S. Ct. 1983 (No. 08-645), 2009 WL 3043970.

<sup>82</sup> *Abbott*, 130 S. Ct. at 2007 n.12 (Stevens, J., dissenting) (Replies of the Governments to the Questionnaire, Hague Convention, *supra* note 1, in 3 Actes et Documents de la Quatorzième session 85, 88 (1982)).



subject matter of the Convention is undoubtedly important, the international relations implications of choosing one possible holding over the other (*ne exeat* rights are or are not rights of custody) seem limited. Indeed, the State Department made no claim that the exigencies of foreign affairs mandated that the Court reach a particular conclusion; rather, its view appears to have been based on “little more than its own reading of the treaty’s text.”<sup>83</sup> The State Department’s role as central authority for administering the Convention could provide the requisite expertise to justify a high degree of deference, but it failed to provide the Court with evidence regarding the post-ratification conduct of the United States and other contracting parties.<sup>84</sup>

Bradley’s *Chevron* standard is a more plausible alternative, but it is unclear whether the Court in fact treated the question presented in *Abbott* as an appropriate subject for *Chevron* deference. The *Chevron* standard applies only where the Court determines that the text of the statute at issue is ambiguous. Yet in *Abbott*, the majority stressed that its decision rested in part on its own reading of the Convention’s text, indicating that the majority found the Convention’s language to be *unambiguous*.<sup>85</sup> Moreover, as others have noted, the Court’s *Chevron* doctrine becomes substantially less deferential where a decision implicates “central aspects of the statutory scheme.”<sup>86</sup> In this case, both the majority and dissent acknowledged that the definition of rights of custody is integrally related to the Convention’s overall purpose.<sup>87</sup>

The final possibility — that the Court applied a highly deferential standard comparable to the one advocated by Yoo<sup>88</sup> — is the most troubling. For a variety of reasons, adopting a rule of substantial deference to the Executive would be a mistake. Conditioning a treaty’s meaning on the Executive’s suggested reading of its language would likely undermine one of the core goals of the treaty-making process: promoting uniformity in international law. If the United States’s international obligations changed dramatically with each new adminis-

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<sup>83</sup> *Id.* at 2008.

<sup>84</sup> *Id.*

<sup>85</sup> *See, e.g., id.* at 1991 (majority opinion) (“The Convention defines ‘rights of custody,’ and it is that definition that a court must consult. This uniform, *text-based* approach ensures international consistency in interpreting the Convention.” (emphasis added)).

<sup>86</sup> Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 231–47 (2006).

<sup>87</sup> *See Abbott*, 130 S. Ct. at 1996 (“To interpret the Convention to permit an abducting parent to avoid a return remedy, even when the other parent holds a *ne exeat* right, would run counter to the Convention’s purpose . . . .”); *id.* at 1998 (Stevens, J., dissenting) (“The distinction between rights of custody and rights of access, therefore, is critically important to the Convention’s scheme and purpose.”).

<sup>88</sup> This possibility is supported by the Court’s invocation of the “great weight” standard of deference first articulated in *Kolovrat. Abbott*, 130 S. Ct. at 1993. The Court has yet to explain the precise meaning of the “great weight” standard, but previous efforts to define it “have tended toward extreme deference.” Sullivan, *supra* note 66, at 791.

tration, treaty partners would likely discount the extent to which the agreements bind them.<sup>89</sup> Additionally, as Professor Michael Van Alstine argues, not all treaties implicate foreign relations concerns to the same degree.<sup>90</sup> While some treaties regulate intrinsically executive functions, others (like the Convention at issue in *Abbott*) establish rights for or concern interactions between private individuals. In such cases, the functional argument in favor of substantial deference to the Executive loses much of its force.

On a more fundamental level, ceding primary interpretive authority over treaties to the executive branch runs contrary to the judicial branch's role as a coequal and independent part of the American system of government. The Supremacy Clause makes clear that "all Treaties . . . shall be the supreme Law of the Land."<sup>91</sup> As such, Article III of the Constitution provides that authority to interpret treaties, like all other laws, is vested in the judicial branch. To be sure, some consideration of the Executive's structural advantages in foreign affairs is warranted.<sup>92</sup> But courts should remain mindful of Justice Brennan's admonition that "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance."<sup>93</sup> Adopting a highly deferential standard risks allowing a single branch of government to both create and enforce legal rights and obligations, exactly the type of power concentration the Framers sought to avoid.<sup>94</sup>

*Abbott* presented the Court with an opportunity to clarify the proper level of deference due executive treaty interpretations. The need for such guidance is especially great given the fact that cases involving treaties and their interpretation make up an increasing share of the Court's docket.<sup>95</sup> By failing to provide a standard for future cases,<sup>96</sup> the *Abbott* decision further complicates the relationship between executive power and judicial restraint.

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<sup>89</sup> See Sullivan, *supra* note 66, at 801 & n.112. The Supreme Court has long guarded against analogous problems in the statutory interpretation context by adopting a presumption against deferring to a current Congress's proposed interpretations of laws passed by a previous Congress. See *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 348–49 (1963).

<sup>90</sup> Van Alstine, *supra* note 60, at 1279–80.

<sup>91</sup> U.S. CONST. art. VI, cl. 2.

<sup>92</sup> See Van Alstine, *supra* note 60, at 1298–1302. Van Alstine advocates the use of a standard he terms "calibrated deference," which grants the executive branch enhanced interpretive authority over treaties when they strongly implicate defense matters or other core executive functions, or where a particular executive agency is responsible for the treaty's continuing administration. *Id.*

<sup>93</sup> *Baker v. Carr*, 369 U.S. 186, 211 (1962).

<sup>94</sup> See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217–25 (1995).

<sup>95</sup> See generally Harold Hongju Koh, *The Ninth Annual John W. Hager Lecture, The 2004 Term: The Supreme Court Meets International Law*, 12 TULSA J. COMP. & INT'L L. 1 (2004) (discussing the increasing prevalence of international law cases).

<sup>96</sup> On the benefits of clear rules generally, see Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

## III. FEDERAL STATUTES AND REGULATIONS

A. *Civil Rights Act, Title VII*

*Statute of Limitations.* — Over forty years after the passage of Title VII of the Civil Rights Act of 1964,<sup>1</sup> that title's statute of limitations remains a "procedural battleground,"<sup>2</sup> despite the Supreme Court's having revisited the statute of limitations on several occasions. Last Term, in *Lewis v. City of Chicago*,<sup>3</sup> the Supreme Court held that the later application of a policy with a disparate impact constituted a discriminatory "use" of the policy. In a factual situation reminiscent of *Ricci v. DeStefano*,<sup>4</sup> the Court addressed whether a challenge brought by a group of minority firefighters to the City of Chicago's use of a standardized test was brought within the statute of limitations. While the Court's decision was consistent with the language and purpose of Title VII, it highlighted the fact that only Congress can resolve Title VII's conflicting jurisprudence.

Title VII of the Civil Rights Act prohibits discrimination by employers on the basis of "race, color, religion, sex, or national origin."<sup>5</sup> This prohibition covers both disparate treatment, where employers engage in intentional discrimination, and disparate impact, where facially neutral employment policies disproportionately affect minority employees.<sup>6</sup> Plaintiffs alleging employment discrimination under Title VII must file charges with the Equal Employment Opportunity Commission (EEOC) within three hundred days of the allegedly discriminatory act or their claims become time-barred by the statute of limita-

<sup>1</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2006).

<sup>2</sup> 2 BARBARA T. LINDEMANN & PAUL GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1749 (C. Geoffrey Weirich ed., 4th ed. 2007).

<sup>3</sup> 130 S. Ct. 2191 (2010).

<sup>4</sup> 129 S. Ct. 2658 (2009). In *Ricci*, the City of New Haven, Connecticut, administered promotional exams for the city's firefighters. *Id.* at 2665. Minority candidates scored poorly on the exams — out of the nineteen candidates immediately eligible for promotion, only two were Hispanic and there were no African Americans, while those two groups represented twenty percent and twenty-three percent of all exam takers, respectively. *Id.* at 2666. The City did not certify the exam results due to concern regarding the adverse impact on minority candidates and the associated legal liability. *Id.* at 2671. The seventeen white firefighters and one of the Hispanic firefighters who passed the exam but were not promoted filed suit against the City of New Haven, alleging that the City violated both the Equal Protection Clause and the disparate treatment prohibition of Title VII. *Id.* In a 5–4 decision, the Supreme Court held that before an employer may intentionally discriminate to remedy an "unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the . . . discriminatory action." *Id.* at 2677. The *Ricci* decision "entrench[ed] the Court's color-blind approach to antidiscrimination law." *The Supreme Court, 2008 Term — Leading Cases*, 123 HARV. L. REV. 153, 283 (2009) [hereinafter 2008 *Leading Cases*].

<sup>5</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>6</sup> *Id.* §§ 2000e-2(a), -2(k)(1)(A)(i).