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# Abstention, Parity, and Treaty Rights: How Federal Courts Regulate Jurisdiction under the Hague Convention on the Civil Aspects of International Child Abduction

Sam F. Halabi\*

## ABSTRACT

While Article VI of the US Constitution establishes treaties as supreme federal law, scholars and lawmakers have historically doubted that state judges will enforce the United States' international obligations when they conflict with important state interests. The Hague Convention on the Civil Aspects of International Child Abduction, codified in US law as the International Child Abduction Remedies Act (ICARA), is the first major family law treaty ratified by the United States. Its provisions are regularly enforced by both federal and state courts. Notwithstanding the relationship of the treaty to important state interests like the integrity of family court systems, financial and social support for families and minors, and the substantive law of marriage and divorce, there is general convergence between federal and state judges on the applicability of the convention and certain exceptions authorized by the treaty. Several federal district courts, acknowledging these state and federal interests in efficacious adjudication of treaty claims, have abstained from hearing ICARA applications in favor of state proceedings. Federal appellate courts, however, have been overwhelmingly hostile to these abstention decisions, citing the role of federal courts in upholding the United States' international commitments. This article argues that federal appellate courts have largely ignored the jurisdictional plan designed by Congress in favor of an implied Article III power to enforce treaties, and recommends changes for both ICARA and additional family law treaties the United States is now preparing to join.



## INTRODUCTION

In 2010, the US Supreme Court decided a child custody case, *Abbott v. Abbott*, despite its traditional preference that state law and state courts handle family law matters.<sup>1</sup> In that case, the Supreme Court resolved a specific issue with respect to child custody: whether or not a term in a custodial decree giving a noncustodial parent the right to prohibit a child's travel nevertheless constituted a "right of custody."<sup>2</sup> Under most circumstances, that issue would be resolved by a state court of general jurisdiction or a state family court. The Abbots, however, came to the Supreme Court by way of a treaty the United States joined in 1988 and an implementing statute that gave federal and state courts concurrent original jurisdiction over claims made under that treaty.<sup>3</sup> This article explores the problems posed by regulating family law through international treaties—a practice that sets federal courts' historical authority to uphold the United States' international commitments on a collision course with the traditional role states play in family law matters. It argues that federal courts view international treaties as fundamentally tied to their Article III judicial power and will narrowly construe Congressional efforts to share or reallocate that jurisdiction to state courts.

The treaty at issue in *Abbott*—the 1980 Convention on the Civil Aspects of International Child Abduction—has, over the course of its twenty-five years in federal and state courts, generated two related problems that tie into deeper, historical constitutional conflicts. The first is the tension in Article III of the US Constitution between the separation of powers principle embodied in the establishment of the judicial power and Congress's ability to limit that power.<sup>4</sup> The second is the capability or

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<sup>1</sup> *In re Burrus*, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

<sup>2</sup> *Abbott v. Abbott*, 130 S. Ct. 1983 (U.S. 2010).

<sup>3</sup> *Id.*

<sup>4</sup> Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1486-87 (1987) ("Judicial doctrines of federal jurisdiction operate similarly to adjust—to redraw—the boundary that circumscribes the states' independent functioning. The courts' interpretive role regarding jurisdictional grants is well established. Although Congress initially prescribes the jurisdiction of the federal courts, the courts themselves find extensive room for interpretation of these grants of jurisdiction."); Tara Leigh Grove, *The Structural Safeguards of Federal Jurisdiction*, 124

inclination of state courts to vindicate federal rights—the so-called “parity” problem.<sup>5</sup> While there is an enormous literature committed to both of these questions, there is relatively modest attention paid to federal rights arising under international treaties.<sup>6</sup> Because treaties are increasingly used to impart and shape domestic rights—including parental rights—attorneys, judges, legislators, and scholars alike will benefit from understanding the alternatives available to Congress when allocating jurisdiction under treaties, as well as understanding the strength and form judicial resistance to those alternatives may take.<sup>7</sup>

The 1980 Convention on the Civil Aspects of International Child Abduction (Hague Child Abduction Convention) vividly illustrates the tensions involved when the federal government uses treaties to regulate wider swaths of national and international problems.<sup>8</sup> In plain terms, parents were increasingly taking their children across international borders in an attempt to obtain more favorable custody determinations. The treaty aimed to deprive the abducting parent of any advantage by requiring the return of the child, and in the case of visitation rights, to ensure respect for those rights.<sup>9</sup> The United States signed the treaty in 1981 and Congress passed an implementing statute, the International Child Abduction

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HARV. L. REV. 869, 870 (2011) (noting a “recurring concern among scholars of federal courts and federal jurisdiction that Article III is at war with itself”).

<sup>5</sup> See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211 (2004); Samuel R. Wiseman, *Habeas After Pinholster*, 53 B.C. L. REV. 953 (2012) (analyzing the state/federal disparity in the habeas corpus context).

<sup>6</sup> Janet Koven Levit, *A Tale of International Law in the Heartland: Torres and the Role of State Courts in Transnational Legal Conversation*, 12 TULSA J. COMP. & INT’L L. 163, 183-84 (2004) (referring to the “neglect” of state court management of treaties). I use the adjective “international” to distinguish from treaties the United States concluded with Native American tribes.

<sup>7</sup> See, e.g., *Golan v. Holder*, 132 S. Ct. 873 (2012). In *Golan*, the US Supreme Court determined that Congress was empowered to move copyrighted works from the public domain back into private copyright holders’ possession through ratification of the Uruguay Round Agreements Act (URAA), adopting as federal law certain treaty-based copyright protections. Plaintiff orchestra conductors, musicians, publishers, and others who formerly enjoyed free access to works removed from the public domain argued that the URAA violated their First Amendment rights to freedom of expression. The US Supreme Court, 6-2, held that the URAA survived First Amendment scrutiny because it was narrowly tailored to fit the national interest in protecting US copyright holders’ interests abroad. Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 MICH. L. REV. 390, 396-98 (1998) (“Moreover, many of these treaties take the form of detailed multilateral instruments negotiated and drafted at international conferences. These treaties resemble and are designed to operate as international “legislation” binding on much of the world.”) (citations omitted); David Sloss, *Domestic Application of Treaties*, in THE OXFORD GUIDE TO TREATIES 367 (Duncan Hollis ed., 2012).

<sup>8</sup> Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89 [hereinafter Hague Child Abduction Convention].

<sup>9</sup> *Id.* at art. 1. In the treaty, rights known as “visitation” rights in the United States are described as rights of “access.”

Remedies Act (ICARA), in 1988.<sup>10</sup> ICARA gave federal and state courts concurrent original jurisdiction over treaty claims and required them to respect each other's judgments. Congress did not specify what federal courts should do when treaty claims appear in both federal and state court litigation. It should have.

Parallel federal and state litigation occurs because state court plaintiffs join Hague Child Abduction Convention claims with their divorce and child custody petitions, and state court defendants raise treaty claims in their responsive pleadings.<sup>11</sup> State court losers go to federal court to re-litigate unfavorable rulings. Citing fundamental state interests, "wise judicial administration," and clear Congressional acknowledgment as to the adequacy of state courts for vindicating rights under the treaty, federal district courts regularly deferred to state proceedings in which treaty claims initially appeared.<sup>12</sup> Federal appellate courts overwhelmingly rejected these "abstention" decisions, emphasizing state courts' role in making child custody determinations and the risk that they would prioritize that role over respecting the United States' international obligations.<sup>13</sup>

The separation of powers problem posed by these decisions is that federal courts are exercising jurisdiction over claims Congress allocated to state courts for good reasons. First, Congress desired to make available as many courts as possible to resolve treaty claims. Second, it sought to create an avenue by which state competence and expertise in family law could aid in the federal effort to meet treaty obligations. Federal courts' exercise of jurisdiction over claims brought in state court is in tension not only with these objectives, but also with prudential doctrines favoring conservation of judicial resources and Congressional limitations on lower federal courts' appellate jurisdiction over state judgments. The immediate injury to federal interests is the substantial delay caused by allowing parents to litigate in state court and then turn to federal court when they

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<sup>10</sup> International Child Abduction Remedies Act, 42 U.S.C. §§ 11601-11611 (2013) [hereinafter ICARA].

<sup>11</sup> The applicability of the federal removal statute 28 U.S.C. § 1441 et seq. is unclear under the implementing legislation. I speculate that it is rarely used because it would place the state court defendant at an evidentiary disadvantage under the statute. *See Lops v. Lops*, 140 F.3d 927, 965 (11th Cir. 1998) (Kravitch, J., dissenting) (arguing that federal removal policy applies to Hague claims); *In re Mahmoud*, No. 96-4165, 1997 U.S. Dist. LEXIS 2158, at \*3 (E.D.N.Y. Jan. 29, 1997) ("The federal removal statute, 28 U.S.C. § 1441a authorizes removal by the defendant to federal court if original jurisdiction exists in the district court, except 'as otherwise expressly provided.' Neither the Hague Convention nor ICARA prohibits removal.") (citations omitted).

<sup>12</sup> *See, e.g., Silverman v. Silverman*, No. 00-2274 (PAM/JGL) (D. Minn. Nov. 13, 2000) ("He can and was afforded the opportunity to raise his Hague Convention petition in state court, but instead chose to file his petition in federal court—interestingly enough, on the same day as the state hearing.").

<sup>13</sup> *See, e.g., Silverman v. Silverman*, 338 F.3d 886, 895 (8th Cir. 2003); *Yang v. Tsui*, 416 F.3d 199 (3d Cir. 2005); *Gaudin v. Remis*, 415 F.3d 1028 (9th Cir. 2005); *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002).

are unhappy with the results. The treaty contemplates a six-week adjudication period.<sup>14</sup> The United States is among the slowest to resolve treaty claims.<sup>15</sup>

The judicial federalism problem posed by these decisions is that, statutory parity notwithstanding, federal appellate courts are shaping jurisdiction under the treaty based on an implied Article III power to uphold the United States' international obligations. In their view, state courts are less capable, less trustworthy, or both. State interests in administering their own judicial systems and family law regimes suffer as litigants use the federal courts to undermine state judicial authority. In the long term, the process by which federal appellate courts have narrowed state jurisdiction under the treaty is likely to reinforce the view that state courts are not legitimate participants in the application of international law. Congress clearly wanted state courts involved in the execution of the Hague Child Abduction Convention. Indeed, state courts' participation makes sense as treaties increasingly regulate issue areas, like family law, where state control is generally assumed and preferred. Moreover, in the Hague Child Abduction Convention context, federal appellate decisions wrongly assume the worst. State judges order the return of children abroad at a slightly higher rate than federal judges and reject affirmative defenses under the treaty at a nearly identical rate.<sup>16</sup>

I explore these arguments through two methods. First, qualitatively, I analyze federal appellate decisions reviewing federal district court decisions to abstain from hearing treaty claims in favor of state proceedings. Of course, one can always dispute the reasoning a court uses to reach its conclusions, and therefore dispute the conclusions themselves. However, in the case of Hague Child Abduction Convention abstention jurisprudence there is an identifiable pattern of federal appellate courts: (1) drawing a sharp distinction between custody and "habitual residence" under the treaty in order to reject abstention decisions, (2) narrowly construing a litigant's invocation of the treaty in a state court proceeding, and (3) emphasizing the role of federal courts in upholding international commitments.<sup>17</sup>

Second, quantitatively, I collected all reported cases in which federal and state judges adjudicated claims brought under the Hague Child Abduction Convention in order to test the hypothesis that state judges enforce international commitments less robustly than federal judges. If it were true that state judges favored domestic resolution of custody disputes

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<sup>14</sup> Hague Child Abduction Convention, *supra* note 8.

<sup>15</sup> NIGEL LOWE, A STATISTICAL ANALYSIS OF APPLICATIONS MADE UNDER THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (2011) ("It took far longer to conclude a case than the global average and this was found to be true for all outcomes in both return and access applications.").

<sup>16</sup> See *infra* Part IV.

<sup>17</sup> See *infra* Part III.

in contravention of the treaty's plan, we would observe state judges returning children abroad less frequently than federal judges. A state judge might achieve that outcome either through determining that the treaty was inapplicable or by applying one of the affirmative defenses available under the treaty to prevent return.

Therefore, the empirical part of this article is a "parity" analysis. There is a large and controversial literature addressing parity between federal and state courts' ability and inclination to vindicate federal rights.<sup>18</sup> Most of this literature is devoted to federal constitutional and "domestic" statutory rights. But, there is some discussion of state courts' willingness to enforce treaty rights, especially post-independence British creditors' rights and recent cases involving the Vienna Convention on Consular Relations.<sup>19</sup> However, in general, there have been few experiences with sufficient state judicial participation upon which a study might be undertaken.<sup>20</sup>

The parity literature is therefore tilted in favor of abstract institutional characterizations over empirical analysis.<sup>21</sup> This is understandable. One may extrapolate a set of expected behaviors resulting from life tenure, method of judicial selection, and, somewhat more arbitrarily, "technical

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<sup>18</sup> Rene Lettow Lerner, *International Pressure to Harmonize: The U.S. Civil Justice System in an Era of Global Trade*, 2001 BYU L. Rev. 229, 253 ("There is a large literature on the relative merits of federal and state courts. These scholars are addressing the question of whether state courts are capable of adequately enforcing federal rights and of deciding diversity cases. Many writers have concluded that state judges are quite capable of handling these cases; a sizable contingent has argued the opposite.").

<sup>19</sup> See Neuborne, *supra* note 5. Both state and federal courts, for example, overwhelmingly rejected defendants' claims that the Vienna Convention on Consular Relations imparted an individually enforceable right in a criminal proceeding. See also Bruno Simma & Carsten Hoppe, *From LaGrand and Avena to Medellín - A Rocky Road Toward Implementation*, 14 TUL. J. INT'L & COMP. L. 7, 27 (2005); Erik G. Luna & Douglas J. Sylvester, *Beyond Breard*, 17 BERKELEY J. INT'L L. 147 (1999); Anna Maria Gabriellidis, *Human Rights Begin at Home: a Policy Analysis of Litigating International Human Rights in U.S. State Courts*, 12 BUFF. HUM. RTS. L. REV. 139, 179 (2006).

<sup>20</sup> David Sloss and Paul Stephan have argued, using both qualitative and quantitative methodologies, that courts are more likely to enforce international treaties against private parties than against the government. DAVID SLOSS, *Treaty Enforcement in U.S. Courts: An Empirical Analysis in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY* (David Sloss ed., 2009); PAUL B. STEPHAN, *Treaties in the Supreme Court, 1946-2000*, in INTERNATIONAL LAW IN THE U.S. SUPREME COURT, 317-52 (David Sloss, Michael D. Ramsey, and William Dodge, eds., 2009). These analyses do not distinguish between federal and state enforcement and, indeed, the latter is focused exclusively on US Supreme Court cases.

<sup>21</sup> See Neuborne, *supra* note 5; Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983); Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 261-69 (1988); Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233, 245-52 (1999).



competence.”<sup>22</sup> While some scholars who have undertaken empirical analyses of federal and state court parity are at pains to emphasize the limited applicability of their findings,<sup>23</sup> other scholars reject even the possibility of objectively comparing federal and state courts’ treatment of federal rights.<sup>24</sup> Conceding these difficulties, this article nevertheless takes the view that in limited circumstances it is possible to draw meaningful conclusions from studies of reported cases. In the case of Hague Child Abduction Convention jurisprudence, the relatively limited universe of adjudications and the treaty’s young life improve the chance that a representative picture of federal and state judicial management will emerge.

This argument implicates a wider theoretical debate on the law of federal jurisdiction in the treaty context, but also raises more immediate, practical questions about the effectiveness of ICARA’s jurisdictional scheme—questions that are especially important to resolve in light of the family law treaties now awaiting ratification and implementation. These latter questions are the focus of this article, which argues that ICARA has failed to effectively or efficiently balance federal and state interests. By granting concurrent original jurisdiction over Hague Child Abduction Convention claims, Congress invited the jurisdictional conflicts it claimed it hoped to avoid. Federal appellate decisions rejecting federal district courts’ abstention orders are not only inconsistent with the jurisdictional statute, they also mandate duplication of judicial resources and undermine state schemes constructed to protect children and effectively adjudicate treaty claims.<sup>25</sup> I conclude by suggesting that, as the United States enters more family law treaties, as it is now poised to do, Congress consider the lessons of the Hague Child Abduction Convention when determining which courts are best suited to adjudicate family law claims. If it again decides that concurrent original jurisdiction between federal and state courts is best, Congress should make more explicit the standards by which federal courts may or must abstain.

Part I of this article provides background to both the increasing influence of international law on traditional state authority and the United States’ increased engagement with international family law treaties. Part II analyzes federal appellate decisions from the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuit Courts of Appeal rejecting abstention under the treaty. Part III discusses the methodology used to

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<sup>22</sup> See Neuborne, *supra* note 5; Jed Shugerman, *Economic Crisis and the Rise of Judicial Elections and Judicial Review*, 123 HARV. L. REV. 1061, 1143-44 (2010).

<sup>23</sup> Gerry, *supra* note 21.

<sup>24</sup> Chemerinsky, *supra* note 21, at 236 (“[T]he debate about parity is unresolvable because parity is an empirical question for which there is no empirical answer.”).

<sup>25</sup> See Full Faith and Credit Act, 28 U.S.C. § 1738 (1948) (requiring a federal court to give the same preclusive effect to a state court judgment as another court of that state would give); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976).

study federal and state judicial management of Hague Child Abduction Convention claims. Part IV applies the lesson of Hague Child Abduction Convention abstention to family law treaties the United States has either signed or already ratified. Part V takes stock of recent US participation in family law treaties and provides a glimpse into the complications that the future may hold for federal court, state court, and treaty jurisdiction over family law.

## I.

### THE INCREASING INFLUENCE OF INTERNATIONAL LAW ON STATE LAW AND THE IMPLEMENTATION OF THE HAGUE ABDUCTION CONVENTION

#### A. *Constitutional Structure and Federal Treaties*

To understand the difficulties raised by concurrent jurisdiction in the Hague Child Abduction Convention context, it is necessary to review the constitutional framework for the implementation of treaties and the spread of international law into the traditionally state-dominated family law sphere.<sup>26</sup> The US Constitution originated in significant part because the Articles of Confederation tolerated competition and conflict between the newly independent states in ways that threatened long-term unity and invited external interference.<sup>27</sup> The Founders, as part of a relatively comprehensive displacement of state sovereignty over foreign relations, stripped away the states' powers to conclude treaties and regulate foreign commerce and vested them in Congress and the President.<sup>28</sup> For example, Article I, Section 8 of the US Constitution authorizes Congress to regulate foreign commerce and to define and punish offenses against the law of nations, and Article II provides for a joint treaty-making process between the President and the Senate.<sup>29</sup> As in the Articles of Confederation, states were prohibited from entering into any "agreement or compact" with a foreign power or engaging in war without Congressional consent.<sup>30</sup>

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<sup>26</sup> See Michael D. Ramsey, *The Power of the States in Foreign Affairs: The Original Understanding of Foreign Policy Federalism*, 75 NOTRE DAME L. REV. 341, 369-90 (1999).

<sup>27</sup> Sam Foster Halabi, *The Supremacy Clause as Structural Safeguard of Federalism: State Judges and International Law in the Post-Erie Era*, 23 DUKE J. COMP. & INT'L L. 63, 64 (2013).

<sup>28</sup> The Articles of Confederation had also attempted to limit state authority over foreign affairs with relatively limited success. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1446 (1987); Thomas H. Lee, *Making Sense of the Eleventh Amendment: International Law and State Sovereignty*, 96 NW. U. L. REV. 1027, 1050-51 (2002) ("Because state legislatures—not Congress—were the original repositories of legislative sovereignty transferred from Parliament by revolution, the dogma of exclusive sovereignty (in thirteen iterations) stood as an impediment to the creation of a 'more perfect Union.'")

<sup>29</sup> Curtis A. Bradley and Jack L. Goldsmith, *Breard: The Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM J. INT'L L. 675, 677-78 (1998) (noting limitations imposed on state foreign relations powers under the US Constitution).

<sup>30</sup> U.S. CONST. art. I, § 10.

Article III's enumerated classes of Supreme Court jurisdiction established federal judicial control over disputes most likely to affect international relations.<sup>31</sup> For example, maritime and admiralty disputes were fundamentally tied to both commercial and security interests of the United States as a unitary sovereign under the law of nations. Thus, the judicial power was always intertwined with the United States' international obligations.<sup>32</sup>

Article VI of the Constitution bound state judiciaries to give effect to actions taken by the political branches in executing these functions.<sup>33</sup> However, initial state judicial resistance to the enforcement of British creditors' treaty-based rights after independence established a long tradition of skepticism about whether state judges would robustly enforce international commitments—especially when doing so threatened important state interests.<sup>34</sup> When states threatened the United States' international obligations through executive, legislative, or judicial action, federal judges readily invalidated those measures by applying one of several doctrines of conflict or field preemption flowing from Article VI.<sup>35</sup>

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<sup>31</sup> Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 3 (2009).

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

<sup>33</sup> U.S. CONST. art. VI, cl. 2. In *United States v. Curtiss-Wright*, the US Supreme Court ruled that federal authority over foreign affairs existed prior to and beyond the textual limits imposed by the US Constitution. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). *Curtiss-Wright* has never been overruled, but Justice Jackson's concurrence in *Youngstown Sheet and Tube v. Sawyer* is now regarded as the most important precedent as to the extent of federal foreign affairs authority flowing from delegated powers under Article I and Article II. 343 U.S. 579 (1952).

<sup>34</sup> See, e.g., Ernest A. Young, *Institutional Settlement in a Globalizing Judicial System*, 54 DUKE L.J. 1143, 1189 (2005); *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1816).

<sup>35</sup> Brannon P. Denning & Michael D. Ramsey, *American Insurance Association v. Garamendi and Executive Preemption in Foreign Affairs*, 46 WM. & MARY L. REV. 825, 843 (2004). The authors note:

The natural effect of making federal law supreme is that it overrides inconsistent state law. Indeed, preemption—and particularly foreign affairs preemption—was a central purpose of the clause, as explained in the founding era . . . The inclusion of treaties, as well as statutes, in the Supremacy Clause shows the extent to which the Constitution's framers focused upon state interferences in foreign affairs under the Articles. Perhaps the single greatest foreign affairs challenge under the Articles was that states refused to implement and abide by treaties negotiated by the national government. *Id.*

See Tim Wu, *Treaties' Domains*, 93 VA. L. REV. 571, 573, 584 n.31 (2007) ("There is, perhaps unsurprisingly, a strong historical pattern of enforcement of treaties against the individual States of the United States.").

There were both explicit and implicit safeguards built into the Constitution to prevent the abuse of international lawmaking powers.<sup>36</sup> Explicitly, states enjoyed participation in Congress through their elected delegations—the “political safeguards of federalism” which protected state interests when Congress, for example, regulated foreign commerce or codified customary international law.<sup>37</sup> With respect to treaties, for example, a super-majority of Senators were required to approve agreements entered into by the President.<sup>38</sup> Implicitly, it was understood that treaties covered a relatively narrow class of national interests, limiting the areas for which this non-bicameral form of law-making might be used.<sup>39</sup> The judiciary fashioned its own methods to enforce that implicit understanding, principally the doctrine of “self-execution”<sup>40</sup> under which courts determined whether or not treaties required additional action from Congress to have domestic legal effect.<sup>41</sup>

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<sup>36</sup> See Oona Hathaway et al., *The Treaty Power: Its History, Scope, and Limits* (Yale Law Sch., Pub. Law Working Paper No. 267, 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2155179###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2155179###) (identifying structural limits on the treaty power); JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* 272-73 (2005).

<sup>37</sup> David Sloss, *International Agreements and the Political Safeguards of Federalism*, 55 *STAN. L. REV.* 1963 (2003). For the seminal contribution on the political safeguards of federalism, see Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1954).

<sup>38</sup> U.S. CONST. art. II, § 2.

<sup>39</sup> David M. Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 *MICH. L. REV.* 1075 (2000); Oona Hathaway et al., *supra* note 36 (“Madison conceded that ‘[t]he exercise of the power must be consistent with the object of the delegation,’ which was ‘the regulation of intercourse with foreign nations,’ and he agreed that the power did not include the power ‘to alienate any great, essential right.’”).

<sup>40</sup> Some treaties are “self-executing” which means no additional legislation from Congress is required to impart individually enforceable federal rights. *Asakura v. City of Seattle*, 265 U.S. 332, 341 (1924). The Court noted:

The rule of equality established by [the treaty] cannot be rendered nugatory in any part of the United States by municipal ordinances or state laws. It stands on the same footing of supremacy as do the provisions of the Constitution and laws of the United States. It operates of itself without the aid of any legislation, state or national; and it will be applied and given authoritative effect by the courts. *Id.*

Curtis Bradley, *Chevron Deference and Foreign Affairs*, 86 *VA. L. REV.* 649, 656 (2000) (“Courts vary to some extent in the precise test they use to determine whether a treaty is self-executing. Typically, courts consider a variety of factors, such as the treaty’s language and purpose, the nature of the obligations that it imposes, and the domestic consequences associated with immediate judicial enforcement.”)

<sup>41</sup> *Foster v. Nielson*, 27 U.S. (2 Pet.) 253 (1829); *Medellin v. Texas*, 552 U.S. 491, 525-26 (2008) (“The responsibility for transforming an international obligation arising from a non-self-executing treaty into domestic law falls to Congress.”). Tim Wu traces the history of the non-self-execution doctrine in US jurisprudence to a 1788 Pennsylvania state court decision, *Camp v. Lockwood*, 1 U.S. (1 Dall.) 393, 403-04 (Pa. Ct. Com. Pl. 1788). See Wu, *supra* note 35, at 594-95 n. 76.

History wrought a number of changes to this balance. The Civil War (and the Reconstruction Amendments that followed) extinguished a number of lingering constitutional questions regarding the preeminence of the national government over the states. Diminishing barriers to the movement of goods and people encouraged the national government to enter into a greater number of international agreements that coordinated, protected, and regulated interests implicated by these movements. These international agreements inevitably encroached upon states' legal authority.<sup>42</sup> The Supreme Court facilitated this encroachment. In 1921, it held in *Missouri v. Holland* that the federal government could accomplish through treaty what the Constitution otherwise allocated to the states.<sup>43</sup> In *Zschernig v. Miller*,<sup>44</sup> which was later reaffirmed on narrower preemption grounds in *American Insurance Association v. Garamendi*, state statutes and administrative measures face a significant risk of preemption if they impose more than an "incidental effect" on foreign relations, even where they do not directly conflict with a treaty or federal statute.<sup>45</sup> Because state courts are, *ex post*, structurally empowered to harmonize treaties with state legal regimes, the expansion of federal power has placed them at the center of longstanding debates over the proper uses of treaties.<sup>46</sup>

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

<sup>43</sup> In *Missouri v. Holland*, 252 U.S. 416 (1921), the US Supreme Court decided that the federal government's ability to make treaties, in that case, the Migratory Bird Treaty Act, is supreme over states' rights arising under the Tenth Amendment.

<sup>44</sup> *Zschernig v. Miller*, 389 U.S. 429 (1968).

<sup>45</sup> *American Ins. Ass'n v. Garamendi*, 539 U.S. 396 (2003).

<sup>46</sup> Sam Foster Halabi, *supra* note 27. State judges are especially influential given that they manage 95% of all litigation. C.J. Christine M. Durham, Utah Supreme Court, *2012 State of the Judiciary Address*, available at <http://www.utcourts.gov/resources/reports/statejudiciary/2012-StateOfTheJudiciary.pdf>. The Connecticut Bar Journal, for example, surveys international law developments in Connecticut courts. Between 1993 and 2003, 60% of the reported decisions were from state courts compared with 40% from district courts or the U.S. Court of Appeals for the Second Circuit. Thomas R. Phillips, *State Supreme Courts: Local Courts in a Global World*, 38 TEX. INT'L L.J. 557, 564 (2003). Alison LaCroix, *IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM*, 172 (2010). The author notes:

To be sure, the clause looked to the judges in the states to enforce this supreme law of the land. It thus set up a procedural overlap between the two levels of government . . . The judges might be nodes of connection between the functional levels of government, but their more significant role was as nodes of separation between the supreme (national, enumerated) law of the land and the (ordinary) state law that operated in all other contexts. *Id.*

See *Sei Fujii v. California*, 242 P.2d 617 (Cal. 1952) (rejecting rights asserted under the U.N. Charter).

### B. *US Engagement with Family Law Treaties*

Family law is an area over which states have historically enjoyed virtually unfettered authority.<sup>47</sup> Diplomatically, the United States protected state family law through reservations, understandings, and declarations stating that any international agreement was subject to principles of federalism or by rejecting agreements which overstepped traditional understandings of the division between federal and state authority.<sup>48</sup> This was especially true of family law treaties,<sup>49</sup> which had long been a focus of the Hague Conference on Private International Law, an international organization committed to the harmonization and unification of choice of law rules.<sup>50</sup>

Major federal interventions into family law arose in part because some states abused this authority, giving little or no deference to family adjudications in other states, creating precisely the kind of full faith and credit problem the federal constitution was designed to address.<sup>51</sup> Aggrieved parents absconded with their children to haven states in search of a more favorable custody or maintenance determination.<sup>52</sup> Judicially mandated child and family support obligations also emerged as an important barrier between self-sufficiency and eligibility for federal assistance.

Over the last three decades, the federal government has increasingly regulated family law with a range of mandatory and permissive legal regimes aimed at these federal interests.<sup>53</sup> For example, citing the

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<sup>47</sup> See, e.g., Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821 (1995); Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829, 1831 (1987).

<sup>48</sup> See, e.g., UN, *International Covenant on Civil and Political Rights 999 Treaty Series* 171 (1966) (“That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments”).

<sup>49</sup> Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J. L. & PUB. POL’Y 267, 269-70 (2009) (“Until recently, family law was viewed as the province of state governments. In the tradition of dual federalism, states were sovereign in this area, and the national government played a relatively minor role.”); Ann Laquer Estin, *Families and Children in International Law*, 12 TRANSNAT’L L. & CONTEMP. PROBS. 271, 276 (2002) (“Although the United States has participated in the Hague Conference since 1964, it has not ratified any of the marriage and divorce treaties, most likely because family law is understood in the United States to be a subject of state jurisdiction while international treaty-making is the province of the federal government.”).

<sup>50</sup> Hague Conference on Private International Law, [http://www.hcch.net/index\\_en.php?act=text.display&tid=26](http://www.hcch.net/index_en.php?act=text.display&tid=26).

<sup>51</sup> Stephen Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1242 (2009).

<sup>52</sup> MAUREEN DABBAGH, *PARENTAL KIDNAPPING IN AMERICA: AN HISTORICAL AND CULTURAL ANALYSIS* (2012).

<sup>53</sup> Estin, *Sharing Governance*, *supra* note 49, at 279-80 (2009) (“State laws governing paternity, adoption, foster care, child support, and child protection now evolve based on a

relationship between delinquent family maintenance obligations and federal welfare assistance, Congress imposed a mandatory regime that requires states to actively pursue individuals who are delinquent in family maintenance payments.<sup>54</sup> With respect to child custody decisions, Congress passed the Parental Kidnapping Prevention Act (PKPA) to eliminate haven states by requiring state judges to defer to the continuing jurisdiction of any decree issued by a previous state judge with jurisdiction over the case.<sup>55</sup> Although the PKPA itself does not provide mechanisms for enforcement, the PKPA makes the Federal Parent Locator Service available in all custody cases and makes the federal Fugitive Felony Act applicable to interstate child abductions.<sup>56</sup>

The two interests that caused the federalization of certain aspects of family law domestically—recovery of maintenance obligations and elimination of haven states—also necessitated protection at the international level.<sup>57</sup> As marriages between people from different countries became more common and families became more mobile, so did the need to reach parents in foreign countries when those marriages ended.<sup>58</sup> As a result, the executive branch has shown greater openness to

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federal design, as do laws regulating family behavior of individuals who receive federally supported welfare benefits. The cost of these programs to the national government shows a substantial federal commitment to family policy and children’s welfare.”).

<sup>54</sup> *Id.* at 275-76, 282. Professor Estin notes:

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

Congress began to search for ways to contain or reduce costs. *Id.* (citations omitted).

<sup>55</sup> Congress enacted the Parental Kidnapping Prevention Act (PKPA), and the Uniform Child Custody Jurisdiction and Enforcement Act, 28 U.S.C. § 1738A (1980), to assist parents to regain their children when unlawfully taken by the other parent. The PKPA reaffirms a court’s duty to give full faith and credit to a decree rendered by a state court and provides that a court of another state must defer to the continuing jurisdiction of the state that rendered the original decree. Congress specifically invoked its Article IV power to effect full faith and credit between the states.

<sup>56</sup> 28 U.S.C. § 1738A (1980); 42 U.S.C. § 653 (1998) (establishing the Federal Parent Locator Service (FPLS)); Caroline LeGette, *International Child Abduction and the Hague Convention: Emerging Practice and Interpretation of the Discretionary Exception*, 25 TEX. INT’L L.J. 287, 292-93 (1990) (describing Department of Health and Human Services’ use of FPLS).

<sup>57</sup> See Judith Resnik, *Categorical Federalism, Jurisdiction, Gender and the Globe*, 111 YALE L.J. 619, 621 (2001) (challenging the assertion that family law is “truly” a subject of local jurisdiction and suggesting that globalization will engender greater US engagement with international and transnational family law).

<sup>58</sup> Peter H. Pfund, *Hague International Child Abduction Convention; Text and Legal Analysis*, 51 Fed. Reg. 10494, 10497 (Mar. 26, 1986) (“This country’s participation in the development of the Convention was a logical extension of U.S. membership in the

participation in treaties previously regarded as excessively intrusive into states' family law authority. The United States has ratified the Hague Child Abduction Convention as well as the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption.<sup>59</sup>

The United States has signed (but not ratified) two additional treaties that upon adoption will regulate important aspects of state family law: the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children;<sup>60</sup> and the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance.<sup>61</sup> The purpose of the first treaty is to protect children over whom citizenship, residency, and parental rights involve more than one state, and to “[avoid] conflicts between their legal systems in respect of jurisdiction, applicable law, recognition and enforcement of measures for the protection of children” through international cooperation and

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Hague Conference on Private International Law and bipartisan domestic concern with interstate parental kidnapping, a phenomenon with roots in the high U.S. divorce rate and mobility of the population.”); National Center for Missing & Exploited Children, *International Forum on Parental Child Abduction: Hague Convention Action Agenda 2* (1999) in PHILIP SCHWARTZ, *INTERNATIONAL CHILD ABDUCTIONS* (DeHart ed., 1993) (“This world-wide phenomenon is the consequence of ease of international travel and the multiplication of bi-national marriages, many of which suffer from cultural and religious friction, and the vulnerability of dual national children with two passports.”).

<sup>59</sup> Hague Conference on International Private Law, *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Status table*, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Nov. 14, 2011). Estin, *Sharing Governance*, *supra* note 49, at 83 (describing the long process involved in finalizing regulations and depositing the instrument of ratification). The United States signed the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention) on March 31, 1994. The United States ratified the Convention on December 12, 2007, and the Convention entered into force on April 1, 2008. The implementing International Adoption Act's (IAA) purpose is to “protect the rights of, and prevent abuses against children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests,” and to “improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States.” 42 U.S.C.A. §§ 14901-14954 (West 2000).

<sup>60</sup> Hague Conference on International Private Law, *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: Status table*, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=70](http://www.hcch.net/index_en.php?act=conventions.status&cid=70) (last visited Nov. 14, 2011) [hereinafter Hague Conference 1996].

<sup>61</sup> Hague Conference on International Private Law, *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance: Status table*, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=131](http://www.hcch.net/index_en.php?act=conventions.status&cid=131) (last visited Nov. 14, 2011) [hereinafter Hague Conference 2007].



promotion of the “best interests of the child.”<sup>62</sup> The second treaty aims to effectuate the “recovery of child support and other forms of family maintenance” in the international setting by establishing a system of cooperation between the contracting states, which will ensure that they make available applications for child support and other forms of family maintenance, recognize child support and other family maintenance orders, and effectively enforce the orders when necessary.<sup>63</sup>

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

Drafted in response to the growing phenomenon of parents in domestic disputes taking children across international borders in order to prejudice custody determinations, the Hague Child Abduction Convention requires the return of a child who was living in one party state, but was removed to or retained in another party state in violation of the left-behind parent’s custodial rights.<sup>64</sup> Once returned, child custody can then be resolved in the courts of that jurisdiction.<sup>65</sup> The Hague Child Abduction Convention does not authorize a court to determine the merits of the underlying custody claim.<sup>66</sup> The court is limited to deciding whether the child should be returned to his or her state of habitual residence.<sup>67</sup> The Hague Child Abduction Convention divides parental rights into “rights of custody” and

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<sup>62</sup> Hague Conference 1996, *supra* note 60, preamble.

<sup>63</sup> Hague Conference 2007, *supra* note 61, preamble.

<sup>64</sup> *Abbott v. Abbott*, 560 U.S. 1 (2010).

<sup>65</sup> *Id.*

<sup>66</sup> Hague Child Abduction Convention, *supra* note 8, art. 16. *See also* ICARA, 42 U.S.C. § 11601(a)(4) (1988).

<sup>67</sup> *See* Karin Wolfe, *A Tale of Two States: Successes and Failures of the 1980 Hague Convention on the Civil Aspects of International Child Abduction in the United States and Germany*, 33 N.Y.U. J. INT’L L. & POL’Y 285, 302 (2000). The author noted:

The child is then to be returned to the state of habitual residence—not to the custody of the left-behind parent—for judicial determination of custody over the child. Of course, the return of the child to the forum of habitual residence does not automatically trigger the application of that state’s law to the proceedings. Rather conflict of laws rules and the possibility of the presence of the doctrine of *renvoi* within the *lex fori* determine the applicable law. The Child Abduction Convention establishes only the forum. *Id.*

*See also* Julia A. Todd, *The Hague Convention on the Civil Aspects of International Child Abduction: Are the Convention’s Goals Being Achieved?*, 2 IND. J. GLOBAL LEGAL STUD. 553 (1995); Susan L. Barone, *International Parental Child Abduction: A Global Dilemma With Limited Relief—Can Something More Be Done?*, 95 N.Y. INT’L L. REV. 103, 104 (1995); Marianne Blair, *International Application of the UCCJEA: Scrutinizing the Escape Clause*, 38 FAM. L. Q. 547, 549-50 (2004). The determination of “habitual residence” itself has divided courts that have considered it. *See, e.g.*, *Silverman v. Silverman*, 338 F.3d 886, 895 (8th Cir. 2003) (ruling that “habitual residence” is a question of law); *Mozes v. Mozes*, 239 F.3d 1067, 1073 (9th Cir. 2001) (determining that “habitual residence” is focused on a factual analysis of parental intent subject to clear error review).

“rights of access.”<sup>68</sup> Article 3 of the treaty by its terms limits a “wrongful” removal to one violating “rights of custody.”<sup>69</sup> The Hague Child Abduction Convention does not mandate any specific remedy when a noncustodial parent has established interference with rights of access.<sup>70</sup> Rather, nations are instructed in Article 21 to “promote the peaceful enjoyment of access rights and the fulfillment of any conditions to which the exercise of those rights may be subject,” as well as to “take steps to remove, as far as possible, all obstacles to the exercise of such rights.”<sup>71</sup>

The Reagan Administration, which signed the treaty, argued that claims brought under the treaty belonged exclusively in state courts because key aspects of the treaty implicated state expertise and state interests.<sup>72</sup> The original House bill, H.R. 3971, gave state courts jurisdiction over all actions requesting the return of an abducted child and vested federal district courts with jurisdiction “to the extent” a question of treaty interpretation or diversity of citizenship arose.<sup>73</sup> The Senate, however, included concurrent, original federal and state jurisdiction both in its initial version of the law and as an amendment to the version eventually passed by both chambers.<sup>74</sup> While it is difficult to identify the

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<sup>68</sup> Hague Child Abduction Convention, *supra* note 8 (“The objects of the present convention are . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”).

<sup>69</sup> *Id.* art. 3.

<sup>70</sup> *See, e.g.,* Viragh v. Fordes, 612 N.E.2d 241, 246-47 (Mass. 1993). In *Viragh*, the custodial parent moved with her two children from Hungary to the United States notwithstanding a Hungarian court’s award of visitation to the noncustodial parent. When she informed her ex-husband that she would not return to Hungary with the children, he brought an action in Massachusetts Family Court seeking enforcement of a right of return under the Hague Child Abduction Convention. The Family Court judge rejected the requested relief on the ground that the father’s rights were “rights of access,” not “rights of custody,” under the treaty and therefore ineligible for the return remedy.

<sup>71</sup> *Croll v. Croll*, 229 F.3d 133, 138 (2d Cir. 2000) (“One such remedy is a writ ordering the custodial parent who has removed the child from the habitual residence to permit, and to pay for, periodic visitation by the non-custodial parent with access rights.”) (citing Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10,494, 10,500 (March 27, 1986)). *See also* Daniel M. Fraidstern, *Croll v. Croll and the Unfortunate Irony of the Hague Convention on the Civil Aspects of International Child Abduction: Parents with “Rights of Access” Get No Rights to Access Courts*, 30 BROOKLYN J. INT’L L. 641 (2005); Viragh, 612 N.E. 2d at 246-47.

<sup>72</sup> *See International Child Abduction Act Hearing Before the Subcomm. on Administrative Law and Governmental Relations of the H. Judiciary Comm.*, 100th Cong. (Feb. 3, 1988); *International Child Abduction Act, Hearing Before Subcomm. on Courts and Administrative Practice of the S. Judiciary Comm.*, 100th Cong. (Feb. 23, 1988); Linda Silberman, *Hague International Child Abduction Convention: A Progress Report*, 57 LAW & CONTEMP. PROBS. 209, 262-63 (1994). President Reagan signed the treaty on December 23, 1981, transmitted it to the Senate on October 30, 1985, and the Senate gave its advice and consent on October 9, 1986 subject to implementing legislation from Congress.

<sup>73</sup> 134 CONG. REC. S4704-04 (1988) (statement of Hon. Benjamin Cardin).

<sup>74</sup> *Id.* *See also* 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, 49 (2010).

reason, the Congressional record strongly hints that the State Department's skepticism toward state judicial enforcement explains the Senate position.<sup>75</sup>

Both chambers were clear on the issue of state competence, expertise, and interest. Then-Representative Ben Cardin emphasized:

[W]e have no intention of expanding Federal court jurisdiction into the realm of family law. In fact, Congress reaffirms its view that States have traditionally had, and continue to have, jurisdiction and expertise in the area of family law. Here we are not intruding into this jurisdiction. Rather, we are simply providing through simple and unambiguous language that in the special circumstance where international child abduction is alleged, both the Federal and State courts should be available to resolve the claims. As a matter of fact, the State courts will often provide the best fora for these cases because their backlogs are often substantially less than those of the Federal courts in many parts of the country.<sup>76</sup>

Senator Orrin Hatch noted the treaty's "custody-related questions" were "traditionally . . . handled by the states," but encouraged passage of the law despite the "close question" of federal or state jurisdiction.<sup>77</sup> Congress appeared to embody this intent with 42 U.S.C. § 11603(g), which provides that:

Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act.<sup>78</sup>

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

Limitation on authority. No court exercising jurisdiction of an action . . . may . . . order a child removed from a person having physical control of the child unless the applicable requirements of State law are satisfied.<sup>79</sup>

The implementing legislation additionally directed the President to establish a "Central Authority" for cooperating with other contracting

<sup>75</sup> See Jean Galbraith, *Prospective Advice and Consent*, 37 YALE J. INT'L L. 247 (2012) (detailing the Senate's bargaining options with respect to multilateral treaties).

<sup>76</sup> Cardin, *supra* note 73.

<sup>77</sup> 134 CONG. REC. 6356, 6484 (1988) (statement of Sen. Orrin Hatch).

<sup>78</sup> ICARA, 42 U.S.C. § 11603(g) (1988).

<sup>79</sup> ICARA, 42 U.S.C.A. § 11604(b) (West 2013). See also *International Child Abduction Act of 1988: Hearing on H.R. 2673 and H.R. 3971 Before the Subcommittee on Admin. Law and Governmental Relations of the Committee on the Judiciary*, 100th Cong. 30 (1988) (statement of Peter Pfund, Assistant Legal Advisor for Private International Law, Department of State) ("The federal legislation seeks to intrude as little as possible on relevant aspects of State law and procedure.").

states with respect to upholding treaty obligations, reporting to Congress and the Hague Conference, and coordinating across agencies. ICARA's principal purpose, however, is to regulate judicial proceedings under the treaty.<sup>80</sup>

Under ICARA, any person seeking the return of a child may commence a civil action by filing a petition in a court authorized to exercise jurisdiction in the place where the child is located.<sup>81</sup> The petitioner bears the burden of showing by a preponderance of the evidence that a child's removal or retention was wrongful.<sup>82</sup> The respondent must show by clear and convincing evidence that one of a limited number of exceptions apply. ICARA grants to state courts and US district courts "concurrent original jurisdiction of actions arising under the Convention."<sup>83</sup> The statute made only modest modifications to the treaty text, requiring simply that courts "shall decide the case in accordance with the Convention."<sup>84</sup>

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

<sup>81</sup> ICARA, 42 U.S.C. § 11603(b) (1988).

(1) A petitioner in an action brought under [the treaty] shall establish by a preponderance of the evidence—

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing—

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies. *Id.*

Most often claimed is that the child's return would result in grave danger of psychological harm. *Id.* § 11603(e)(1)(A)-(2)(A). *See* Friedrich v. Friedrich, 78 F.3d 1060, 1063-64 (6th Cir. 1996); Feder v. Evans-Feder, 63 F.3d 217, 221 (3rd Cir. 1995).

<sup>82</sup> Hague Child Abduction Convention, *supra* note 8. Article 13b provides that a court may refuse to return a child where there is a grave risk of physical or psychological harm or placement of the child in an intolerable situation. Article 20 allows a court to refuse to return a child where doing so would violate the requested state's principles regarding human rights and fundamental freedoms. Article 12 imposes a one-year time limit under which the remedy of return is most readily available, while the remaining exceptions under Article 13 apply to acquiescence in the removal or the child's objection where a sufficiently mature child meaningfully objects to the return. When Congress codified the treaty, it placed differing evidentiary burdens on parties seeking return or invocation of one or more exceptions. *See* ICARA, 42 U.S.C.A. § 11603(b) (West 2013).

<sup>83</sup> ICARA, 42 U.S.C.A. § 11603(a) (West 2013).

<sup>84</sup> ICARA, 42 U.S.C.A. 11603(d) (West 2013).

Under the treaty, judges may refuse to order return of a child through two principal means. Article 3 of the Hague Child Abduction Convention gives left-behind parents a right to have a child returned if: (1) a child's removal from a contracting state is "wrongful" and (2) the removal "is in breach of rights of custody."<sup>85</sup> Judges may therefore render the treaty inapplicable by determining that a removal was not "wrongful" or that a left-behind parent did not have "rights of custody," which are characterized (but not defined) in the treaty. For example, if a court determines that a left-behind parent's rights are actually rights of visitation, and not custody, then the parent would not have a right to have a child returned. Similarly, if a taking parent traveled to a foreign country with a child, a left-behind parent would not have a right to have the child returned if a judge determined that the taking parent was traveling with the consent of the left-behind parent or pursuant to a custody agreement because the removal would not be "wrongful."<sup>86</sup>

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

## II.

### FEDERAL DISTRICT COURT ABSTENTION UNDER THE HAGUE ABDUCTION CONVENTION

Hague Child Abduction Convention petitioners may file with the State Department as well as raise a treaty claim before a state and/or federal court. Indeed, part of the problem with the treaty as it functions in the United States is that petitioners often file in all three of these uncoordinated fora.<sup>89</sup>

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<sup>85</sup> Hague Child Abduction Convention, *supra* note 8, art. 3.

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

<sup>87</sup> Hague Child Abduction Convention, *supra* note 8, art. 12.

<sup>88</sup> Hague Child Abduction Convention, *supra* note 8, art. 13a, 13b, 20.

<sup>89</sup> *See Eric Lesh, Jurisdiction Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases Should be Heard Exclusively by Federal Courts*, 49 FAM. CT. REV. 170, 174 (2010) (attributing the slowness of American adjudications to the frequent occurrence of parallel litigation).

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

Where Hague Child Abduction Convention claims appear in state litigation, federal district courts have used both formal and informal methods to decide whether to exercise jurisdiction. In *Aldogan v. Aldogan*, for example, the federal district court held a hearing in order to determine if either party objected to a state family court having the first opportunity to decide the Hague Child Abduction Convention claim because the court already had jurisdiction over the underlying child custody suit.<sup>90</sup> Both parties assented to the transfer.<sup>91</sup> Federal district courts have also applied formal abstention doctrines permitting, and in some circumstances requiring, deference to state court proceedings.<sup>92</sup> Based on the statutory scheme, and where other criteria are met, dismissal in favor of state adjudication would not appear to threaten federal interests under the treaty.<sup>93</sup> Certainly, where state court proceedings have advanced beyond the pleading stage, avoidance of duplication and waste as well as comity and federalism concerns would weigh in favor of dismissal.<sup>94</sup> These represent the contexts in which federal district courts have declined jurisdiction in favor of state family, juvenile, or general trial court proceedings, roughly corresponding to *Colorado River*, *Rooker-Feldman*, and *Younger* abstention.<sup>95</sup>

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<sup>90</sup> *Aldogan v. Aldogan*, No. 03cv 11837, 2003 U.S. Dist LEXIS 4811 (D. Mass. Dec. 10, 2003).

<sup>91</sup> *Id.*

<sup>92</sup> *See infra* Part II-A.

<sup>93</sup> *Witherspoon v. Orange Cnty. Dep't of Soc. Services*, 646 F. Supp. 2d 1176 (C.D. Cal. Aug. 10, 2009).

<sup>94</sup> Ion Hazzikostas, Note, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421, 432 (2004) (abstaining based on *Colorado River*: the inconvenience of the federal forum, piecemeal litigation, and the California state courts had obtained jurisdiction long before the federal forum).

<sup>95</sup> While it has not yet come before a district court, *Burford* abstention may also be warranted given the specialized courts many states have established to adjudicate family law claims, the conditions under which state departments of child, family, and social services are authorized to intervene on behalf of children, and the allocation of jurisdiction between juvenile courts, family courts, and general jurisdiction trial courts. *See Ankenbrandt ex rel. L.R. v. Richards*, 504 U.S. 689, 705-06 (1992) ("It is not inconceivable, however, that in certain circumstances, the abstention principles developed in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody. This would be so when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'").

Federal district courts have often referred to state interests in child custody adjudication as the state interest justifying abstention. It is almost certainly true that a state's interest in an initial custody determination is insufficient to justify abstention. Child custody determinations are, by nature, case specific. In any event, the Hague Child Abduction Convention bars final decisions on the merits of custody disputes until the removal claim is resolved.<sup>96</sup> Yet, child custody inquiries frequently implicate other arguably more relevant state schemes for assessing a child's maturity and risk of psychological or physical harm as well as use of temporary or foster care pending resolution of Hague Child Abduction Convention or custody claims.<sup>97</sup> With respect to custody arrangements in which state courts have already established original and continuing jurisdiction, state interests in those determinations are more developed.<sup>98</sup> These factors matter because abstention decisions under *Younger* and *Colorado River* frequently turn on the presence of state interests or the application of state law in parallel state proceedings.<sup>99</sup> In addition to safeguarding state interests in family law schemes and in the administration of their judicial systems, abstention furthers treaty interests in the efficacious adjudication of removal claims.<sup>100</sup>

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<sup>96</sup> Hague Child Abduction Convention, *supra* note 8, art. 16; Centenaro v. Poliero, 901 N.Y.S.2d 905 (Sup. Ct. 2009).

<sup>97</sup> Bouvagnet v. Bouvagnet, No. 01 C 4685, 2001 U.S. Dist. LEXIS 17095, at \*9 (N.D. Ill. 2001) ("Finally, the Court notes that the proceedings here are somewhat similar because the evidence that will be used to determine whether the children are settled in their new environment, a determination required by the Hague Convention under the present circumstances, will also be used for the required determination of the best interests of the children in the custody proceedings.").

<sup>98</sup> See, e.g., Gaudin v. Remis, 415 F.3d 1028, 1035-36 (9th Cir. 2005). In *Gaudin*, the Hawaii state court had entered a determination that return of children to Canada would "pose a grave risk of psychological harm" under the treaty. While the district court did not, and was not asked to, abstain in favor of state proceedings, it did rely on the state court "grave risk" determination.

<sup>99</sup> See, e.g., Witherspoon v. Orange Cnty. Dep't of Soc. Services, 646 F. Supp. 2d 1176, 1180 (C.D. Cal. 2009) ("Federalism gives states authority over matters of marriage, family, and child welfare. This case deals with those interests . . . the state proceeding gives Ms. Witherspoon an adequate opportunity to raise the issues she seeks to raise here in federal court."); Grieve v. Tamerin No. 00-3824, 2000 U.S. Dist. LEXIS 12210 (E.D.N.Y. Aug. 25, 2000) (holding that *Younger* abstention was appropriate where the petitioner had filed a Hague Convention petition in state court previous to filing it in federal court); Cerit v. Cerit, 188 F. Supp. 2d 1239 (D. Haw. 2002) (ruling that it was appropriate to abstain from ruling on a Turkish man's ICARA petition when he had already made an ICARA argument in Hawaii state court) *Contra* Hazbun Escaf v. Rodriguez, 191 F. Supp. 2d 685, 688, 692 (E.D. Va. 2002) (criticizing *Cerit* and denying motion to dismiss based on abstention).

<sup>100</sup> Ann Althouse, *The Misguided Search for State Interests in Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. REV. 1051, 1053 (1988) (arguing that abstention should be applied when it advances federal interests).

*A. Federal District Court Abstention in Hague Abduction Convention Cases*

Federal district courts have deferred to state courts under three principal doctrines—*Younger*, *Colorado River*, and *Rooker-Feldman*. These doctrines are briefly summarized below and discussed in the context of the typical circumstances under which they are invoked. The factual backgrounds of the cases are provided to emphasize the usefulness of abstention in furthering both federal and state interests under the treaty.

*1. Younger Abstention Based on State Custody and Dependency Interest*

In *Younger v. Harris*, a California criminal defendant brought an initial action for injunctive relief in federal district court instead of raising a First Amendment defense in his state criminal prosecution.<sup>101</sup> The district court issued the injunction and invalidated California’s Criminal Syndicalism Act for unconstitutional vagueness.<sup>102</sup> The Supreme Court reversed.<sup>103</sup> Speaking through Justice Black, the Court emphasized that Congress had historically allowed few and minor exceptions allowing federal courts to interfere with state proceedings and that:

This, perhaps for lack of a better and clearer way to describe it, is referred to by many as “Our Federalism,” and one familiar with the profound debates that ushered our Federal Constitution into existence is bound to respect those who remain loyal to the ideals and dreams of “Our Federalism.” The concept does not mean blind deference to “States’ Rights” any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.<sup>104</sup>

*Younger* has been controversial since it was decided.<sup>105</sup> The Anti-Injunction Act of 1793 prohibited federal courts from issuing anti-suit injunctions against state proceedings unless “expressly authorized by an Act of Congress.”<sup>106</sup> In *Younger*, that exception was asserted to be the Civil Rights Act of 1871.<sup>107</sup> Even assuming

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<sup>101</sup> *Younger v. Harris*, 401 U.S. 37 (1971).

<sup>102</sup> *Id.* at 40.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 44.

<sup>105</sup> Joshua G. Urquhart, *Younger Abstention and Its Aftermath: an Empirical Perspective*, 12 NEV. L.J. 1 (2011).

<sup>106</sup> Mark Tushnet, *Constitutional and Statutory Analyses in the Law of Federal Jurisdiction*, 25 UCLA L. Rev. 1301, 1304-05 (1978) (discussing the Supreme Court’s decision not to decide *Younger* as a statutory exception to the Anti-Injunction Act).

<sup>107</sup> *Id.*



federal courts obtained equitable jurisdiction over a state proceeding under that exception, they may still refuse to issue an injunction for the same reason courts sitting in equity often refuse to do so—there is already an adequate remedy at law. Justice Black’s opinion might be read narrowly to establish the scope of the “irreparability” inquiry federal courts must undertake when asked to enjoin state proceedings.<sup>108</sup> A second, broader reading suggests that Justice Black’s opinion is actually based upon a general Article III responsibility given to federal courts to ensure the protection of federal rights while interfering as little as possible with state courts.<sup>109</sup> It is fair to say that, at least in Justice Black’s view, federal courts may not equitably enjoin a state criminal proceeding where it poses no imminent or irreparable threat to a state defendant’s ability to vindicate a federal right.<sup>110</sup> The Supreme Court extended *Younger* abstention to state civil proceedings in *Huffman v. Pursue, Ltd.*,<sup>111</sup> and state family law proceedings in *Moore v. Sims*.<sup>112</sup> While federal appellate courts have diverged in the precise wording of *Younger* criteria and the depth of involvement required by states and their agencies, three general inquiries have emerged in the Hague Child Abduction Convention context: (1) there is a judicial proceeding to which the federal plaintiff is a party and with which the federal proceeding will interfere, (2) the state proceeding must implicate important state interests, and (3) the state proceeding must afford an adequate opportunity to raise federal claims.<sup>113</sup> Federal district courts have abstained under this doctrine to preserve state interests in maintaining the integrity of their judicial systems and their interests in using dependency systems to protect minors from abuse.

a. *Witherspoon v. Orange County Department of Social Services*

In *Witherspoon v. Orange County Department of Social Services*, a mother attempted to use litigation in federal court to undermine a state court order entered to protect her children. Danny Witherspoon brought a divorce suit in state court and sought custody over two minor children

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<sup>108</sup> *Id.*

<sup>109</sup> Peter W. Low, John C. Jeffries, Jr. & Curtis Bradley, *FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS* 718-19 (7th ed. 2011) (noting the unclear scope of Black’s “comity” analysis); Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071, 1154 (1974).

<sup>110</sup> *Younger*, 401 U.S. at 45 (“The accused should first set up and rely upon his defense in the state courts, even though this involves a challenge of the validity of some statute, unless it plainly appears that this course would not afford adequate protection.”).

<sup>111</sup> *Huffman v. Pursue*, 420 U.S. 592 (1969).

<sup>112</sup> *Moore v. Sims*, 442 U.S. 415 (1979). In *Pennzoil v. Texaco*, 481 U.S. 1 (1987), the U.S. Supreme Court extended *Younger* abstention to a state’s fundamental interest in “administering certain aspects of their judicial systems.” In 2013, the U.S. Supreme Court narrowed the applicability of *Younger* in *Sprint Communications, Inc. v. Jacobs*, although it appears that even within its narrower confines it would easily protect actions by state agencies to protect children as in *Witherspoon*.

<sup>113</sup> See *Middlesex Cnty. Ethics Comm. v. Garden State Bar Ass’n.*, 457 U.S. 423 (1982); *Yang v. Tsui*, 416 F.3d 199 (3d Cir. 2005).

after they had been returned to him from Germany.<sup>114</sup> Their mother, a US soldier, had taken them to a hospital where they showed signs of mistreatment, and Ms. Witherspoon, demonstrating “intoxicated, hostile, and bizarre” behavior, threatened to harm herself and the children.<sup>115</sup> Ms. Witherspoon raised a claim under the Hague Child Abduction Convention in that proceeding, arguing that the children’s habitual residence was Germany, which was therefore the jurisdiction for any custody dispute.<sup>116</sup> In a parallel proceeding, a California juvenile court ordered the state to take temporary custody of the children, placing them first in a shelter and then in foster care.<sup>117</sup>

The state court agreed with Ms. Witherspoon that Germany was the children’s habitual residence under the treaty because the children had lived and attended school there for the previous four years.<sup>118</sup> On appeal, a California appellate panel determined that the trial judge had failed to adequately consider the exceptions to return under the treaty—especially Article 13b’s “grave risk” exception.<sup>119</sup> The appellate panel further ordered the state court to stay proceedings pending the resolution of the juvenile dependency proceeding.<sup>120</sup> The juvenile court ultimately determined the children to be dependents of the state and adopted a plan for both parents that included therapy and classes.<sup>121</sup> The juvenile court also ordered Ms. Witherspoon to undergo substance abuse treatment.<sup>122</sup>

Ms. Witherspoon subsequently filed a Hague Child Abduction Convention petition in federal district court, requesting immediate return of the children to Germany.<sup>123</sup> The federal district judge abstained under *Younger*:

This case concerns domestic relations, conflicts between fathers and mothers, and the state’s role ensuring the health and welfare of the Minors . . . States allocate considerable resources to family and juvenile courts so they can effectively navigate these often troubled

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<sup>114</sup> *Witherspoon v. Orange Cnty. Dep’t of Soc. Services*, 646 F. Supp. 2d 1176, 1180 (C.D. Cal. 2009).

<sup>115</sup> *Id.* at 1178.

<sup>116</sup> *Id.*

<sup>117</sup> *See In re Marriage of Witherspoon*, 155 Cal. App. 4th 963 (2007).

<sup>118</sup> *Witherspoon*, 646 F. Supp. 2d at 1178.

<sup>119</sup> *Id.* “[The grave risk exception] is the most widely litigated defense to an application for return of a child to his or her place of habitual residence.” Michael R. Walshand & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 38 (2006).

<sup>120</sup> *Witherspoon*, 646 F. Supp. 2d at 1178.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1179.

<sup>123</sup> *Id.*

waters. State courts have access to child welfare and social workers, and available foster parents and shelters.<sup>124</sup>

Noting cases in which the Ninth Circuit Court of Appeals had rejected *Rooker-Feldman*, *Younger*, and *Colorado River* abstention, the district judge observed that “the juvenile court proceedings that have delayed the ICARA proceedings are not custody proceedings, but dependency proceedings.<sup>125</sup> The purpose of custody proceedings is to determine which parent, or private party, should retain custody of children.<sup>126</sup> In contrast, a juvenile court initiates dependency proceedings to determine if the state—not private individuals—should have custody of children to shield them from harm.”<sup>127</sup>

*b. Barzilay v. Barzilay*

In *Barzilay v. Barzilay*, the Circuit Court of St. Louis County, Missouri entered a divorce decree that dissolved the marriage between two Israeli citizens, Sagi and Tamar Barzilay, and provided joint custody for their three minor children.<sup>128</sup> The Barzilays had moved to Missouri in 2001 and divorced in 2005.<sup>129</sup> The children had lived in Missouri since

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<sup>124</sup> *Id.* at 1180.

<sup>125</sup> *Id.* at 1181.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 1181. *See also* Grieve v. Tamerin, No. 00-CV-3824 JG, 2000 U.S. Dist. LEXIS 12210 (E.D.N.Y. Aug. 25, 2000) *aff'd on other grounds*, Grieve v. Tamerin, 69 F.3d 149 (2d Cir. 2001) (citing *Neustein v. Orbach*, 732 F. Supp. 333, 341 (E.D.N.Y. 1990)) (quoting *Mendez v. Heller*, 530 F.2d 457, 461 (2d Cir. 1976) (Oakes, J., concurring) (“In this narrow area of law [child custody], we should be especially careful to avoid unnecessary or untimely interference with the State’s administration of its domestic policies.”). The federal district court noted:

At oral argument, Grieve’s new counsel contended that his client had made no Hague Convention application to the state court. That contention is contradicted by Exhibit T, which is a July 24, 2000, letter from Grieve to Justice Garson stating that he made the Hague Convention application in May and asking for a written decision on the application. (The fact that Grieve did not use the word “petition,” the term of art used in the Convention is immaterial, especially given Grieve’s *pro se* status at the time.) Counsel’s assertion is further contradicted by Paragraph 25 of his client’s declaration, dated July 27, 2000, in which he states: “Recently, I brought an Order to Show Cause, in the State Supreme Court, requesting the Court to invoke the provisions of the Hague Convention, and return my passport so that my son may be returned to me and we can go back home. This was despite my objections, when acting *pro se*, that this delay was in contravention of the Hague Agreement and Article 11, which requests *expeditious consideration* thereof. . . . I have also requested a ‘Statement of Reason’ from the Hon. Judge Gerald Garson (Exhibit T), asking him to give reason for the delay in making a decision regarding a previous attempt to invoke the Hague Convention, in terms of Article 11 of the Convention.” *Id.* at \*4 n.1.

<sup>128</sup> *Barzilay v. Barzilay*, No. 4:07CV01781 ERW, 2007 U.S. Dist. LEXIS 89304 (E.D. Mo. Dec. 4, 2007).

<sup>129</sup> *Id.*

2001; the younger two had never lived in Israel.<sup>130</sup> During the children's visit to Israel during 2006, Sagi Barzilay secured an order from an Israeli court prohibiting the children's return to the United States, which he used to secure a modified visitation schedule with the children and an agreement from Tamar to repatriate to Israel with the children by August, 2009.<sup>131</sup> When she returned to the United States, she filed a motion with the Circuit Court of St. Louis to modify the divorce decree to restrict Sagi's access to the minor children based in part on the Hague Child Abduction Convention.<sup>132</sup> Sagi filed a motion to dismiss Tamar's state petition also based on the treaty.<sup>133</sup> One day *after* the state court determined that the children's habitual residence was the United States, denying Sagi's ICARA claim, Sagi filed a suit in the US District Court for the Eastern District of Missouri, requesting return of the children to Israel.<sup>134</sup>

The federal district court dismissed the claim, concluding that the final state order left Sagi's only available course of action appeal in the Missouri courts.<sup>135</sup> Although the district court did not specifically invoke *Younger*, and, indeed, the procedural history suggests the application of the *Rooker-Feldman* doctrine, the district court focused on the presence of the Hague Child Abduction Convention issues in an ongoing state custody proceeding, the relatively flagrant attempt to undermine the state custody determination through the use of foreign judicial process, and Congress's clear intent that state courts share jurisdiction over Hague Child Abduction Convention claims with federal courts.<sup>136</sup>

## 2. *Advanced State Proceedings and Abstention under Colorado River*

Unlike *Younger* abstention, the *Colorado River* doctrine is prudential and discretionary, and is driven in significant part by arguments disfavoring piecemeal litigation or duplication of judicial resources.<sup>137</sup> Indeed, it is not technically a

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<sup>130</sup> *Id.* at \*1-2.

<sup>131</sup> *Id.* at \*2-3.

<sup>132</sup> *Id.* at \*4.

<sup>133</sup> *Id.* at \*5. *See also* Barzilay v. Barzilay, 04FC10567 (St. Louis Cnty. Oct. 16, 2007).

<sup>134</sup> Barzilay, 2007 U.S. Dist. LEXIS 89304, at \*5.

<sup>135</sup> *Id.* at \*15. (“[T]he state court held that the mere presence of the minor children on vacation in Israel is insufficient to establish a ‘habitual presence’ so as to fall under the purview of International Child Abduction Remedies Act. . . . While the state court does not specifically make a finding of whether the minor children were wrongfully removed to, or wrongfully retained in, the United States, it necessarily follows from a finding of habitual presence in the United States that the minor children were not wrongfully removed from Israel. If the Plaintiff is not satisfied with the state court ruling, then the Plaintiff's only available course of action is to appeal that decision.”) *Id.* at \*13-14.

<sup>136</sup> *Id.* at \*10.

<sup>137</sup> *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976).

form of “abstention” at all,<sup>138</sup> but history and judicial shorthand have eclipsed the nominal distinction.<sup>139</sup> In *Colorado River*, the state of Colorado had divided the major water basins within its territory into seven districts for purposes of adjudicating disputes over water rights.<sup>140</sup> The United States filed suit in federal district court to protect its own water rights and those under its authority.<sup>141</sup> After the United States filed suit, a defendant filed a motion in Colorado state court seeking to join the federal government as a defendant in a state court proceeding, adjudicating the rights of all parties in Colorado’s District 7.<sup>142</sup> Congress had specifically authorized such joinder.<sup>143</sup> Several defendants then filed a motion to dismiss the federal action on abstention grounds.<sup>144</sup> The US Supreme Court upheld the district court’s decision to abstain.<sup>145</sup> Rejecting the application of existing abstention doctrines, Justice Brennan nevertheless justified dismissal of the government’s suit on the basis of “wise judicial administration” and “conservation of judicial resources” based on Congress’s assent to joinder in state court on a matter in which states maintain “comprehensive state systems for adjudication of water rights . . .”<sup>146</sup>

Beyond Congressional intent, the Court also noted the preliminary nature of proceedings in the federal district court—the extensive “involvement of state water rights occasioned by this suit naming 1,000 defendants,” and the “300-mile distance between the District Court in Denver and the court in Division 7”.<sup>147</sup> Where parallel state proceedings exist, federal appellate courts have interpreted these parts of the Brennan opinion to require consideration of at least six factors of unequal and somewhat unpredictable significance.<sup>148</sup>

(1) [W]hether one of the courts has assumed jurisdiction over any property in issue; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; (4) the order in which the forums obtained

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<sup>138</sup> Justice Brennan’s majority and Justice Stewart’s dissent both rejected the application of existing abstention doctrines.

<sup>139</sup> *Lops v. Lops*, 140 F.3d 927 n. 21 (11th Cir. 1998) (“However, since prior decisions of this court label a federal court’s deference to a parallel state court litigation as a type of abstention, we do likewise.”).

<sup>140</sup> *Colorado River Water Conservation Dist.*, 424 U.S. at 806-7.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 807.

<sup>143</sup> 43 U.S.C. § 666 (1952).

<sup>144</sup> 28 U.S.C. § 1345 (1948).

<sup>145</sup> *Colorado River Water Conservation Dist.*, 424 U.S. at 822.

<sup>146</sup> *Id.* at 818, 820.

<sup>147</sup> *Id.*

<sup>148</sup> Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99, 104 (1986) (“Confronted with a list of ambiguous and overly broad factors, many lower courts have inferred that the Supreme Court has implicitly approved abstention from adjudicating properly filed federal cases if the facts can colorably be focused by the exceptional circumstances lens.”); Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59 (1981) (describing as “arbitrary” the division between permissible and impermissible abstention decisions).

jurisdiction; (5) whether federal or state law will be applied; and; (6) the adequacy of each forum to protect the parties' rights.<sup>149</sup>

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

a. *Holder v. Holder*

In *Holder v. Holder*, Jeremiah Holder sought the return of his children to Germany, where he was stationed with the US Army.<sup>150</sup> His wife Carla had left Germany with their two sons during what he thought to be a vacation in Washington State.<sup>151</sup> Jeremiah filed for divorce and custody in California, where he and Carla had met and where their two children had been born.<sup>152</sup> The California court ordered mediation regarding a custody and visitation plan.<sup>153</sup> Jeremiah consented to the arrangement proposed by the mediator, which provided Carla with custody of the children in Washington and became part of the state trial court custody order on August 9, 2000.<sup>154</sup> Jeremiah then obtained new counsel and filed a motion to reconsider the California order.<sup>155</sup> At the hearing for reconsideration, Holder's counsel informed the state court that he had filed a Hague Child Abduction Convention petition with the US State Department, to which the state court judge noted that Carla would be allowed to brief and argue the Hague claim since Holder had raised it.<sup>156</sup> The trial court raised the Hague Child Abduction Convention issue four times in the course of the reconsideration hearing, and each time, Holder's counsel refused to discuss the claim.<sup>157</sup>

Jeremiah then filed a Hague Child Abduction Convention petition in the US District Court for the Western District of Washington at the same time that he appealed the initial California custody order.<sup>158</sup> In the petition, he asserted that Germany was the children's habitual residence under the treaty and that therefore German courts should adjudicate custody.<sup>159</sup> The federal district judge abstained under *Colorado River*, determining that

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<sup>149</sup> Lops, 140 F.3d at 942-43.

<sup>150</sup> *Holder v. Holder*, 305 F.3d 845, 859 (9th Cir. 2002).

<sup>151</sup> *Id.* at 861.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 862.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

California state courts had obtained jurisdiction before the US district court, and that the litigation of the Hague Child Abduction Convention claim in Washington would be both inconvenient and result in piecemeal litigation. While the treaty was federal law, Congress had vested both federal and state courts with original jurisdiction over treaty claims.<sup>160</sup> Under California waiver law, Holder had abandoned his treaty claim when he failed to bring it with his divorce and custody action. “Comity and federalism” required deference to the California judgment because Holder had used the treaty to get a “second bite at the custody apple.”<sup>161</sup>

*b.* Cerit v. Cerit

In *Cerit v. Cerit*, the federal plaintiff had initially filed his Hague Child Abduction Convention petition as part of his answer in state court divorce proceedings.<sup>162</sup> After the state judge ordered hearings on the children’s habitual residence, appointed a guardian *ad litem* to investigate the psychological harm exception, and entered an order granting temporary custody to the state court plaintiff, the federal plaintiff filed a treaty petition in the US District Court for the District of Hawaii.<sup>163</sup> The district court abstained, noting that the state court had undertaken significant effort toward resolution of the treaty claim and that the federal plaintiff “vigorously litigated his ICARA petition in state court for three months prior to seeking resolution of the matter in federal court.”<sup>164</sup> The court also noted: “[it] appears from the record that petitioner, unhappy with the proceedings in state court, is attempting to obtain a different result from the federal court.”<sup>165</sup>

*c.* Copeland v. Copeland

In *Copeland v. Copeland*, Berengere Copeland filed a Hague Child Abduction Convention claim in her response to Sean Copeland’s divorce and custody suit in North Carolina state court.<sup>166</sup> The state court denied her petition and granted temporary custody to Sean. Berengere then filed a treaty petition in the US District Court for the Western District of North Carolina, alleging that Sean had wrongfully removed their son from France.<sup>167</sup>

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<sup>160</sup> *Id.* at 867.

<sup>161</sup> *Id.* at 875.

<sup>162</sup> *Cerit v. Cerit*, 188 F. Supp. 2d 1239, 1251 (D. Haw. 2002).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* (The federal district judge also abstained under *Younger*, noting Hawaii’s specialized family court system was “especially implicated” in deciding to abstain from hearing a Hague Abduction Convention petition.”).

<sup>166</sup> *Copeland v. Copeland*, No. 97-1665, 1998 U.S. App. LEXIS 1670 (4th Cir. Feb. 6, 1998).

<sup>167</sup> *Id.*

The federal district court abstained under *Colorado River*, determining that not only had the state court proceeding commenced two years before the federal action, but that “abstention would promote the objective of avoiding piecemeal litigation.”<sup>168</sup> The federal district court emphasized that, although the case involved a treaty, it did not involve foreign relations subject matter typically associated with federal courts’ greater specialization in international law.<sup>169</sup>

### 3. Abstaining in Deference to State Judgments under *Rooker-Feldman*

As with *Colorado River*, *Rooker-Feldman* is not strictly speaking an abstention device. The doctrine, which takes its name from two US Supreme Court cases decided 60 years apart, prohibits litigants from using federal courts to re-litigate issues they lost in state court proceedings. *Rooker-Feldman* erects a jurisdictional bar to lower federal courts’ review of state court judgments based on Congress’s decision to vest only the US Supreme Court with appellate jurisdiction over those judgments.<sup>170</sup>

In *Rooker*, two Indiana residents sought to have a federal district court declare “null and void” a state court judgment against them on the bases that it gave effect to an unconstitutional state statute and failed to follow prior Indiana precedent.<sup>171</sup> The district court determined that it lacked subject matter jurisdiction and the Supreme Court affirmed on the basis that Congress had chosen to vest appellate jurisdiction in the US Supreme Court only.<sup>172</sup> The *Rooker* doctrine, such that it was, remained fallow for most of the next sixty years.

In 1983, the Supreme Court rejected federal jurisdiction over claims by two applicants to the District of Columbia bar who, in order to sit for the exam, faced a special requirement for graduates of unaccredited law schools.<sup>173</sup> This special requirement allowed a graduate of an unaccredited law school (or, in Feldman’s case, Virginia’s alternative attorney credentialing system) to sit for the bar exam “only after receiving credit for 24 semester hours of study in a law school that at the time was approved by the ABA . . .”<sup>174</sup> There was a waiver process for this requirement, but the DC Court of Appeals had ended that waiver program shortly before the plaintiffs applied to sit for the exam.<sup>175</sup> They challenged the waiver denial and the underlying requirement in federal district court as a violation of both constitutional rights and antitrust laws.<sup>176</sup> The district court dismissed for

<sup>168</sup> *Id.*

<sup>169</sup> See Arthur M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1 (1995) (noting scholars who advocate federal jurisdiction for cases that involve “important foreign policy implications”).

<sup>170</sup> 28 U.S.C. § 1257 (2006).

<sup>171</sup> *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

<sup>172</sup> *Id.*

<sup>173</sup> The Supreme Court did not extensively reference *Rooker* in the *Feldman* decision.

<sup>174</sup> D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486-87 (1983).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*



lack of subject matter jurisdiction and the DC Court of Appeals reversed, determining that the proceedings under which Feldman’s waiver was denied were not sufficiently “judicial” to divest federal courts’ jurisdiction over their federal claims.<sup>177</sup>

The Supreme Court reversed on the issue of the waiver denial.<sup>178</sup> Feldman’s petition “involved a ‘judicial inquiry’ in which the [DC Court of Appeals] was called upon to investigate, declare and enforce” DC law.<sup>179</sup>

If the constitutional claims presented to a United States district court are inextricably intertwined with the state court’s denial in a judicial proceeding of a particular plaintiff’s application for admission to the state bar, then the district court is in essence being called upon to review the state-court decision. This the district court may not do.<sup>180</sup>

*Feldman* expanded the rule announced in *Rooker*. Not only did state court judgments provide a jurisdictional bar to federal district courts, the bar also applied to claims “inextricably intertwined” with prior state court judgments.<sup>181</sup> Plaintiffs were theoretically prohibited from recasting their state appeals as new federal claims.<sup>182</sup> Although it was several years before the doctrine went by the name *Rooker-Feldman*, federal district courts frequently applied it to prevent end-runs around state court judgments.<sup>183</sup>

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<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Feldman, 460 U.S. at 479.

<sup>180</sup> *Id.* at 462, 486-87 n. 16.

<sup>181</sup> *Id.*

<sup>182</sup> Dustin E. Buehler, *Revisiting Rooker-Feldman: Extending the Doctrine to State Court Interlocutory Order*, 36 FLA. ST. U. L. REV. 373, 383 (2009) (quoting D.C. Court of Appeals v. Feldman, 460 U.S. 462, 483-84 n. 16 (1983)).

<sup>183</sup> In 2005 and 2006, the US Supreme Court narrowed the applicability of *Rooker-Feldman* in two cases, *Exxon Mobil Corp. v. Saudi Basic Industries*, 544 U.S. 280, 284 (2005) and *Lance v. Dennis*, 546 U.S. 459, 465 (2006). In *Exxon*, the Court rejected the Third Circuit’s application of *Rooker-Feldman* to a federal appeal where the federal litigation had commenced before entry of the state court judgment. The Court clarified that *Rooker-Feldman* was distinct and separate from abstention and preclusion doctrines and was limited to “cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.” *Exxon Mobil Corp.*, 544 U.S. at 284. In *Lance v. Dennis*, the Supreme Court allowed a federal suit by Colorado citizens challenging the Colorado Supreme Court’s invalidation of Colorado’s redistricting plan. The district court applied *Rooker-Feldman* on the basis that the parties to the federal suit stood “in privity” with the state court losers. The Supreme Court reversed, rejecting the application of privity, a preclusion principle, in the *Rooker-Feldman* context. The “plaintiffs were plainly not parties to the underlying state-court proceeding.” *Lance*, 546 U.S. at 462-63. While the cases were characterized (and sometimes celebrated) as spelling the end of *Rooker-Feldman*, the Supreme Court failed to clarify two key aspects of the doctrine, thus ensuring its continued use in the lower federal courts. First, the Court did not clarify which state court judgments enjoyed *Rooker-Feldman* deference (e.g. interlocutory orders, stays, preliminary injunctions, rulings on pretrial motions and discovery orders). See *Shelley v. Brandveen*, 2012 U.S. Dist. LEXIS 127647 (E.D.N.Y. Sept. 6, 2012) (citing *Campbell v. Greisberger*, 80 F.3d 703, 707 (2d Cir. 1996) (“It cannot be the meaning of *Rooker-Feldman* that, while the inferior federal courts are barred from reviewing *final* decisions of state courts, they are

a. *White v. White*

In *White v. White*, a federal district court abstained under the *Rooker-Feldman* doctrine when Kevin White sought to challenge a state court custody determination in favor of Gabriela White that had been based in part on the state court's adoption of an initial Hague Child Abduction Convention petition brought in German court.<sup>184</sup> The district court applied the US Supreme Court's most recent articulation of the *Rooker-Feldman* doctrine, which barred:

cases brought by state court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.<sup>185</sup>

The district court determined that Kevin had "lost" arguments regarding the proper construction of the German case which he asserted before the New York Supreme Court; that this "loss" caused his injuries (failure to return his children to him); and, that he urged the district court to circumvent the state custody determination through a Hague Child Abduction Convention return order.<sup>186</sup>

b. *Gaudin v. Remis*

The inquiries authorized or mandated by the treaty produce other likely *Rooker-Feldman* scenarios.<sup>187</sup> For example, judicial authorities considering Hague Child Abduction Convention petitions may not reach underlying custody claims, but in order for the treaty to apply, a court must determine whether a left-behind parent had, and was exercising, custody rights at the time of a wrongful removal and retention.<sup>188</sup> Because the US Supreme Court has not specified which state judgments enjoy *Rooker-Feldman* protection, cumulative determinations may weigh against federal jurisdiction.<sup>189</sup> For example, in *Gaudin v. Remis*, a Hawaii Family

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free to review interlocutory orders.”)). Second, the Court did not address the extent to which claims must be “inextricably intertwined” for purposes of *Rooker-Feldman*.

<sup>184</sup> *White v. White*, No. 12 Civ. 200(GBD)(JLC), 2012 WL 3041660, at \*11 (S.D.N.Y. July 20, 2012).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> Michael R. Walsh & Susan W. Savard, *International Child Abduction and the Hague Convention*, 6 BARRY L. REV. 29, 37 (2006) (“All three of these issues (habitual residence, wrongful removal, and right of custody), may easily become inextricably tangled.”).

<sup>188</sup> *Abbott v. Abbott*, 560 U.S. 1 (2010).

<sup>189</sup> See Suzanna Sherry, *Judicial Federalism in the Trenches: the Rooker-Feldman Doctrine in Action*, 74 NOTRE DAME L. REV. 1085, 1092 (1999) (“But what if the federal plaintiff does not seek to enjoin the state proceeding, and state appeals are still pending? In this case, as we have already seen, *Younger* does not apply, and in some states interlocutory or appealable orders are given no preclusive effect. Here the *Rooker-Feldman* doctrine, as it is generally used in the lower courts, seems both necessary and appropriate.”).

Court determined on evidence adduced by a guardian *ad litem* that there was “a grave risk of psychological harm if the children [were] returned to their mother” in Canada.<sup>190</sup> The district court noted that if the state court judge had applied a “clear and convincing” evidentiary standard, it could not have reviewed that determination under *Rooker-Feldman*.<sup>191</sup> Similar variations on these facts are likely.<sup>192</sup> If a party raises a treaty claim in connection with a state custody proceeding, and a trial court issues simultaneous rulings giving temporary custody to the adverse party and orders a hearing on “habitual residence,” is a federal district court divested of subject matter jurisdiction because the party has “lost” in the state court proceeding?<sup>193</sup>

### III.

#### FEDERAL APPELLATE COURT REJECTION OF ABSTENTION UNDER THE HAGUE ABDUCTION CONVENTION

Whatever the balance federal district courts have attempted to strike while weighing state interests and judicial economy with federal interests in treaty commitments, federal appellate courts have been overwhelmingly hostile to abstention decisions.<sup>194</sup> Every federal appellate court before which *Younger* and *Rooker-Feldman* abstentions have been raised has rejected them. Indeed, the Eighth and Ninth Circuit Courts of Appeal have adopted per se rules prohibiting the application of *Rooker-Feldman*. The Seventh, Eighth, and Ninth Circuits have announced per se rules barring *Younger* abstention.<sup>195</sup> The Fourth Circuit Court of Appeals alone has affirmed a district court abstention decision—based on *Colorado River*—but more recently affirmed a district court decision to deny both *Colorado*

<sup>190</sup> *Gaudin v. Remis*, 00-00765-SPK (D. Haw. 2000) (citing *Gaudin v. Remis*, FC-P 93-0625 (Fam. Ct. Haw. 2000)).

<sup>191</sup> Because it was not clear which evidentiary standard the state court applied, the district court undertook its own review of the evidence establishing the grave risk exception and reached the same conclusion. *Gaudin v. Remis*, 379 F.3d 631, 634 (9th Cir. 2004).

<sup>192</sup> *In re Lehmann*, No. 16353 / 16365, 1997 Ohio App. LEXIS 1083 at \*5 (Mar 21, 1997) (“Although the federal court denied Rolf’s requested relief, citing its concern that the *Rooker-Feldman* doctrine deprived it of subject matter jurisdiction, the court engaged in lengthy settlement negotiations and the parties resolved their dispute.”).

<sup>193</sup> *Barzilay v. Barzilay*, No. 4:07CV01781 ERW, 2007 U.S. Dist. LEXIS 89304 (E.D. Mo. Dec. 4, 2007).

<sup>194</sup> See, e.g., *Silverman v. Silverman*, 338 F.3d 886, 895 (8th Cir. 2003); see also *Yang v. Tsui*, 416 F.3d 199 (3d Cir. 2005); *Gaudin v. Remis*, 415 F.3d 1028 (9th Cir. 2005); *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002). Justice Ginsburg effectively advocates that position in her *Garamendi* dissent. See also *El Al Israel Airlines v. Tseng*, 525 U.S. 155, 175 (1999) (“Our home-centered preemption analysis, therefore, should not be applied, mechanically, in construing our international obligations.”).

<sup>195</sup> The Seventh Circuit announced its rule in an opinion issued on July 26, 2002 after the parties had settled, but before the court had received notice of the settlement. Therefore, the opinion is technically advisory, but should the Seventh Circuit revisit the issue, it is likely to accord the judgment significant weight. *Bouvagnet v. Bouvagnet*, 45 Fed. Appx. 535 (7th Cir. 2002).

*River* and *Younger* abstention based on reasoning similar to that adopted by other federal appellate courts.<sup>196</sup>

To be sure, ICARA vests a party with the option to raise his or her claim in either federal or state court. The treaty also prohibits a court from adjudicating the merits of a custody suit pending the resolution of the wrongful removal claim. So, even if a state court plaintiff initiates divorce and child custody proceedings, the state court defendant may bring a separate action in federal court. These circumstances, without more, might not justify abstention. Indeed, the Third Circuit in *Yang v. Tsui* explained the pattern in federal appellate decisions not by which sovereign was better able to enforce international obligations, but by whether or not a Hague Convention petition had been filed in state court.<sup>197</sup> In *Yang*, the Third Circuit could rightly point to the fact that not only had no party raised a Hague Convention petition in the underlying state custody proceeding, but that a final judgment had been entered resolving the entire custody dispute and thus no specter of a Hague claim in state court existed.<sup>198</sup>

#### A. *Narrow Construction of Hague “Petitions” in State Courts*

But federal appellate decisions have rejected abstention even in cases where a left-behind parent initially selected a state forum or substantially engaged state judicial process in pursuance of a Hague Child Abduction Convention claim. Article 8 of the treaty specifies the information required of a return application to a central authority, but Congress made no association between those requirements and pleading under the Federal Rules of Civil Procedure.<sup>199</sup> Congress included only a permissive provision regarding a Hague Child Abduction Convention claim, noting that a claimant “may . . . [file] a petition for the relief sought in any court which has jurisdiction . . . .”<sup>200</sup> The State Department’s legal analysis suggests that applicants provide as much information to a court as Article

<sup>196</sup> *Copeland v. Copeland*, No. 97-1665, 1998 U.S. App. LEXIS 1670 (4th Cir. Feb. 6, 1998) (affirming district court *Colorado River* abstention); *Hazbun v. Rodriguez*, 52 Fed. Appx. 207 (4th Cir. 2002) (upholding district court rejection of *Colorado River* and *Younger* abstention).

<sup>197</sup> *Yang v. Tsui*, 416 F.3d 199, 204 (3d Cir. 2005).

<sup>198</sup> *Id.* at 204.

<sup>199</sup> Hague Child Abduction Convention, *supra* note 8, art. 8, requires an application to a Central Authority to include information concerning the identity of the applicant, the child, and the person alleged to have removed or retained the child. Where available, the date of birth of the child, the grounds on which the applicant’s claim for return of the child is based, and all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be should be included. The application may be accompanied or supplemented by an authenticated copy of any relevant decision or agreement, a certificate or affidavit emanating from a Central Authority, other competent authority of the State of the child’s habitual residence, or from a qualified person, concerning the relevant law of that State, and any other relevant document.

<sup>200</sup> 42 U.S.C. § 11603(b) (2006).

8 requires, but notes “the informal nature of the pleading and proof requirements; Article 8(c) merely requires a statement in the application to the Central Authority as to ‘the grounds on which the applicant’s claim for return of the child is based.’”<sup>201</sup> Federal appellate courts, however, have adopted fatal scrutiny in cases where a federal district court abstained without a Hague Child Abduction Convention claim being brought in the form recommended in Annex A to the State Department’s legal analysis.<sup>202</sup>

### 1. *Barzilay v. Barzilay*

In the aforementioned case of *Barzilay v. Barzilay*, for example, the state court plaintiff brought her Hague Child Abduction claim in her motion for modification of the divorce decree while the state court defendant raised his request for return in his answer to her motion.<sup>203</sup> The state court entered an order rejecting the state court defendant’s assertion that Israel was the children’s habitual residence under the treaty.<sup>204</sup> The federal district court abstained, ruling that the state court defendant (the federal court plaintiff) was required to appeal through Missouri courts.<sup>205</sup> The Eighth Circuit reversed, adopting a *per se* rule that abstention was inappropriate in Hague Child Abduction Convention cases.<sup>206</sup> The Eighth Circuit appeared aware of the tension between the state court judgment and its own refusal to affirm the abstention decision:

Tamar stated that Sagi used the Israeli court system “to fraudulently procure a judgment giving Israel exclusive jurisdiction over the custody of the minor children . . . in blatant defiance of . . . the Hague Treaty on Child Abduction.” She did not reference the terms of the Hague treaty or explain how Sagi’s use of the Israeli court system implicated the treaty. In her motion for a temporary restraining order, Tamar argued that the Israeli judgment . . . should have deferred to the Missouri court given its existing custody judgment and the habitual residence of the children. She also complained that Sagi’s use of the

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<sup>201</sup> Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10498 (Mar. 26, 1986) (quoting Elisa Pérez-Vera, HCCH Explanatory Report on the 1980 Hague Convention on the Civil Aspects of International Child Abduction).

<sup>202</sup> See, e.g., *Burns v. Burns*, No. 96-6268, 1996 U.S. Dist. LEXIS 18116, at \*9-10 (E.D. Pa. Dec. 6, 1996) (rejecting the mother’s attempt to re-litigate a Hague Child Abduction claim on the basis that “she clearly stated the source of her alleged custody rights and the date of the alleged wrongful retention, and requested in her prayer for relief that she be allowed to return to the United Kingdom with the four children.”).

<sup>203</sup> *Barzilay v. Barzilay*, 04FC10567 (St. Louis Cnty., Oct. 16, 2007).

<sup>204</sup> *Id.*

<sup>205</sup> *Barzilay v. Barzilay*, No. 4:07CV01781 ERW, 2007 U.S. Dist. LEXIS 89304 (E.D. Mo. Dec. 4, 2007).

<sup>206</sup> *Barzilay v. Barzilay*, 536 F.3d 844 (8th Cir. 2008) (“The controlling case in our circuit is *Silverman I*, which concluded that abstention was inappropriate in Hague Convention cases.”).

Israeli court system “violated the spirit, if not the letter, of the Hague Convention.”<sup>207</sup>

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

Moreover, given that Sagi obtained a custody determination from an Israeli court and Tamar has obtained a custody determination from a state court in this country, the federal district court is uniquely situated to adjudicate the question of whether Israel or Missouri is the habitual residence of the Barzilay children and whether they were wrongfully removed from that residence. Although the state clearly has an important interest in child custody matters, that interest has not been considered to be a significant factor in terms of abstention where ICARA is involved.<sup>208</sup>

It is not clear why a federal district court judge would be better “situated” to determine the habitual residence of children where domestic and foreign custody orders conflict—a situation state courts face with some frequency and to which federal courts hearing claims based on diversity of citizenship apply so-called “domestic relations” abstention.<sup>209</sup>

## 2. *Silverman v. Silverman*

In *Silverman v. Silverman*, the federal plaintiff had initially asserted Israel to be the “habitual residence” of the children under the Hague Child Abduction Convention in Minnesota state court, and had defended his claim of a “wrongful removal” from Israel before a state court magistrate.<sup>210</sup> He filed a Hague Child Abduction Convention petition

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<sup>207</sup> *Id.* at 851.

<sup>208</sup> Barzilay, 536 F.3d at 844 (internal citations omitted).

<sup>209</sup> *See, e.g.,* Csibi v. Fustos, 670 F.2d 134 (9th Cir. 1982) (applying domestic relations abstention in a suit by Romanian citizens against California residents to determine marital status); *In re D.M.T.-R., M.C.*, 802 N.W.2d 759, 764-765 (Minn. Ct. App. 2011). The Minnesota court noted:

For example, the domestic relations exception to federal diversity jurisdiction divests federal courts of subject matter jurisdiction over child custody decrees . . . Thus we conclude that the UCCJEA confers to state courts subject matter jurisdiction over child custody proceedings, including the termination of parental rights involving a child who is not a United States citizen but who is in Minnesota. *Id.*

*See also* Maqsudi v. Maqsudi, 830 A.2d 929 (N.J. Super. Ct. Ch. Div. 2002) (adjudicating dispute between New Jersey and Uzbekistan custody decrees).

<sup>210</sup> *Silverman v. Silverman*, 267 F.3d 788, 790 (8th Cir. 2001) (“At the hearing before a state-court referee on October 10, Robert’s attorney argued the jurisdictional issue, and the referee engaged her in a discussion of the facts surrounding the parties’ move to Israel, the bankruptcy, and the status of the children in Minnesota at the time. Counsel repeatedly asserted that the court should not reach the merits of the custody issue, noting that the children’s physical presence in Minnesota was the result of an allegedly wrongful removal from Israel.”).

motion in federal court on the day of the state court hearing.<sup>211</sup> The state court later entered an order granting temporary custody to the state court plaintiff and scheduled a hearing for the remaining claims.<sup>212</sup> On this basis, the federal district court dismissed under *Younger*.<sup>213</sup> The Eighth Circuit reversed, determining that *Younger* abstention did not apply because federal courts enjoyed no equitable discretion under the treaty.<sup>214</sup> The court did not discuss the jurisdictional issue and ultimately concluded that because

the Hague issue has not been addressed . . . we believe the appropriate course of action is to remand the matter to the district court to consider whether the Silverman children were wrongfully removed. We note that nearly a year has passed since Robert filed his petition under the Hague Convention, due in no small part to our own consideration of the case.<sup>215</sup>

After the case was remanded, the Minnesota trial court entered a final custody determination, including a finding that Minnesota was the children’s “home state” under Minnesota law.<sup>216</sup> Reviewing the district court’s later denial of the Hague Child Abduction Convention claim, the Eighth Circuit analyzed the effect of the state court’s “home state” determination on the “habitual residence” inquiry under the treaty.<sup>217</sup> While the court concluded that those questions were not “inextricably intertwined” within the meaning of *Rooker-Feldman*, it took the additional step of establishing the doctrine’s *per se* inapplicability because “Congress adopted the Hague Convention, an international treaty, making it, under the Constitution, part of the ‘supreme Law of the Land’”<sup>218</sup> and therefore *Rooker-Feldman* did not apply outside of the implementing statute’s full faith and credit clause.<sup>219</sup>

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<sup>211</sup> Silverman v. Silverman, No. 00-2274 (PAM/JGL) at 7 (D. Minn. Nov. 13, 2000).

<sup>212</sup> *Id.*

<sup>213</sup> Silverman v. Silverman, 338 F.3d 886, 892 (8th Cir. 2003).

<sup>214</sup> Silverman, No. 00-2274 (PAM/JGL) at 9 (D. Minn. Nov. 13, 2000).

<sup>215</sup> Silverman, 267 F.3d at 788. The Eighth Circuit rejected *Younger* abstention on the basis that relief under the treaty is mandatory and therefore there is no equitable discretion. Even if the Eighth Circuit’s analysis as to its equitable powers under treaties in general is correct, the treaty provides a number of discretionary forms of relief to judicial authorities and Congress specifically vested both federal and state courts with the power to impose provisional remedies. *See, e.g.*, Merle H. Weiner, *Uprooting Children in the Name of Equity*, 33 *FORDHAM INT’L. L.J.* 409 (2010) (discussing federal courts’ use of equitable estoppel and tolling under certain treaty provisions).

<sup>216</sup> Silverman, 267 F.3d at 792.

<sup>217</sup> Silverman, 338 F.3d at 886, 892.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 894.

<sup>220</sup> Silverman, 338 F.3d at 886, 892. State court orders under the treaty, it determined, were limited to those falling under 42 U.S.C. § 11603(g) (2006) providing that “full faith and credit shall be accorded by the courts of the States and the courts of the United States

*B. The Role of the Federal Courts in Upholding Treaty Obligations*

The recurrent theme in federal appellate decisions is that—Congress’s explicit grant of concurrent original jurisdiction notwithstanding—responsibility for upholding international obligations is a fundamental function of the federal courts. These decisions are relatively vague as to which federal treaty interests need protecting—uniformity in interpretation, reciprocity between contracting states, or the treaty provisions that federal courts are uniquely able to adjudicate and enforce.<sup>220</sup> The emphasis is instead on the general constitutional entrustment of treaty obligations to the federal courts and skepticism that state courts will respect the United States’ international commitments.

In *Grieve v. Tamerin*, the Second Circuit grudgingly affirmed an abstention decision by the US District Court for the Southern District of New York because the state court rendered a final decision on the Hague Child Abduction Convention petition after the abstention order.<sup>221</sup> The Second Circuit noted the role of the federal judiciary in enforcing the United States’ international obligations:

Grieve’s claim implicates a paramount federal interest in foreign relations and the enforcement of United States treaty obligations. Deference to a state court’s interest in the outcome of a child custody dispute would be particularly problematic in the context of a Hague Convention claim inasmuch as the Convention divests the state of jurisdiction over these custody issues until the merits of the Hague Convention claim have been resolved. New York State’s interests do not, then, appear to raise the sort of substantial comity concerns that require *Younger* abstention. We are nonetheless constrained to affirm the judgment of the district court. The Southern District’s decision in Grieve’s action there, a final judgment on the merits subject to no further review holding that, once the Hague Convention had been raised in the state court litigation, *Younger* required the court’s abstention from further adjudication of Grieve’s Convention-

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to the judgment of any other such court ordering or denying the return of a child pursuant to the Convention, in an action brought under this Act.”

<sup>220</sup> *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 383 (2006) (“[U]niformity is an important goal of treaty interpretation.”); Vicki Jackson, *World Habeas Corpus*, 91 CORNELL L. REV. 303, 356 (2006) (“A basic premise of the constitutional system has long been that appellate review of state court decisions is particularly important where treaty rights are asserted, both to assure a uniformity of interpretation and to minimize the possibilities of error in sensitive areas affecting foreign relations.”); *Trans World Airlines v. Franklin Mint Corp.*, 466 U.S. 243, 262 (1984) (Stevens, J., dissenting) (“The great object of an international agreement is to define the common ground between sovereign nations.”).

<sup>221</sup> *Grieve v. Tamerin*, 269 F.3d 149 (2d Cir. 2001). The litigant filed a habeas petition in the Eastern District of New York raising the same issues as his petition in the Southern District. By that time, the New York Supreme Court had entered a judgment on the Hague Abduction Convention claim.



based claims, collaterally estops the plaintiff from further asserting the contrary here.<sup>222</sup>

In its one decision addressing abstention under the Hague Child Abduction Convention—a case in which the federal plaintiff was convicted of murdering the children’s mother, fleeing to Mexico, and violating numerous state court orders regarding the custody of his children in the process—the Sixth Circuit did not engage in any extensive analysis of the appellants’ abstention claim, but hinted that it would be disinclined to defer to state court proceedings.<sup>223</sup> “We find the circumstances surrounding the entry of this default, like the circumstances surrounding the Tennessee contempt orders, highly unusual, and suggestive of the home court advantage that the treaty was designed to correct.”<sup>224</sup>

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

It was to curb [international parental kidnapping] that the United States assumed a treaty obligation to cooperate with other nations states to adopt a mutual policy in favor of restoring the status quo by means of the prompt return of abducted children to the country of their habitual residence and in this way depriving custody decrees of states to which a parent has removed a child “of any practical or juridical consequences.” Indeed, although the state to which the child has been taken no doubt has an important interest in adjudicating the custody of a child within its borders, it now shares, with the other states of the Union, an even more important interest in ensuring that its courts are not used to escape the strictures of a custody decree already rendered by another nation-state or to otherwise interfere with the custody rights that a parent enjoys under the law of another country. We hold, therefore, in agreement with the other Circuits that have confronted the issue, that a Hague petition simply does not implicate the *Younger* abstention doctrine.<sup>225</sup>

While the Seventh, Eighth and Ninth Circuits have adopted *per se* rules against *Younger* abstention, the Eighth, Ninth and Eleventh Circuit

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<sup>222</sup> *Id.* at 149, 153.

<sup>223</sup> March v. Levine, 249 F.3d 462 (6th Cir. 2001); *In re S.L.M.*, 207 S.W.3d 288 (Tenn. Ct. App. 2006) (detailing how Perry March murdered his wife then fled to Mexico to escape criminal prosecution and civil liability, lost custody battles with the maternal grandparents in Illinois and Tennessee courts, and then used the Hague Child Abduction Convention to have the children returned to Mexico).

<sup>224</sup> March, 249 F.3d at 472.

<sup>225</sup> *Bouvagnet v. Bouvagnet*, No. 01-3928, 2002 U.S. App. LEXIS 17661 (7th Cir. July 26, 2002) *vacated pursuant to settlement agreement*, *Bouvagnet v. Bouvagnet*, No. 01-3928, 2002 U.S. App. LEXIS 17954 (7th Cir. Aug. 29, 2002).

Courts of Appeals have implicitly foreclosed *Colorado River* abstention.<sup>226</sup>

In *Lops v. Lops*, a left-behind parent initially brought her Hague Child Abduction Convention petition in a Georgia state court, which determined that it did not have jurisdiction over the case, and transferred the matter to the South Carolina Family Court which did have jurisdiction.<sup>227</sup> As in *Silverman*, the state trial court granted the taking parent temporary custody pending a later hearing.<sup>228</sup> The left-behind parent then filed a Hague Child Abduction Convention petition in the federal district court in Georgia.<sup>229</sup> The *Lops* court noted: “After all, the act and the treaty, which the Petitioner seeks to enforce, are creatures of the federal sovereign as opposed to any state’s sovereignty.”<sup>230</sup>

In *Holder v. Holder*, the Ninth Circuit rejected federal district court abstention on the basis of *Colorado River* even though the federal plaintiff had initiated state custody and divorce proceedings, was given the opportunity to brief the petition claim in state proceedings, and the state appellate panel had considered the views of the United States as amicus on the Hague Convention claim.<sup>231</sup> The decision forced litigation in both California state court and Washington federal court—a result which weighed against the convenience of the federal forum and consolidated litigation.<sup>232</sup> The Ninth Circuit determined that it need not apply “general res judicata principles” where “the implementation of federal statutes representing countervailing and compelling federal policies justifies departures from a strict application.”<sup>233</sup> Similarly, the majority held that *Rooker-Feldman* did not apply in the Hague Child Abduction Convention context because “Congress has expressly granted the federal courts jurisdiction to vindicate rights arising under the Convention.”<sup>234</sup> Thus,

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<sup>226</sup> *Holder v. Holder*, 305 F.3d 854 (9th Cir. 2002). The court noted:

In light of the Hague Convention policy that signatory countries should return wrongfully removed children expeditiously and through any appropriate remedy, we reject the claim that a left-behind parent is precluded or barred from raising his Hague Convention claim in the court of his choice, or that “wise judicial administration” is furthered by staying a federal Hague petition, simply because that left-behind parent has pursued the return of his children through multiple legal avenues. *Id.*

<sup>227</sup> *Lops v. Lops*, 140 F.3d 927, 934 (11th Cir. 1998).

<sup>228</sup> *Id.* at 933.

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 943 n. 22.

<sup>231</sup> In that brief, the United States argued that the Hague Abduction Convention was not meant to be used to give a litigant an opportunity to re-litigate custody.

<sup>232</sup> *Holder v. Holder*, No. C001927C., 2003 WL 24091906 (W.D. Wash. June 13, 2003).

<sup>233</sup> *Holder v. Holder*, 305 F.3d 864 (9th Cir. 2002).

<sup>234</sup> *Id.* (citing *Mozes v. Mozes*, 239 F.3d 1067, 1085 n. 55 (9th Cir. 2001)) (“Congress has expressly granted the federal courts jurisdiction to vindicate rights arising under the Convention. Thus, federal courts must have the power to vacate state custody determinations and other state court orders that contravene the treaty.” It clearly follows

federal courts must have the power to vacate state custody determinations and other state court orders that contravene the treaty.”<sup>235</sup>

This conclusion sits uneasily with the statutory language. ICARA established concurrent original jurisdiction between federal and state courts. Its full faith and credit provision does not establish a hierarchy between federal and state courts; instead, it requires horizontal parity between state judgments and vertical parity between federal and state courts. As the United States noted in its amicus brief in *Holder*, the full faith and credit provision was included because a court may exercise jurisdiction over a treaty claim even where the children are physically located elsewhere.<sup>236</sup> The statute simply confirmed that a second action was unnecessary. Also, Congress vested federal district courts with original jurisdiction, leaving in place *Rooker-Feldman*'s admonition to lower federal courts to not exercise appellate jurisdiction over state court judgments.

The *Holder* dissent noted that the federal plaintiff, an American citizen, plainly used his federal petition to undermine an unfavorable custody judgment issued by the California forum he had chosen—a result not only inconsistent with the treaty's purpose, but also only justifiable by subordinating state courts to federal courts in the resolution of Hague Child Abduction Convention claims.<sup>237</sup>

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that, if a prior state court custody order cannot bar a federal court from vacating the state court order, then it cannot bar federal adjudication of the Hague Convention claim).

<sup>235</sup> *Id.*

<sup>236</sup> *In re Marriage of Holder*, No. F036747, 2002 WL 443397 (Cal. Ct. App. Mar. 20, 2002).

<sup>237</sup> *Holder*, 305 F.3d at 875. The Judiciary Committee's House report noted:

[Section 11603(g)] means, for example, that if a court in one jurisdiction has ordered the return of a child and the child is located in another jurisdiction in the United States before that order has been executed, the order shall be given full effect in the second jurisdiction without the need to initiate a new return action there pursuant to the Convention and [ICARA]. H.R. Rep. No. 100-525, at 12 (1988).

In other words, the provision exists to reinforce the importance that a return order under ICARA be effected with haste and to close the door on any possible delay or manipulation by the allegedly abducting parent. It is unreasonable to assume that Congress intended to create a singular exception to a large body of statutory and common law but declined to mention this intent in any way. Additionally, an amicus brief filed by the United States in *Holder* and cited by the dissent stated that:

the Hague Convention was not intended to allow the “left-behind parent” a second bite at the custody apple just because, after specifically electing to litigate custody in a forum that otherwise had jurisdiction, the parent suffered an adverse result . . . The majority opinion . . . gives the left-behind parent a windfall by providing him with *two* opportunities to litigate custody: once in state court, and if he is unhappy with the result, all over again in another forum under the Hague Convention. *Holder*, 305 F.3d at 875 (Thompson, J., dissenting) (quoting Brief of Amicus Curiae United States) (unpublished decision).

### C. *Rejecting Jurisdiction over Rights of Access*

This jurisprudence is in contrast with emerging federal appellate decisions rejecting jurisdiction over “rights of access” under ICARA and the Hague Child Abduction Convention. Although ICARA makes clear that a petitioner may pursue, in federal or state court, “an action for arrangements for organizing or securing the effective exercise of rights of access” and an action for return after a wrongful removal or retention, federal courts have determined that, because the treaty lacks a specific remedy for violation of access rights, the federal courts lack subject matter jurisdiction entirely.<sup>238</sup>

It is possible to read their jurisdictional mandate in that way if federal courts turn their inquiry on the Congressional mandate to “decide cases in accordance with the Convention.”<sup>239</sup> The treaty’s provisions speak at greater length to judicial conduct governing return actions than access actions.<sup>240</sup> Article 21, covering actions for rights of access, suggests a prominent role for “Central Authorities” and international cooperation, but refers explicitly to that cooperation in “proceedings” aimed at ensuring access.<sup>241</sup> Even if it were the case that the treaty exclusively committed access rights to “Central Authorities”—the US State Department as opposed to judicial authorities—that reading would apply equally to federal and state courts. Federal courts have not, however, ruled that ICARA does not vest courts with jurisdiction over access claims. Indeed, it would be difficult to do so given the statutory language. Instead, federal courts have determined that access claims are intended for state court adjudication:

With the exception of the limited matters of international child abduction or wrongful removal claims, which is expressly addressed by the Convention and ICARA, other child custody matters, including access claims, would be better handled by the state courts which have

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Hague Child Abduction Convention, *supra* note 8, art. 1. (“The objects of the present convention are . . . to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”).

<sup>238</sup> *Croll v. Croll*, 229 F.3d 133, 135 (2d Cir. 2000) (“Because courts in the United States have jurisdiction to enforce the Convention by ordering a child’s return to her habitual residence only if the child has been removed in breach of a petitioning parent’s custodial rights, the district court lacked jurisdiction to order return in this case.”); *Cantor v. Cohen*, 442 F.3d 196, 202 (4th Cir. 2006).

<sup>239</sup> *Cantor*, 442 F.3d at 202; *In re S.E.O.*, 873 F. Supp. 2d 536, 545-46 (S.D.N.Y. 2012) (“Given the language of the statute, this Court finds that it has jurisdiction to enforce Petitioner’s rights of access to the Children, and orders Respondent to comply with the visitation rights set forth by the Turkish Court’s May 13, 2011 Order, so long as the Children remain in the United States.”). The Second Circuit affirmed the district court’s conclusion in *S.E.O.*, but recast the case as a custody rights case. See *Ozaltin v. Ozaltin*, 708 F.3d 355 (2013).

<sup>240</sup> Hague Child Abduction Convention, *supra* note 8, art. 12-20.,

<sup>241</sup> *Id.* art. 21.

the experience to deal with this specific area of the law . . . a state court would have the ability to weigh the children's interests, the parent's interests, and other familial considerations. Therefore, we find it best not to move domestic relations litigation to federal courts.<sup>242</sup>

In *Abbott v. Abbott*, the US Supreme Court's only decision in interpreting the Hague Child Abduction Convention, the Court mentioned remedies available for violations of rights of access by referring to a Massachusetts Supreme Judicial Court case, but did not otherwise address federal court refusal to hear access claims.<sup>243</sup>

It might be that rights of access under the treaty fall within the core issues of child custody decrees, divorce, and marriage to which "domestic relations" abstention is applicable.<sup>244</sup> Yet the treaty itself draws relatively sharp lines between "rights of custody" and "rights of access."<sup>245</sup> Federal appellate courts have emphasized the distinction in the return context to extend federal jurisdiction deep into state adjudications of treaty claims. If federal courts are applying "domestic relations" abstention, they are doing so somewhat unconventionally as that doctrine is generally applied where federal courts sit in diversity—not in suits seeking rights arising under a federal treaty.<sup>246</sup> Federal courts' refusal to hear access claims provides additional evidence that, in the treaty context, federal courts see themselves playing an independent constitutional role in managing their jurisdiction.

#### D. *Rejection of Abstention and the Frustration of Federal and State Interests*

Federal appellate decisions rejecting abstention ultimately frustrate the realization of the federal and state interests Congress had sought to protect.

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<sup>242</sup> Cantor v. Cohen, 442 F.3d 196, 202 (4th Cir. 2006); Fernandez v. Yeager, 121 F. Supp. 2d 1118, 1126 (W.D. Mich. 2000) (matters relating to access are best left to the state courts, which are more experienced in resolving these issues); Bromley v. Bromley, 30 F. Supp. 2d 857, 862 (E.D. Pa. 1998) ("The arena of child custody matters, except for the limited matters of international abduction expressly addressed by the Convention, would better be handled by the state courts which are more numerous and have both the experience and resources to deal with this special area of the law."); Croll v. Croll, 229 F.3d 133, 138 (2d Cir. 2000) ("One such remedy is a writ ordering the custodial parent who has removed the child from the habitual residence to permit, and to pay for, periodic visitation by the non-custodial parent with access rights.") (citation omitted); Wiesel v. Wiesel-Tyrnauer, 388 F. Supp. 2d 206 (S.D.N.Y. 2005).

<sup>243</sup> *Abbott v. Abbott*, 560 U.S. 1 (2010).

<sup>244</sup> Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669 (1995).

<sup>245</sup> Hague Child Abduction Convention, *supra* note 8, art. 3.

<sup>246</sup> See Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131 (2009).

With respect to federal interests under the treaty, the application of abstention is consistent with the treaty's requirement that wrongful removal claims be adjudicated expeditiously. The United States is among the slowest contracting states with respect to the resolution of claims.<sup>247</sup> Even in cases where the state's interests focus on a generalized concern with custody adjudications, *Colorado River* abstention may be the best way to promote the treaty's purpose of rapid adjudication.<sup>248</sup> Raising (or re-raising) a Hague Child Abduction Convention claim in federal court adds to the delay in a treaty that contemplates a six-week adjudication period. The *Barzilay* and *Holder* cases provide good illustrations. The Eighth Circuit affirmed the district court's conclusion that the Barzilay children's habitual residence was Missouri on April 2, 2010, two and a half years after the state trial court had reached the same conclusion.<sup>249</sup> The Ninth Circuit affirmed the district court's conclusion that the Holder children were not habitual residents of Germany on December 9, 2004, nearly three years after the decision of the California appellate panel.<sup>250</sup>

State interests in Hague Child Abduction Convention cases also take a stronger form than generalized interests in child custody. In *Witherspoon v. Orange County Department of Social Services*, the state agency participated in the litigation in its role of protecting children from domestic abuse.<sup>251</sup> The state plaintiff, losing her treaty claim in state court, filed her federal treaty claim after the state appellate court had vacated the trial court order.<sup>252</sup> Under current law, abstention alternatives available to the federal district court are limited and heavily scrutinized. In the Seventh and Eighth Circuits, *Younger* abstention would not be available to safeguard the state's interest in protecting minors from abuse, and in the Ninth Circuit—where the suit originated—neither *Colorado River* nor *Rooker-Feldman* would permit abstention based on judicial economy, Congressional intent with adjudication of treaty claims in state court, or the existence of a state return order (because it had been vacated).<sup>253</sup>

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<sup>247</sup> Eric Lesh, *Jurisdiction Friction and the Frustration of the Hague Convention: Why International Child Abduction Cases Should be Heard Exclusively by Federal Courts*, 49 FAM. CT. REV. 170, 174 (2010).

<sup>248</sup> Ion Hazzikostas, Note, *Federal Court Abstention and the Hague Child Abduction Convention*, 79 N.Y.U. L. REV. 421,424 (2004).

<sup>249</sup> See *Barzilay v. Barzilay*, 04FC10567 (St. Louis Cnty. Oct. 16, 2007) (rejecting Sagi Barzilay's request for return); *Barzilay v. Barzilay*, 600 F.3d 912 (8th Cir. 2010) (upholding district court determination that Israel was not children's habitual residence).

<sup>250</sup> See *In re Marriage of Holder*, No. F036747, 2002 WL 443397 (Cal. Ct. App. Mar. 20, 2002) (holding that Jeremiah Holder waived his Hague Convention claim); *Holder v. Holder*, 392 F.3d 1009 (9th Cir. 2004) (upholding federal district court determination that Germany was not the Holder children's habitual residence).

<sup>251</sup> *Witherspoon v. Orange Cnty. Dep't of Soc. Services*, 646 F. Supp. 2d 1176 (C.D. Cal. Aug. 10, 2009).

<sup>252</sup> *Id.*

<sup>253</sup> In *Gaudin v. Remis*, which did not involve *Younger* abstention, the Ninth Circuit suggested that the doctrine would be inapplicable to Hague Child Abduction Convention

This is problematic because it upends the Congressional purpose behind the grant of original jurisdiction to both federal and state courts. It is possible to read the statutory language to authorize federal jurisdiction over any and all aspects of a Hague Child Abduction Convention claim short of a final state judgment, but that reading is in tension with aspects of ICARA that require deference to state law and statutory and common law prohibitions against re-litigation of claims. The requirement that federal and state courts give full faith and credit to each other's grant or denial of return orders cannot mean that Congress intended federal courts to exercise jurisdiction over Hague Child Abduction Convention claims brought in state court up to the point that the trial court grants or denies a petition.<sup>254</sup>

Federal appellate courts' dicta that custody interests alone cannot justify abstention are almost certainly correct.<sup>255</sup> By its terms, the treaty separates habitual residence and custody determinations, despite the significant overlap between the factual findings necessary to determine both.<sup>256</sup> Federal appellate courts have used this distinction to suggest that *because* the treaty does not allow a court to adjudicate the merits of a custody dispute before a decision on return, the statutory scheme opens only a narrow window for state court jurisdiction. The effect of this line of reasoning is to upend the legislative purpose behind state court jurisdiction in the first place. Instead of using state courts' general authority and expertise in child custody adjudications as a reason to vest them with original jurisdiction over Hague Child Abduction Convention claims, it is used to strip away treaty claims to federal court, often with the disruptive, dilatory, and fracturing effects abstention was fashioned to prevent. In short, because state courts deal with child custody, they cannot be trusted to deal with child custody.<sup>257</sup>

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claims. The district court in *Witherspoon* emphasized that the state interest justifying *Younger* abstention was dependency, not custody. *Gaudin v. Remis*, 415 F.3d 1028 (9th Cir. 2005).

<sup>254</sup> *Yang v. Tsui*, 416 F.3d 199, 203 (3d Cir. 2005) ("It is clear that if the state proceeding is one in which the petitioner has raised, litigated and been given a ruling on the Hague Convention claims, any subsequent ruling by the federal court on the same issues would constitute interference.").

<sup>255</sup> *See id.* at 204.

<sup>256</sup> *Friedrich v. Friedrich*, 983 F.2d 1396, 1402 (6th Cir. 1993).

<sup>257</sup> The US Supreme Court's only decision regarding the treaty, *Abbott v. Abbott*, was necessary because federal appellate courts determined with one exception that a non-custodial parent's right to prevent a custodial parent's foreign travel did not give the left-behind parent a right to demand return of a child. *Abbott v. Abbott*, 560 U.S. 1 (2010).

## IV.

## STATE AND FEDERAL JUDICIAL MANAGEMENT OF THE HAGUE ABDUCTION CONVENTION

Doing away with abstention might make more sense if state courts were truly guilty of undermining federal commitments under the treaty. The measurable reality is that they are not. Based on cases reported in major databases, state trial courts order return of children abroad and reject affirmative defenses at the same rate as federal trial courts. While any empirical study of published orders must necessarily be taken for the imperfect exercise it is, empirical comparisons can give us at least some picture of how federal and state courts approach treaty claims.

The first difficulty is identifying all claims for return of a child. Because a petitioner is not required to exhaust or even resort to the State Department's diplomatic processes, data on the number of Hague Child Abduction Convention cases pending in the United States is never precise.<sup>258</sup> A 2008 study undertaken by the Hague Conference estimated 329 incoming cases to the United States each year, and that approximately one-fifth of those applications end in a voluntary return of the child.<sup>259</sup> This leaves approximately 6,300 cases over a twenty-four year period in which parties sought judicial resolution.<sup>260</sup> There were only 373 federal or state trial judgments under the treaty reported in LEXIS and Westlaw, suggesting that approximately six percent of the cases go to trial.<sup>261</sup> That rate is higher than the general rate of civil claims going to trial in federal courts, but is consistent with the rate at which divorce petitions go to trial.<sup>262</sup>

A second difficulty is ascertaining factors like settlement rates and resolutions occurring short of a final court order. The analysis provided herein is premised upon the Hague Child Abduction Convention petitions filed in state or federal trial courts that reach final judgment. The analysis is therefore not representative of the relative ability of federal or state judges to facilitate pre-judgment settlement, and does not answer whether,

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<sup>258</sup> Walshand & Savard, *supra* note 119 at 30 (noting difficulty in accurately measuring international child abductions).

<sup>259</sup> Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I*, available at <http://www.hcch.net/upload/wop/abduct2011pd08ae.pdf> (Nov. 2011). A similar study conducted on 2003 cases placed the number at 345.

<sup>260</sup> Hague Conference on Private International Law, *A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part III*, 180, available at <http://www.hcch.net/upload/wop/abduct2011pd08c.pdf>.

<sup>261</sup> This quotient is derived by dividing 384 by 6,300.

<sup>262</sup> MARLENE M. BROWNE, *THE DIVORCE PROCESS: EMPOWERMENT THROUGH KNOWLEDGE* (2001).



in aggregate, state court parties settle at the same rate as federal court parties. Indeed, given the idiosyncratic nature of family disputes that give rise to international abductions, it is difficult to see how the broader picture might be accurately assessed. The analysis is also indifferent as to the United States or a state agency acting as an *amicus curiae* or litigant in a Hague Child Abduction Convention proceeding. Those limitations aside, this discussion proceeds on the assumption that these influences would affect federal and state adjudications in the same manner.

The evidentiary division between remedies and affirmative defenses under ICARA frames the empirical part of this article. The following hypothesis is tested: state judges order fewer returns of children abroad than federal judges either by finding the treaty inapplicable or by liberally interpreting affirmative defenses available to the taking parent. In order to test this hypothesis, I collected all federal and state trial court cases in which Hague Child Abduction Convention claims were raised through August 16, 2012.<sup>263</sup> Within this set, I separately analyzed cases in which parties raised affirmative defenses under the treaty.

#### A. *State Judicial Management of Hague Child Abduction Convention Claims*

In ninety-five state trial court judgments, state judges determined that the treaty applied in seventy-five cases, or 78.9 percent, of cases brought before them. In the twenty, or 21.1 percent, of cases where the state court rejected the treaty's application, four decisions were based on what I consider to be objectively clear rules under the treaty. For example, state judges dismissed Hague Child Abduction Convention petitions where claims were brought to return children to non-party states, or where attempts were made to invoke the treaty to enforce rights over a child who had reached sixteen years of age.<sup>264</sup>

<sup>263</sup> I used the search terms "ICARA" or "International Child Abduction Remedies Act" or "Hague Convention on the Civil Aspects of International Child Abduction" or "28 U.S.C. § 11601" or "28 U.S.C. § 11603" or "grave risk of physical or psychological harm" or "age and degree of maturity," ending on August 16, 2012. For state cases this yielded an initial set of 238 cases (Lexis (238), Westlaw (231)) but only 95 cases in which a Hague Child Abduction Convention claim was actually raised in state court. For example, a decision may cite a statute in which ICARA was included, refer to Hague Convention adjudications in foreign countries, involve a non-custodial issue under the Convention (like service of process), use the Hague Convention as part of a risk-of-abduction analysis for a custody determination, cite the Hague Convention for another proposition of law such as a rule of treaty interpretation, or be in a state court action that was removed to federal court. The same search resulted in 456 federal district court cases (Lexis (456), Westlaw (433)), of which 278 cases involved the litigation of a Hague Child Abduction Convention claim. In cases where only state appellate court decisions were available, those were used to ascertain the trial court judgment.

<sup>264</sup> See *In re Gold*, No. 1 CA-CV 10-0471, 2011 WL 2462474 (Ariz. Ct. App. June, 21 2011) (Ghana is not a party to the Hague Convention); *In re David B.*, 164 Misc. 2d 566

Even where state courts determined that the treaty was not applicable, that conclusion resulted in deference to a foreign jurisdiction to adjudicate custody in two cases. In *L.H. v. Youth Welfare Office*, a New York Family Court determined that there was no wrongful removal of the child under Article 3 of the Convention, and deferred to German proceedings after lengthy communications with the German family court judge.<sup>265</sup> Similarly, a Minnesota trial court rejected a mother's effort to prevent the removal of her child to Canada because the dispute involved visitation rights (return is not a mandated remedy under the treaty).<sup>266</sup> In the remaining cases, the determination that the Hague Child Abduction Convention did not apply resulted in either the retention of children in the United States or an order that they be returned to the United States, a conclusion consistent with the hypothesis that state judges tend to retain children in the United States even where doing so is in tension with treaty obligations.

In the seventy-five cases where it was determined that the treaty applied, state trial judges ordered the return of a child to a foreign country in fifty-five, or 73.3 percent, of them. Those repatriation orders were issued from jurisdictions in which trial judges are elected in partisan elections,<sup>267</sup> elected in non-partisan elections,<sup>268</sup> selected through merit screening,<sup>269</sup> selected by a judicial commission, nominated by a governor but ultimately receiving legislative appointment,<sup>270</sup> exclusive legislative selection,<sup>271</sup> or gubernatorial appointment with senatorial or judicial commission approval.<sup>272</sup>

In thirty-three proceedings, litigants raised one or more of the affirmative defenses authorized by the Hague Abduction Convention. State courts rejected these affirmative defenses in twenty-three of these proceedings, or 69.7 percent of the time. In Hague Child Abduction Convention cases, defendants frequently raise the Article 13(b) affirmative defense, asserting a "grave risk that the child's return would expose the child to physical or psychological harm or otherwise place the child in an

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(N.Y. Fam. Ct. 1995) (Nigeria is not a party to the Hague Convention) ; *In re R.P.B.*, 2010, No. CA2009-07-097, 2010 WL 339812 (Ohio Ct. App. Feb. 1, 2010) (unpublished) (the Ohio juvenile court dismissed a father's Hague Convention petition because the child had reached the age of sixteen and therefore relief was unavailable under the treaty); *Terron v. Ruff*, 116 Wash. App. 1019 (2003).

<sup>265</sup> *L.H. v. Youth Welfare Office*, 150 Misc. 2d 490 (N.Y. Fam. Ct. 150 1991).

<sup>266</sup> *In re T. G. M. D.*, 2011 Minn. App. LEXIS 329 (2011).

<sup>267</sup> New York and Texas.

<sup>268</sup> Arkansas, Michigan, Minnesota, Nevada, North Carolina, Ohio, and Washington.

<sup>269</sup> Colorado and Nebraska.

<sup>270</sup> Connecticut.

<sup>271</sup> Virginia.

<sup>272</sup> California, Massachusetts, and New Jersey.

intolerable situation.”<sup>273</sup> This claim can take the form of harms ranging from a child not wishing to return to his or her state of habitual residence to physical abuse at the hand of the left-behind parent. In approximately two-thirds of the cases, the taking parent is the mother, a fact which has caused some to argue that the Hague Child Abduction Convention insufficiently protects mothers fleeing domestic abuse.<sup>274</sup>

#### B. *Federal Judicial Management of Hague Abduction Convention Claims*

In 278 federal trial court judgments, federal district court judges determined that the treaty applied in 229 cases, or 82.4 percent, of the time. In the forty-nine cases (17.6 percent) where the federal district court rejected the treaty’s application, a similarly small number of decisions were based on clear prohibitions on jurisdiction under the treaty.<sup>275</sup> Federal district courts, like state family or trial courts, find the treaty inapplicable primarily where the left-behind parent did not have custody rights or where they determine that the child’s habitual residence was the United States.<sup>276</sup>

<sup>273</sup> See Gary Salkin, Note, *The Increasing Incidence of American Courts Allowing Abducting Parents to Use the Article 13(b) Exception to the Hague Convention on the Civil Aspects of International Child Abduction*, 23 SUFFOLK TRANSNAT’L L. REV. 265 (1999).

<sup>274</sup> Mirela Iverac, *Protecting Kids: Rethinking the Hague Convention*, TIME MAG., available at <http://www.time.com/time/nation/article/0,8599,2036246,00.html> (Dec. 10, 2010).

<sup>275</sup> *Mohamud v. Guuleed*, No. 09-C-146, 2009 U.S. Dist. LEXIS 42687, at \*12 (E.D. Wis. May 4, 2009) (the child had turned sixteen); *Mezo v. Elmergawi*, 855 F. Supp. 59, 62 (E.D.N.Y. 1994); *Mohsen v. Mohsen*, 715 F. Supp. 1063, 1065 (D. Wyo. 1989) (“In light of the fact the petitioner’s daughter was last habitually resident in Bahrain, a noncontracting state, the court concludes that the petitioner has no rights under the Convention and is therefore not entitled to seek redress under its remedial provisions.”); *Wiesel v. Wiesel-Tyrnauer*, 388 F. Supp. 2d 206 (S.D.N.Y. 2005) (rights of visitation).

<sup>276</sup> See *Darin v. Olivero-Huffman*, No. 12-1121, 2012 U.S. Dist. LEXIS 116089, at \*31 (D.P.R. Aug. 16 2012) (habitual residence was Puerto Rico); *Guzzo v. Cristofano*, No. 11 Civ. 7394 (RJS), 2004 U.S. Dist. LEXIS 149816, at \*25 (S.D.N.Y. Dec. 30 2011) (habitual residence was New York); *Walker v. Walker*, No. 11 C 2967, 2011 U.S. Dist. LEXIS 121371, at \*7 (N.D. Ill. Oct. 20, 2011) (no wrongful removal or exercise of custody rights); *Radu v. Toader*, 805 F. Supp. 2d (E.D.N.Y. 2011) (no breach of rights of custody); *Johnson v. Johnson*, No. 11 Civ. 37 (RMB), 2011 U.S. Dist. LEXIS 15258, at \*21 (S.D.N.Y. Feb. 10, 2011) (Italy was not the habitual residence); *Fernandez v. Bailey*, No. 1:10CV00084 SNLJ, 2010 U.S. Dist. LEXIS 70386, at \*8 (E.D. Mo. Jul. 14, 2010) (finding no rights of custody); *Tamman v. Tamman*, No. 08-00155 DAE-LEK, 2008 U.S. Dist. LEXIS 79318, at \*70 (D. Haw. Oct. 8 2008) (Switzerland was not habitual residence); *Maxwell v. Maxwell*, No. 3:08-cv-254-RJC, 2008 U.S. Dist. LEXIS 103461, at \*51 (W.D.N.C. Sep. 2, 2008) (Australia was not habitual residence nor was there a wrongful removal); *Davis v. Strout*, No. 07-cv-141-GZS, 2007 U.S. Dist. LEXIS 75272, at \*4 (D. Me. Oct. 9, 2007) (requesting rights of access better handled by state court); *Wagner v. Wagner*, No. RWT 07-1347, 2007 U.S. Dist. LEXIS 45720, at \*9 (D. Md. June 21, 2007) (no habitual residence judgment was available for an infant); *Roux v. Roux*, No. CV 06-2203-PHX-JAT, 2007 U.S. Dist. LEXIS 8105, at \*12 (D. Ariz. Feb. 2, 2007) (there was no violation of rights of custody); *Thompson v. Brown*, No. 05 C 1648, 2007 LEXIS 1187, at \*48 (N.D. Ill. Jan. 3, 2007) (child was not a habitual resident of the

In the 229 cases in which it was determined that the treaty applied, federal district court judges ordered the return of a child to a foreign country in 163 of them, or 71 percent of the cases. In 177 proceedings, litigants raised one or more of the affirmative defenses authorized by ICARA. Federal district courts rejected these affirmative defenses in 123 of these proceedings, or 69.5 percent of the cases.

On all of these metrics, state judges demonstrate close parity with federal judges. Based on reported cases, state judges order the return of children abroad at a slightly higher rate (73.3 percent to 71 percent) than federal judges, an outcome that suggests that plaintiffs have no greater difficulty vindicating treaty rights in state courts than in federal courts. State judges reject affirmative defenses under the treaty at a marginally higher rate than federal judges (69.7 percent to 69.5 percent), giving effect to the treaty drafters' intent that exceptions be narrowly construed.<sup>277</sup> As Thomas Johnson observed at the twentieth anniversary of the treaty, "both federal and state courts in the United States have given foreign parents and their governments little to complain about . . . ."<sup>278</sup>

## V.

### THE FUTURE OF ABSTENTION AND FAMILY LAW TREATIES

All of this might be of modest import if the Hague Child Abduction Convention represented the end of US participation in family law treaties. But the increasing role of Congress and the President in these areas of family law has facilitated the US government's engagement with at least three additional Hague Conference family law treaties.<sup>279</sup> The United States has ratified the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Adoption

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UK); *March v. Levine*, No. 3:06-0878, 2001 U.S. Dist. Lexis 92931 (M.D. Tenn. Dec. 22, 2006) (there were no rights of custody).

<sup>277</sup> See *Tahan v. Duquette*, 259 N.J. Super. 328 (Ct. App. 1992) (ruling that the inquiry be limited to the level of safety in the state of habitual residence); Salkin *supra* note 273 (citing in equal measure state and federal courts narrowing the scope of inquiry under the affirmative defenses); *Renovala v. Roosa*, No. FA 91 0392232 S, 1991 Conn. Super. Ct. LEXIS 2215 (Sep 27, 1991) (denying the grave risk defense based on relocation).

<sup>278</sup> Thomas Johnson, *The Hague Child Abduction Convention: Diminishing Returns and Little to Celebrate for Americans*, 33 N.Y.U. J. INT'L L. & POL. 125, 130 (2000).

<sup>279</sup> Estin, *Sharing Governance*, *supra* note 49, at 279-80 ("State laws governing paternity, adoption, foster care, child support, and child protection now evolve based on a federal design, as do laws regulating family behavior of individuals shows a substantial federal commitment to family policy and children's welfare."); David F. Cavers, *International Enforcement of Family Support*, 81 COLUM. L. REV. 994, 1000-02, 1007-12 (1981); see also Gloria Folger DeHart, *Comity, Conventions, and the Constitution: State and Federal Initiatives in International Child Support Enforcement*, 28 FAM. L.Q. 89, 110 (1994) (state governments are allowed to enter into compacts with foreign governments).

Convention).<sup>280</sup> Congress passed the implementing Intercountry Adoption Act (IAA) in 2000 even though the State Department has only finalized implementing regulations relatively recently.<sup>281</sup> The IAA explicitly preempts state laws only to the extent they are inconsistent with the IAA, and acknowledges the particular role of state courts in regulating emigration of US children to Convention countries.<sup>282</sup> There is no concurrent jurisdictional statute, and private rights of action are not authorized. The existence of an extensive federal regulatory scheme for intercountry adoption, including participation by state regulatory agencies in the comment process, suggests that federalism questions under the treaty are more likely to center around preemption than jurisdiction.<sup>283</sup>

The United States has also signed the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children,<sup>284</sup> and the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance<sup>285</sup>—both of which will invite similar

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<sup>280</sup> Hague Conference on International Private Law, *Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption: Status table*, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=69](http://www.hcch.net/index_en.php?act=conventions.status&cid=69) (last visited Nov. 14, 2011). The United States signed the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption (Convention) on March 31, 1994. The United States ratified the Convention on December 12, 2007, and the Convention entered into force on April 1, 2008.

<sup>281</sup> 42 U.S.C.A. §§ 14901-14954 (West 2000). The IAA's purpose is to "protect the rights of, and prevent abuses against children, birth families, and adoptive parents involved in adoptions (or prospective adoptions) subject to the Convention, and to ensure that such adoptions are in the children's best interests," and to "improve the ability of the Federal Government to assist United States citizens seeking to adopt children from abroad and residents of other countries party to the Convention seeking to adopt children from the United States." The IAA accomplishes these goals by regulating the accreditation and approval of adoption agencies, recognizing Convention adoptions, providing administrative and enforcement procedures to uphold the IAA. *Id.*

<sup>282</sup> State Department, *Intercountry Adoption Act of 2000, Accreditation of Agencies; Approval of Persons, Preservation of Convention Records*, available at <https://www.federalregister.gov/articles/2003/09/15/03-22650/hague-convention-on-intercountry-adoption-intercountry-adoption-act-of-2000-accreditation-of> (last visited Nov. 14, 2011).

<sup>283</sup> The regulations set forth a detailed dispute resolution procedure which contemplates final resolution in federal courts.

<sup>284</sup> Hague Convention on Intercountry Adoption Hague Conference on International Private Law, *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children: Status table*, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=70](http://www.hcch.net/index_en.php?act=conventions.status&cid=70) (last visited Nov. 14, 2011).

<sup>285</sup> Hague Conference on International Private Law, *Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance: Status table*, available at [http://www.hcch.net/index\\_en.php?act=conventions.status&cid=131](http://www.hcch.net/index_en.php?act=conventions.status&cid=131) (last visited Nov. 14, 2011).

difficulties in drawing the boundary between national interests in the treaty's observance and state interests in the treaty's underlying legal problems. As Ann Laquer Estin has noted, harmonization of these treaties with domestic US law will be difficult because of "our approach to federalism and the traditional role of state governments in family law."<sup>286</sup> This entire picture becomes even more muddled once we consider the potentially preemptive effect of federal common law,<sup>287</sup> which is now being developed with respect to the Hague Child Abduction Convention.<sup>288</sup>

The Hague Child Abduction Convention may be viewed in part as a victory for bicameral international lawmaking.<sup>289</sup> The large Congressional majorities behind the implementing legislation represent an underlying interest by states in increasing the tools available to reach abducted children.<sup>290</sup> Compared to federal judges, state judges have applied the treaty with an understanding of the importance of mutuality and reciprocity in making sure child custody is adjudicated in the

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<sup>286</sup> Estin, *Families Across Borders*, *supra* note 74, at 50

<sup>287</sup> Daniel J. Meltzer, *Customary International Law, Foreign Affairs, and Federal Common Law*, 42 VA. J. INT'L L. 513, 536 (2002); Jack L. Goldsmith, *Federal Courts, Foreign Affairs and Federalism*, 83 VA. L. REV. 1617, 1618 (1997).

<sup>288</sup> See Samuel P. Jordan, *Reverse Abstention*, 92 B.U. L. REV. 1771 (2012) (analyzing circumstances under which federal procedural common law accompanying enforcement of a federal right is applicable only in a federal forum); Anthony J. Bellia, Jr., *State Courts and the Interpretation of Federal Statutes*, 59 VAND. L. REV. 1501, 1505-06 (2006). Bellia and Clark, *supra* note 31, at 9 ("Taken in historical context, the best reading of Supreme Court precedent dating from the founding to the present is that the law of nations does not apply as preemptive federal law by virtue of any Article III power to fashion federal common law, but only when necessary to preserve and implement distinct Article I and Article II powers . . .").

<sup>289</sup> Estin, *Families Across Borders*, *supra* note 74, at 67 (citing Peter H. Pfund, *Contributing to Progressive Development of Private International Law: the International Process and the United States Approach*, in 249 RECUIL DES COURS: COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 1, 25-26, 73 (1996)). Estin, *Families Across Borders*, *supra* note 74, at 103 ("Whatever the outer limits of the foreign commerce and foreign relations powers, both Congress and the Executive Branch evaluate federalism concerns before enacting legislation of this nature, and both branches have clearly understood the importance of coordinating our treaty obligations with the family law systems that exist in the states."). See also Curtis Bradley & Jack L. Goldsmith, *Breard: the Abiding Relevance of Federalism to U.S. Foreign Relations*, 92 AM. J. INT'L L. 675, 677-78 (1998) (noting treaty contexts in which the federal government safeguarded state interests).

<sup>290</sup> Peter H. Pfund, Hague International Child Abduction Convention; Text and Legal Analysis, 51 Fed. Reg. 10494, 10498 (Mar. 26, 1986) ("In reply to a State Department letter inquiring whether and how the states of the United States could assist in implementing the Convention if it were ratified by the United States, officials of many states welcomed the Convention in principle and expressed general willingness to cooperate with the federal Central Authority in its implementation.").

appropriate forum.<sup>291</sup> A similarly inclusive process governed the ratification of the Hague Adoption Convention.<sup>292</sup>

Yet the treaty has not been a story of the success of judicial federalism. Without wading into the much wider (and more perilous) debate surrounding the use of legislative history for purposes of statutory interpretation, it is fair to say that federal appellate courts have been relatively indifferent to the implicit Congressional admonition as to state family law interests and the explicit grant of *original* jurisdiction over petitions brought under the treaty.<sup>293</sup> This indifference appears motivated in substantial measure by a suggested but forceful view of the relationship between federal courts and the rights imparted by treaties.<sup>294</sup> If the United States is to continue to enter into treaties that fundamentally change or limit states' authority over family law—and assuming Congress means what it says about state interests—it will need to either structure Article III jurisdiction more carefully or consider other alternatives.<sup>295</sup>

Indeed, federal treaties may not even be preferable given some contracting states' poor records with respect to Hague Child Abduction Convention enforcement.<sup>296</sup> State executive agencies and law enforcement have successfully negotiated bilateral agreements with foreign sovereign states for some time—a practice that, at least impliedly, proceeds with

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<sup>291</sup> See, e.g., *Tahan v. Duquette*, 259 N.J. Super. 328, 334 (1992) (“Although we are not bound by the decisions of courts in other states or by the manner in which a treaty has been interpreted in other nations, a proper regard for promoting uniformity of approach in addressing a treaty of this kind requires that the views of other courts receive respectful attention.”) (citations omitted).

<sup>292</sup> Estin, *Families Across Borders*, *supra* note 74, at 75-76 (describing Congressional remedial action on the treaty).

<sup>293</sup> Jeffrey Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479 (2013) (suggesting an uneasy convergence toward “textualism” in the interpretation of federal statutes).

<sup>294</sup> See *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003); *Gonzalez v. Gutierrez*, 311 F.3d 942, 949 (9th Cir. 2002). The Court of Appeals for the Eleventh Circuit adopted the reasoning of then Judge Sotomayor's *Croll* dissent. *Furnes v. Reeves*, 362 F.3d 702, 720, n.15 (11th Cir. 2004). Linda Silberman, *Patching Up the Abduction Convention: A Call for a New International Protocol and a Suggestion for Amendments to ICARA*, 38 TEX. INT'L L.J. 41, 49 (2003) (“Federal courts in the United States have held that they do not even have jurisdiction to hear a claim for enforcement of access rights.”).

<sup>295</sup> Not all treaties, of course, introduce these confrontations. The United States, for example, has ratified the Convention Providing a Uniform Law on the Form of an International Will, but has not adopted national implementing legislation in favor of state-by-state adoption through the National Conference of Commissioners on Uniform State Laws. See President's Message to Congress Transmitting the Convention Providing a Uniform Law on the Form of an International Will, 1986 Pub. Papers 905-06 (July 2, 1986), available at 1973 U.S.T. LEXIS 321.

<sup>296</sup> Walshand & Savard, *supra* note 119, at 38 (noting cases in which European jurisdictions especially have not complied with treaty mandates).

Congressional approval.<sup>297</sup> If, however, federal treaties continue to dominate the future of transnational family dispute resolution, then greater attention to the jurisdictional divide between state and federal courts in implementing legislation is warranted.

#### CONCLUSION

If it is true that Congress wishes to safeguard state family law to the greatest extent possible as it enters more treaties dealing with child custody, family maintenance obligations, and divorce and marriage, then the experience with the Hague Child Abduction Convention counsels against a reliance on judicial federalism to accomplish that objective. The empirical part of this paper suggests that exclusive state court jurisdiction poses no threat to federal interests in uniformity and mutuality of decisions with other contracting states. Of course, this is not Congress's only option.<sup>298</sup> A second option is exclusive federal jurisdiction, a course which would at least eliminate delays caused by abstention adjudication.<sup>299</sup> As Congress recognized in 1986, this option also engenders substantial federal intrusion into areas where states are generally better situated to administer the treaty's purpose in part because they have oriented more resources toward doing so. Many Hague Conference participants recommend a specialized court to adjudicate petitions.<sup>300</sup> Exclusive federal jurisdiction would reduce the time required for petitions to reach final conclusion and end the long delays caused by abstention and opportunistic forum shopping. Finally, Congress may attempt to draw jurisdictional lines between federal and state courts. It is not clear that ICARA's original House version, which limited federal jurisdiction to a residual role over claims that did not involve a request for

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<sup>297</sup> Estin, *Families Across Borders*, *supra* note 74, at 80-81, 90-91 (“[I]ndividual states began to enter reciprocal arrangements with foreign governments to establish, recognize, and enforce child support orders, following a trail blazed by Gloria DeHart, who negotiated many of these agreements as Deputy Attorney General in California.”).

<sup>298</sup> As in the domestic context, uniformity is asserted as an important goal of federal court jurisdiction over treaties without that rationale having been tested to any significant extent. In *Medellin*, for example, the U.S. Supreme Court rejected individual enforceable remedies under the Vienna Convention on Consular Relations which was inconsistent with a “uniformity” rationale. The International Court of Justice had determined, in a case against the United States, that treaty claims required judicial authorities to evaluate any prejudice caused by a denial of treaty rights. For critical views of the uniformity rationale in the domestic context, see John Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247 (2007) (empirically questioning the validity of the uniformity justification); Amanda Frost, *Overvaluing Uniformity*, 94 VA. L. REV. 1567 (2008) (analyzing constitutional structure with respect to a purported federal interest in uniformity).

<sup>299</sup> See Susan Block Leib, *The Costs of a Non-Article III Bankruptcy System*, 72 AM. BANKR. L.J. 529, 566 (1998) (advocating exclusive federal jurisdiction to resolve delays and costs associated with fragmented bankruptcy jurisdiction).

<sup>300</sup> Bureau of Consular Affairs, *The Common Law Judicial Conference on International Child Custody, Best Practices*, available at [http://travel.state.gov/abduction/resources/resources\\_548.html](http://travel.state.gov/abduction/resources/resources_548.html) (last visited Nov. 4, 2013).



return of a child, would have avoided the jurisdiction problems caused by concurrent original jurisdiction. Congress has certainly shown itself able to craft an abstention statute where federal and state interests regularly and predictably collide.<sup>301</sup> Future family law treaties represent a fruitful area for the collaborative political process leading to the Hague Child Abduction Convention to go a bit further.<sup>302</sup>

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<sup>301</sup> 28 U.S.C. § 1334 (2005).

<sup>302</sup> See Oona Hathaway, *Treaties' End: The Past, Present and Future of International Law-Making in the United States*, 117 YALE L.J. 1236 (2008) (advocating bicameral implementation of U.S. treaties).