

Sotomayor and the Future of International Law

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I. INTRODUCTION

Supreme Court nominations are usually accompanied by a flurry of speculation regarding the nominee’s position on various legal issues. In this respect, the nomination of Justice Sotomayor was not exceptional. A significant question presented by commentators at that time was how she would use, interpret, and apply international law if confirmed.

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This paper continues the discussion by examining Sotomayor's record on international legal issues. First, it examines the extent to which she has treated international law as binding authority within the domestic sphere. Second, it evaluates her view of the role of foreign jurisprudence in the interpretation of international agreements. Third, it explores cases in which she has looked to foreign jurisprudence in interpreting domestic legal provisions concerning foreign-nationals and in which she has dealt with customary international legal issues. Fourth, it analyzes her speeches, writings, and confirmation-hearing responses in order to shed light on the question of her potential future use of foreign law in deciding domestic legal issues.

After examining her decisions, speeches, and writings, this paper concludes that she is receptive to the use of international law, although she will not always prioritize international law over domestic law. There is especially strong evidence that she favors the use of foreign jurisprudence when interpreting treaties and when defining certain legal terms in order to apply domestic law to foreign nationals. There is further evidence that she favors the use of foreign law to aid in the interpretation of domestic law under certain circumstances.

This paper also notes that the infrequency with which she has dealt with international law and the narrowness of her holdings make it difficult to predict her future treatment of international law. Ultimately, Sotomayor's treatment of international law is not internally consistent; that is, she does not always subrogate domestic law to international law, nor does she consistently treat domestic law as a superior source of legal authority to international law. Rather, her cases demonstrate that, depending on the legal issues and the fact pattern at hand, either international law or domestic law may prevail. The only consistencies across all of her jurisprudence concerning international legal issues are: (1) her reliance on precedent; and (2) her tendency to craft narrow holdings which do no more than answer the question at hand. Her new post on the nation's highest court may lead her to either broaden her holdings or break from precedent. If either change should occur, we may glean a clearer view of Sotomayor's position on the proper place of international law in the American legal order.

II. INTERNATIONAL AGREEMENTS AS BINDING DOMESTIC LAW

The relationship between international treaties and domestic law has long been disputed. The President has the power to make treaties with the advice and consent of two-thirds of the Senate.¹ Once made, the Supremacy Clause declares these treaties "the supreme law of the land,"² but the analysis of their effect in the domestic sphere does not end there.³ In consequence, while all treaties may be the supreme law of the land for the purpose of creating international legal obligations, the precise domestic legal effect of their provisions is anything but uniform.⁴

1. U.S. CONST. art. II, § 2, cl. 2.

2. *Id.* art. VI, cl. 2.

3. *Foster v. Neilson*, 27 U.S. 253, 314 (1829).

4. See *Medellin v. Texas*, 552 U.S. 491 (2008) (noting that there was a presumption against self-executing treaty provisions, concluding that only if a "treaty contains stipulations which are self-executing . . . [will] they have the force and effect of a legislative enactment"). In *Medellin*, the court considered whether the Vienna Convention—which gives foreign nationals accused of crime a right to meet with diplomats from their home country—could be enforced as U.S. law and whether an International Court of

Sotomayor's opinion in *United States v. Ni Fa Yi* shows that, although she respects Congress's role in making treaty provisions binding by passing legislation, equal protection concerns might affect her determination of when these provisions are binding.⁵ In contrast, her decision in *European Community v. RJR Nabisco* demonstrates a willingness to defer to the executive branch when her decision will have foreign policy implications.⁶

A. *Congressional Enactments of Treaty Provisions are Subject to Judicial Scrutiny*

Sotomayor's opinion in *Ni Fa Yi* indicates that she does not consider treaty obligations as a source of law that is separate from Congressional legislation. In *Ni Fa Yi*, she held that treaty provisions that required Congressional enactment before taking effect as domestic law would not automatically meet the requirements of judicial scrutiny.⁷ As these treaty provisions only become binding domestic law after a Congressional enactment, as opposed to self-executing treaty provisions, they are subject to the same judicial scrutiny as any other Congressional enactment.⁸

In *Ni Fa Yi*, Judge Sotomayor was concerned that "... the [Hostage Taking] Act reach[ed] a significant amount of conduct unrelated to" the government's goal and "that [her] holding could support some other provision . . . which . . . effect[ed] no sounder purpose than to discriminate against persons on the basis of their alienage."⁹ This suggests that equal protection concerns may temper her decisions regarding the binding authority of international treaties on U.S. courts and, ultimately, limit the nature of the provisions that may be implemented by Congress. However, when a decision will have foreign policy implications, Sotomayor has exhibited deference to the wishes of the executive branch.

Justice's ruling that stated the treaty was binding inside the United States was binding on the United States. The Supreme Court ruled 6-3 that the Vienna Convention was not enforceable as a matter of U.S. law because it did not contain explicit provisions that made it self-executing. It also held that that the World Court decision did not bind the United States and therefore did not preempt state law restrictions on challenges to convictions. Chief Justice John G. Roberts's opinion was supported in full by Justices Samuel A. Alito, Jr., Anthony M. Kennedy, Antonin Scalia, and Clarence Thomas. Justice John Paul Stevens supported the result only, saying he found the issue to be a closer one than the Roberts opinion allowed, but said that he was persuaded "in the end" that the treaty did not authorize the Supreme Court to enforce the International Court of Justice's ruling. *See id.* (noting that there was a presumption against self-executing treaty provisions, concluding that only if a "treaty contains stipulations which are self-executing . . . will they have the force and effect of a legislative enactment").

5. *See* 951 F. Supp. 42, 45 (S.D.N.Y. 1997) (stating that treaties with foreign nations must pass Constitutional muster).

6. *See generally* 355 F.3d 123 (2d Cir. 2004), *vacated and remanded*, 544 U.S. 1012 (2005).

7. *Ni Fa Yi*, 951 F. Supp. at 43. Finding for the government, Sotomayor held the Hostage Taking Act (enacted to ratify the International Convention against the Taking of Hostages) constitutional when a defendant charged with hostage-taking argued that it deprived him of equal protection by differentiating between U.S. nationals and non-citizens.

8. *Id.* at 45-46 ("[R]ules of international law and provisions of international agreements of the United States are subject to the Bill of Rights and other prohibitions, restrictions and requirements of the Constitution and cannot be given effect in violation of them.").

9. *Id.*

B. Deference to the Executive Branch May Affect the Binding Nature of Judgments by Foreign Courts

In *Nabisco*, Judge Sotomayor deferred to the executive in determining whether the common law “revenue rule” was binding on domestic courts.¹⁰ This rule holds that courts of one country will not enforce tax judgments by foreign courts.¹¹ Specifically, *Nabisco* examined the rule as it applied to a civil Racketeer Influenced and Corrupt Organizations (RICO) suit brought by the European Community and its member states against a variety of tobacco companies.¹² Sotomayor was reluctant to involve the judiciary in resolving this dispute. Furthermore, she paid great attention to the role that the other political branches could play in this type of civil suit and required clear evidence that they had declined to participate before she would allow the litigation to proceed.¹³ Finding such evidence lacking, she barred the RICO suit on the basis of earlier Second Circuit precedent.¹⁴

An earlier Second Circuit decision, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, had held that the rule applied to a civil RICO suit filed by the government of Canada against various Canadian and American tobacco firms.¹⁵ Writing for the court in *Nabisco*, Judge Sotomayor held that *R.J. Reynolds* was controlling and that, in the absence of mitigating factors, the revenue rule applied, barring the plaintiff’s claims.¹⁶ She noted two concerns behind the revenue rule explained in *R.J. Reynolds*: sovereignty and separation of powers.¹⁷ Further, she acknowledged that the rule need not be applied when these concerns are not present.¹⁸ As the abrogation of the revenue rule in any one case would necessarily impact foreign relations, Sotomayor found that such an abrogation required a showing that Congress had directly spoken on the matter.¹⁹ She rejected the plaintiff’s attempts to show the absence of foreign policy concerns by finding that the

10. 355 F.3d at 132.

11. *Id.*

12. *Id.*

13. *Id.*

14. *See id.*

15. 268 F.3d 103 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002). Both cases involved allegations that the defendants had participated in schemes to smuggle contraband cigarettes into the plaintiff’s territories and thereby committed RICO violations—e.g., conspiracies to commit mail and wire fraud—that resulted in the governments’ loss of revenue from tobacco duties and taxes and law enforcement costs.

16. The Supreme Court later vacated the judgment and remanded the decision for further consideration in light of the Court’s ruling in *Pasquantino v. United States* that the revenue rule did not bar a government prosecution of wire fraud under 18 U.S.C. § 1343 connected to a scheme to smuggle liquor into Canada to avoid heavy import taxes. 544 U.S. 349 (2005). On remand, Judge Sotomayor concluded that *Pasquantino* did not “cast doubt” on the prior Second Circuit ruling—the court standard that would have permitted a different outcome on remand—and reinstated the earlier opinion. *European Community v. RJR Nabisco Inc.*, 424 F.3d 175, 178 (2d Cir. 2005). As it had in *R.J. Reynolds*, the Supreme Court denied review. *European Cmnty. v. RJR Nabisco Inc.*, 546 U.S. 1092 (2006) (denying cert.).

17. *Nabisco*, 355 F.3d at 131 (citing *R.J. Reynolds*, 268 F.3d at 126).

18. *Id.* at 132 (explaining that under the holding in *R.J. Reynolds*, the rule would not have to be applied if the executive branch expressed its consent to the suit or, absent such consent, if the plaintiffs “establish that superior law, such as the federal statute that provides that applicable right of action, abrogates the rule in the context in which the plaintiffs seek to enforce their tax laws”).

19. *Id.* (“Because the revenue rule is a longstanding common law rule, and its abrogation in any one situation necessarily impacts foreign relations, a statute or treaty ‘must speak directly to the matter’ in order to abrogate it.”).

Executive Branch's decision not to intervene in the suit, despite being aware of it, did not constitute consent to the action.²⁰

The Second Circuit stated that where the executive branch had "expressed its consent to adjudication by the courts," the institutional and separation of power concerns behind the rule would be mitigated.²¹ As in *R.J. Reynolds*, the court suggested that executive consent may be found where the United States itself institutes a prosecution designed to punish those who have defrauded foreign governments of tax revenues, or where the treaties between the United States and the sovereigns at issue provide for broad, reciprocal tax enforcement assistance.²² The executive also might indicate its consent to the suit by other means, such as by submitting a statement from the State Department or filing an amicus brief.²³ The court stated that "[a]bsent such indication that the executive branch consents to the suit, a claim that triggers the revenue rule is barred unless the plaintiffs establish that superior law, such as the federal statute that provides the applicable right of action, abrogates the rule in the context in which the plaintiffs seek to enforce their tax laws."²⁴ Thus, she showed an inclination to defer to the executive branch in a case with foreign-policy implications in two ways: first, by respecting executive branch silence and second, by indicating that deference would likely be accorded to its views once expressed.

Sotomayor's positions in *Ni Fa Yi* and *Nabisco* show that, as a Second Circuit judge, she followed precedent in determining issues surrounding the binding nature of treaty provisions as domestic law. To date, she has not decided a case that calls into question the process by which a treaty becomes domestic law. Given the divided court in *Medellin v. Texas*,²⁵ the Supreme Court is likely to hear another case on the issue. In *Ni Fa Yi*, Sotomayor noted that equal protection concerns may allow courts to overturn treaty provisions made into law by Congress. Justice Sotomayor may then be swayed by the argument that equal protection concerns similarly weigh against self-executing treaty provisions, because requiring Congressional legislation provides an added layer of protection against the violation of equal protection rights. However, both self-executing treaties and treaties made binding by Congressional action may be subject to judicial scrutiny,²⁶ so the method by which the treaty becomes effective domestically may not weigh into Sotomayor's decision. As Sotomayor's opinion in *Nabisco* demonstrated that she believes the court may need to defer to the executive on some international matters, she may be more inclined to allow some treaty provisions to be self-executing because of executive branch involvement in entering into the treaty.

20. *Id.* at 137.

21. *Id.* at 132.

22. *Id.*

23. *Nabisco*, 355 F.3d at 132.

24. *Id.*

25. *Medellin v. Texas*, 552 U.S. 491 (2008). *See supra* discussion at note 4.

26. *See United States v. Ni Fa Yi*, 951 F. Supp. 42 (S.D.N.Y. 1997) (involving a treaty approved by Congress which was subjected to judicial scrutiny).

III. USING FOREIGN JURISPRUDENCE TO INTERPRET INTERNATIONAL AGREEMENTS

Given that treaty provisions can become binding domestic law, enforced by the U.S. judicial system, one must ask how a court should interpret and apply those provisions. The Supreme Court has held that “the opinions of our sister signatories [are] entitled to considerable weight.”²⁷ However, it remains unclear how much deference American courts should give to foreign jurisprudence when it does not unanimously support one interpretation over all others.²⁸ The circuit-split over the proper application of foreign jurisprudence in defining a parent’s “right of custody” under the Hague Convention on the Civil Aspects of International Child Abduction exemplifies this difficulty.²⁹ Justice Sotomayor wrote the dissent in *Croll v. Croll*,³⁰ and she will soon face the question yet again in *Abbott v. Abbott*.³¹ *Abbott* may provide the court with the opportunity to more thoroughly define the proper role of foreign jurisprudence in treaty interpretation.

Croll was the first case on the matter to be decided by a U.S. Court of Appeals. Mrs. Croll had custody of her daughter, Christina while Mr. Croll had only “rights of access.”³² There was also a *ne exeat* provision preventing both parties from removing Christina from Hong Kong without the other parent’s permission or authorization of the court.³³ Violating that order, Mrs. Croll brought Christina to the United States.³⁴ Arguing that the violation of the *ne exeat* clause rendered Christina’s removal from Hong Kong wrongful under the Convention, Mr. Croll brought suit in a federal

27. *Air France v. Saks*, 470 U.S. 392, 404 (1985).

28. *See Croll v. Croll*, 229 F.3d 133, 143 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001) (acknowledging that there is no doctrine requiring the court’s deference to foreign jurisprudence that is inconsistent in its interpretation of a treaty).

29. *Compare Furnes v. Reeves*, 362 F.3d 702, 716–17 (11th Cir. 2004) (holding that the *ne exeat* right as defined by the Hague Convention provided a father with a right of custody over the child and noting that its “reasoning and conclusions are in harmony with the majority of the courts of our sister signatories that have addressed this treaty issue”), and *Fawcett v. McRoberts*, 326 F.3d 491, 500 (4th Cir. 2003) (holding that the court will “accept the holding of *In re H*, [[1999] 2 A.C. 291 (H.L.) (appeal taken from N. Ir.) (U.K.),] and assume, without deciding, that if an ‘application to the court . . . raise[s] matters of custody within the meaning of the [Hague] Convention’ the court may have ‘rights of custody,’ and further that a third party (such as a parent) may assert those rights in a petition for return of child”), with *Abbott v. Abbott*, 542 F.3d 1081, 1086 (5th Cir. 2008) (adopting the district court reasoning that although “[t]he opinions of courts in other signatory states to the Hague Convention are also ‘entitled to considerable weight’” according to *Air France*, the “cases from other signatory states addressing the rights conferred on a parent by a *ne exeat* order are ‘few, scattered, [and] conflicting’ and thus do not guide this Court in its consideration of the issue”), *cert. granted*, 129 S. Ct. 2859 (June 29, 2009) (No. 08-645), *Gonzalez v. Gutierrez*, 311 F.3d 942, 952, 954 (9th Cir. 2002) (holding that “a *ne exeat* clause intended to benefit a non-custodial parent who possesses access or visitation rights does not afford ‘rights of custody’ to that parent under the Hague Convention,” noting that “as the Second Circuit has observed, the cases of other signatory states on this question are ‘few, scattered, conflicting, and sometimes, conclusory and unreasoned’” (quoting *Croll*, 229 F.3d at 143)), and *Croll*, 229 F.3d 133, 143 (“[T]hough the ‘opinions of our sister signatories [are] entitled to considerable weight,’ . . . we are aware of no doctrine requiring our deference to a series of conflicting cases from foreign signatories.” . . . “[W]e hold that a *ne exeat* clause does not transmute access rights into rights of custody under the Convention.” (quoting *Air France*, 470 U.S. at 404)).

30. 229 F.3d at 144.

31. 129 S.Ct. 2859 (2009) (granting cert.)

32. *Croll*, 229 F. 3d at 134.

33. *Id.* at 134–35.

34. *Id.* at 135

district court.³⁵ The court ordered Christina's return to Hong Kong.³⁶ It reasoned that because the *ne exeat* clause bestowed a joint right to determine her place of residence upon both parents, Mr. Croll had a "corresponding right of custody within the meaning of the Convention."³⁷

Overturing the district court, the Second Circuit held that the *ne exeat* clause did not provide Mr. Croll with a right of custody.³⁸ In coming to its conclusion, the Court privileged the conventional meaning of "custody"³⁹ and the intentions of the treaty's drafters⁴⁰ over the jurisprudence of other signatory nations.⁴¹ The majority justified this decision by emphasizing the split in the foreign jurisprudence.⁴² It noted that no doctrine required it to follow such jurisprudence when there is not a single interpretation of a treaty.⁴³ Sotomayor's dissent suggests that the relevant foreign jurisprudence should have played a greater role in informing the majority's interpretation of the treaty.⁴⁴ She argued that the foreign cases seemingly supporting the majority are not strong authority.⁴⁵ In her view, the majority overstated the divided nature of the foreign jurisprudence.⁴⁶ While there was not one prevailing view as to whether a *ne exeat* clause conferred a right of custody under the

35. *Id.* Only people or entities holding "rights of custody" can seek the return of children wrongly removed from the child's habitual country of residence. Convention on the Civil Aspects of International Child Abduction, art. 5, para.1, Oct. 25, 1980, T.I.A.S. No. 11,670, 1983 U.N.T.S. 98.

36. *Croll*, 229 F.3d at 136.

37. *Id.* (quoting *Croll v. Croll*, 66 F. Supp. 2d at 559 (1999)).

38. *Id.* at 143.

39. *Id.* at 138–39 (defining custody by looking at dictionaries and American case law).

40. *Id.* at 141–43 (citing sources suggesting that the drafters did not intend for a *ne exeat* clause to confer rights of custody onto a parent).

41. *Id.* at 143–45 (demonstrating that the foreign case law was not as heavily weighed in coming to a decision as were these other factors).

42. *Croll*, 229 F.3d at 138–45.

43. *Id.* at 143. The court described "the cases worldwide [as] few, scattered, conflicting, and sometimes conclusory and unreasoned." *Id.* Further justifying its position, the majority claimed that "most of the cases rest on distinguishable facts, such as (a) orders of *temporary* custody awarded in the course of an ongoing custody battle . . . or (b) consent decrees expressly granting custody rights to both parents." *Id.* (internal citations omitted).

44. *Id.* at 150–53 (summarizing foreign cases interpreting rights of custody in light of the Hague Convention).

45. *Id.* While the majority argues that the "joint guardian" status of the parents distinguishes an English case in which both parents were granted "joint guardianship" of the child and a *ne exeat* order was in place, from *Croll*, Sotomayor points out that "the court explicitly relied on the language of the *ne exeat* provision and not the joint guardianship clause in determining that the father possessed 'rights of custody' under the Convention." *Croll*, 229 F.3d at 150 n.6 (citing *C v. C*, [1989] 1 W.L.R. 654 (C.A. (appeal taken from Eng.) (U.K.)). The court also cited a French case, in which that Court declined to order the return of a child in England and Wales, not because the order did not confer custodial rights on the father, but because an order preventing the defendant from moving would violate the mother's expatriation rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms. *Id.* at 152 (citing *Ministere Public v. Mme Y.*, Tribunaux de grande instance [T.G.I.] [ordinary court of original jurisdiction] *Periguez*, Mar. 17, 1992, D.S. Jur. 1992 (Fr.)). Finally, the court recalled that the Canadian Supreme Court only noted in dicta that where there is a final non-removal order, ordering the return of a child would be inappropriate. *Id.* at 152 (citing *Thomson v. Thomson*, [1994] 119 D.L.R. 253 (Can.)).

46. *See id.* at 150 (explaining that "[m]ost foreign courts addressing this question have interpreted the notion of rights of custody broadly in light of the Convention's purpose and structure"; that is, the majority's interpretation is contrary to the majority of foreign jurisprudence). *See also id.* at 151–53 (arguing that the cases which seemingly support the majority's interpretation are not strong authority).

Convention, she claimed that only Canadian courts had interpreted *ne exeat* clauses as not constituting a right of custody and that this was only done in dictum.⁴⁷

Following the Second Circuit's decision in *Croll*, other U.S. Courts of Appeal were confronted with this question, and there is now a split in the jurisprudence.⁴⁸ This split may explain the Supreme Court's recent decision to grant a writ of certiorari in *Abbott v. Abbott*.⁴⁹

The fact pattern in *Abbott* is similar to *Croll*: Mr. Abbot had a right to regular visitation with his son, and Mrs. Abbott had custody rights.⁵⁰ Mrs. Abbott then violated a *ne exeat* order.⁵¹ Requesting the return of his son, Mr. Abbott filed suit in a Federal District Court.⁵²

The court followed *Croll* in holding that a *ne exeat* order does not grant a "right of custody" under the Convention.⁵³ The court also distinguished this case from *Furnes v. Reeves*, on the grounds that the two parties in *Furnes* had joint parental responsibility for the child.⁵⁴ On appeal, the Fifth Circuit affirmed the district court's decision and explicitly adopted the reasoning in *Croll*.⁵⁵

Renewing the argument that the Convention confers rights of custody upon a parent when a *ne exeat* order is in place, Mr. Abbott petitioned the Supreme Court for review.⁵⁶ His petition echoes Sotomayor's argument that the majority in *Croll* misinterpreted the foreign cases.⁵⁷ It also points out that, subsequent to *Croll*, at least two foreign courts have rejected the Second Circuit's interpretation of the treaty.⁵⁸

The contention that the Supreme Court should review the decision in order to ensure both national and international uniformity in treaty-interpretation is one of the petitioner's more provocative arguments. He argues that the split in both the national and the international jurisprudence allows a custodial parent who wrongfully removes a child from another country to circumvent the Convention through forum-shopping.⁵⁹

47. *Id.* at 152.

48. Petition for Writ of Certiorari at 7, *Abbott v. Abbott*, 542 F.3d 1081, *cert. granted*, 77 U.S.L.W. 3308, 3702, 3708 (U.S. Jun. 29, 2009) (No. 08-645).

49. *Abbott*, 542 F.3d 1081.

50. *Id.* at 1082.

51. *Id.*

52. *Id.*

53. *Id.* at 1082–83.

54. *Id.* at 1085–86. *See also supra*, note 28 (discussing the American jurisprudence).

55. *Abbott*, 542 F.3d at 1087–88.

56. Petition for Writ of Certiorari at 2–6, *Abbott*, 542 F.3d 1081 (No. 08-645) (petitioning the U.S. Supreme Court for review).

57. *Id.* at 21–24 (summarizing and elaborating upon Sotomayor's discussion of the foreign cases which are considered to support the notion that a *ne exeat* clause does not confer rights of custody upon a parent).

58. *See id.* at 21 (explaining that opinions in at least two cases explicitly rejected the *Croll* majority's reasoning and supported Sotomayor's dissent) (citing *Sonderup v. Tondelli*, 2000 (1) SA 1171 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/2000/26.pdf>; *Re P (A Child) (Abduction: Acquiescence)* [2004] EWCA (Civ) 971, paras. 57–60 (Eng.), available at <http://www.incadat.com/index.cfm?fuseaction=convtext.showFull&code=591&lng=1> (INCADAT summary)).

59. *See id.* at 14–16 (outlining the petitioner's arguments regarding the necessity of national uniformity in treaty-interpretation). In order to avoid a *ne exeat* order, one need only remain in a circuit which has held that a *ne exeat* order does not confer a "right of custody" under the Convention. *Id.* at 15. Furthermore, the petitioner argues that review is necessary because: (1) the court ignored the fact that the

In *Croll*, Sotomayor briefly cited a Second Circuit decision for the proposition that uniformity among signatories in treaty-interpretation is desirable.⁶⁰ Otherwise, her dissent does not provide much guidance on how to handle a situation in which a majority of foreign courts have interpreted an international agreement in one manner and a minority in another. For example, she did not specify how much consensus is required before a majority view becomes persuasive. *Abbott* may be the vehicle through which we learn her views on the matter.

Abbott, which is currently awaiting oral argument, may cause the Supreme Court to further address the issue of how courts should treat foreign jurisprudence when interpreting treaties. Sotomayor will not only have the opportunity to stand by her view that the majority's decision in *Croll* was wrong on the merits,⁶¹ but she may also have the opportunity to elaborate on the proper role of foreign jurisprudence. Given that *Croll* is not the only example of Sotomayor's willingness to consider the decisions of foreign courts, it is likely that any view she would express on the matter would evidence an open-mindedness toward the reasoning employed by the courts of other nations.

IV. JUSTICE SOTOMAYOR'S VARIED OPINIONS ON INTERNATIONAL LAW

Sotomayor's dissent in *Croll* displayed her willingness to consider international jurisprudence in the interpretation of international obligations. Similarly, her dissent from the Second Circuit's denial of a rehearing en banc in *Koehler v. Bank of Bermuda* displayed a willingness to look to foreign jurisprudence, but here it was applied to the interpretation of domestic law that applies to foreign-nationals.⁶² However, Justice Sotomayor is not consistently open to the use of international law. When confronted with questions concerning customary international law, she has shown a tendency to subordinate it to domestic law.

In *Koehler*, she argued that the court should reconsider its understanding of relationships between the United Kingdom and its territories in considering alienage jurisdiction under 28 U.S.C. §1332(a), which grants federal courts diversity jurisdiction in cases between "citizens of a State and citizens or subjects of a foreign state."⁶³ Relying on a previous case, *Matimak Trading Co. v. Khalily*,⁶⁴ the Second Circuit had held that alienage jurisdiction was lacking in a case involving a U.S.

majority of international cases have interpreted Article 5 of the Convention to include *ne exeat* provisions as sources of rights of custody; and (2) the legislative history makes clear that both Congress and the Executive understood that national uniformity is a necessary condition for uniform international interpretation. *Id.* at 17–24.

60. *Croll v. Croll*, 229 F.3d 133, 150 (2d Cir. 2000), *cert. denied*, 534 U.S. 949 (2001) (citing *Denby v. Seaboard World Airlines, Inc.*, 737 F.2d 172, 176 n.5 (2d Cir. 1984)).

61. *See id.* at 145–50 (explaining why a *ne exeat* clause should be considered to grant rights of custody under the Convention).

62. *See Koehler v. Bank of Bermuda (Koehler II)*, 229 F.3d 187 (2d Cir. 2000); *see also* Senator Linni Gmbh & Co. Kg. v. Sunway Line, Inc., 291 F.3d 145, 158–65 (2d Cir. 2002) (looking at the international forces leading to the enactment of the Carriage of Goods at Sea Act of 1936 to help her make sense of that statute, which potentially shows a willingness on her part to consider the international environment when applying statutes).

63. *Koehler II*, 229 F.3d at 187.

64. 118 F.3d 76 (2d Cir. 1997).

plaintiff and defendants that were residents of Bermuda on the ground that Bermuda defendants were not “citizens or subjects of a foreign state.”⁶⁵ Judge Sotomayor dissented from the court’s denial of a rehearing en banc, arguing that a rehearing “would provide a much-needed opportunity for the full Court to reexamine the flawed and internationally troublesome position that corporations and individuals from territories of the United Kingdom do not fall within the alienage jurisdiction of the federal courts.”⁶⁶ In arguing for the rehearing, Judge Sotomayor cited factors that may evidence her willingness to employ international jurisprudence of the alienage issue: (1) the strong negative reaction to the cases by the United Kingdom, specifically citing that government’s request to reconsider *Matimak*; (2) the misapplication of the terms “citizens or subjects of a foreign state” in *Matimak*, which rendered those terms “inconsistent with both the historical understanding of these terms; and (3) the need for a contemporary understanding of the relationship between the United Kingdom and its Overseas Territories.”⁶⁷

However, when she has been confronted with questions of customary international law, Justice Sotomayor has tended to subordinate it to domestic law.⁶⁸ For example, in *Center for Reproductive Law and Policy v. Bush*, she rejected a lawsuit challenging the ban on funding for overseas abortions under constitutional and customary international law.⁶⁹ In doing so, she disposed of the customary international law claim in a single footnote stating that since the “plaintiffs’ claims based on customary international law [were] substantively indistinguishable from their First Amendment claims, they are dismissed on the same ground. We express no view as to whether those claims are otherwise viable.”⁷⁰

As Sotomayor does not consistently defer to international law, it is difficult to predict if and how she will employ international law in any single case that comes before her. However, her track record suggests that she is not dogmatic and analyzes the appropriateness of international law in each case. Arguably, her views on the use of foreign jurisprudence in the interpretation and application of domestic law are more accessible than her views on other international law issues.

V. THE ROLE OF FOREIGN LAW IN THE DETERMINATION OF DOMESTIC LAW ISSUES

In her speeches, writings, and confirmation-hearing responses, Justice Sotomayor has demonstrated that, at least within certain constraints, she accepts the consideration of foreign law and jurisprudence in the interpretation of domestic law as a valid one. Furthermore, these records suggest that she approves of the Supreme

65. *Koehler v. Bank of Bermuda (Koehler I)*, 209 F.3d 130, 139 (2d Cir. 2000). The Supreme Court later rejected the majority’s approach in its reversal of another Second Circuit ruling. *JP Morgan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 536 U.S. 88 (2002).

66. *Koehler II*, 229 F.2d at 187.

67. *Id.* at 188, 190–93.

68. See *Beharry v. Ashcroft*, 339 F.3d 51, 55 (2d Cir. 2003) (rejecting the lower court’s assertion that customary international law was accorded the same status as federal legislation under the Supremacy Clause).

69. See generally 304 F.3d 183, 195 (2d Cir. 2002) (disposing of the case on the merits because the challenged governmental provision was entertained and a controlling decision issued in *Planned Parenthood Fed’n of Am., Inc. v. Agency for Int’l Dev.*, 915 F.2d 59 (2d Cir. 1990).

70. *Ctr. for Reprod. Law & Policy*, 304 F.3d at 195 n.6.

Court's use of foreign law in both *Roper v. Simmons* and *Lawrence v. Texas*—two cases that critics argue subordinated domestic law to foreign domestic law.

A. *Roper v. Simmons* and the Debate over the Use of Foreign Law

The Court's use of foreign jurisprudence in *Roper v. Simmons* sparked a debate over the proper role of foreign law in the interpretation and application of domestic law. In *Roper*, the Court held that it is cruel and unusual punishment to execute an individual for crimes committed while a juvenile⁷¹ after concluding that there was a consensus against the practice.⁷²

Using foreign law to define constitutional terms⁷³ and surveying foreign jurisprudence to delineate acceptable practices are particularly contentious uses of foreign law.⁷⁴ Justice Scalia's dissent in *Roper* represents one side of the debate. He noted that the Eighth Amendment jurisprudence asks whether there is a "national consensus" opposing a disputed practice and only allows the Court to ban the practice if one exists.⁷⁵ Arguing that the practice of executing individuals who had committed crimes as juveniles was not obsolete, Justice Scalia concluded in his dissent that there was not a *national* consensus against the practice.⁷⁶ To bolster its argument, the majority looked outside the borders of the United States to determine whether an *international* consensus on the matter existed.⁷⁷ Finding that very few foreign states allowed the practice, the Court condemned it.⁷⁸

The use of foreign law is more contentious when the Court is perceived as using it as grounds for deciding a domestic legal issue (as was the case in both *Roper* and *Lawrence*) than it is when the Court is perceived as using it in a demonstrative manner.⁷⁹ Examples of the latter include using it to define American law by showing

71. *Roper v. Simmons*, 543 U.S. 551 (2005).

72. *Id.* at 575.

73. See J. Antonin Scalia & J. Stephen Breyer, *A Conversation Between U.S. Supreme Court Justices: The Relevance of Foreign Legal Materials in U.S. Constitutional Cases*, 3 INT'L J. CONST. L. 519, 521 (2005) (Scalia arguing it would be inappropriate to use foreign law to determine constitutional terms because the United States does not "have the same legal and moral framework as the rest of the world").

74. Compare Steven G. Calabresi & Stephanie Dotson Zimdahl, *The Supreme Court and Foreign Sources of Law: Two Hundred Years of Practice and the Juvenile Death Penalty Decision*, 47 WM. & MARY L. REV. 743, 755 (2005) (examining the use of foreign law in U.S. case decisions), with Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271, 281–82 (2003) (praising the Court's transnational turn), and Harold Hongju Koh, *International Law as Part of Our Law*, 98 AM. J. INT'L L. 43, 56 (2004) (arguing enthusiastically that "*Lawrence* and *Atkins* may signal that the nationalists' heyday has finally passed").

75. *Roper*, 543 U.S. at 608 (Scalia, J., dissenting). The Court has developed objective criteria by which it can determine whether a consensus exists, which includes surveying "statutes passed by society's elected representatives." *Stanford v. Kentucky*, 492 U.S. 361, 370 (1989). If very few state legislatures allow a practice, then the Court "will condemn the practice as an outlier." Ernest A. Young, *The Supreme Court, 2004 Term—Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148, 148 (2005).

76. *Roper*, 543 U.S. at 609 (Scalia, J., dissenting) ("Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus.").

77. *Id.* at 575.

78. *Id.*

79. JEFF SESSIONS, LEGISLATIVE BRANCH APPROPRIATIONS ACT 2010: TEXT FROM THE CONGRESSIONAL RECORD (2009), available at <http://www.c-spanarchives.org/congress/?q=node/77531&id=9004211>.

what it is *not*,⁸⁰ and citing foreign experience to illustrate possible consequences of a proposed holding.⁸¹

B. *Sotomayor's Speeches and Writings*

While on the Second Circuit, Sotomayor had few opportunities “to look to international sources.”⁸² Thus, one may need to examine her speeches and writings in order to determine her views regarding the proper uses of foreign law in the consideration of domestic legal issues.

In her foreword to *The International Judge*,⁸³ Sotomayor claimed that “the question of how much we have to learn from foreign law and the international community when interpreting our Constitution is . . . worth posing.”⁸⁴ During her confirmation hearings, Sotomayor argued that she was referring to the purely academic question posed by the book, pointing out that she is not “a comparative law scholar . . . [who] spend[s] [her] time studying these questions.”⁸⁵ As she does not appear to have published anything else on the topic, many have turned to her speeches in order to assess her views.

Sotomayor’s speech to the ACLU of Puerto Rico⁸⁶ indicates that she views foreign law as a rich source of legal ideas.⁸⁷ She explained that judges “don’t *use* foreign or international law; [they] *consider* the ideas that are suggested by an international court of law.”⁸⁸ This statement indicates that while she would not defer to the judgments of foreign courts, she would willingly consider the strength of their arguments when facing questions of domestic law.⁸⁹ “Ideas are ideas,” she said, “and whatever their source, whether they come from foreign law, or international law, or a trial judge in Alabama . . . if it persuades you . . . then you’re going to adopt its reasoning. If it doesn’t fit, then you won’t use it.”⁹⁰

80. See Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283, 1288 (2004) (“A court uses comparative or international law in this [expository] sense when it uses the foreign law rule to contrast and thereby explain a domestic constitutional rule.”).

81. *Id.* at 1289 (“[T]he Court looks abroad to see what the effect of the proposed rule might be in the context of a particular legal system.”).

82. Collin Levy, *Sotomayor and International Law*, WALL ST. J., July 14, 2009, available at <http://online.wsj.com/article/SB124753085258335815.html>.

83. SONIA SOTOMAYOR, *Foreword* to DANIEL TERRIS, CESARE P. R. ROMANO, AND LEIGH SWIGART, *THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD’S CASES* (2007).

84. *Id.*

85. SONIA SOTOMAYOR, *RESPONSES OF JUDGE SONIA SOTOMAYOR TO THE WRITTEN QUESTIONS OF SENATOR JEFF SESSIONS* (21) (July 20, 2009), available at <http://judiciary.senate.gov/nominations/SupremeCourt/Sotomayor/upload/QFRsSessions.pdf> [hereinafter *RESPONSES TO SESSIONS*].

86. Sonia Sotomayor, *Speech to the ACLU of Puerto Rico* (April 2009), available at http://www.heritage.org/research/legalissues/wm2525.cfm#_ftn12 [hereinafter *ACLU SPEECH*].

87. *Id.*

88. *Id.*

89. *Id.* (“American analytical principles do not permit us to use that law to decide our cases. But nothing in the American legal system stops us from considering the ideas that that law can give us.”).

90. *Id.*

Her speech did not express disapproval of the use of foreign law in *Roper* and *Lawrence*. Rather, she said that using foreign law could help judges discover “whether [their] understanding of our own constitutional rights [falls] into the mainstream of human thinking.”⁹¹ This serves to make sure the decision “will be more informed” as judges “look at the ideas of everyone, consider them, and . . . test the force of their persuasiveness.”⁹²

In Sotomayor’s view, objections to the Supreme Court’s citations to foreign law in cases like *Lawrence* and *Roper* reflect a “misunderstanding of the American use of . . . foreign law.”⁹³ While acknowledging that Justices Scalia and Thomas are right to worry that “a judge can look to the law of any country to support his or her own conclusion, because they’ll find someone who will agree with them,” she ultimately agrees with Justice Ginsburg’s view that foreign opinions “add to the story of knowledge relevant to the solution of a question.”⁹⁴

In short, both Sotomayor’s foreword and her speech express her opinion that foreign law is a good source of ideas but it is not binding law which judges should blindly follow.⁹⁵ Her responses to questions posed at her confirmation hearings appear to be consistent with this view.⁹⁶

C. *The Hearings*

As expected, many of the questions posed to Sotomayor concerning the proper use of foreign law were phrased generally.⁹⁷ Furthermore, her responses on the appropriate use of foreign law referenced treaty and contract-interpretation but disavowed the use of foreign law in constitutional interpretation.⁹⁸

While acknowledging that foreign decisions are not “binding precedent,” she appears to support their use as a persuasive source.⁹⁹ In a post-hearing questionnaire, she stated that she accepted the Supreme Court’s Eighth Amendment

91. *Id.*

92. *Id.*; see Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1944 (2008) (stating that this reason-borrowing argument should be distinguished from the opinions in *Roper*, *Lawrence*, and similar cases, which do not analyze the reasons why other countries allow a disputed practice, only whether or not they do allow it).

93. ACLU speech, *supra* note 86.

94. *Id.*

95. RESPONSES TO SESSIONS, *supra* note 85.

96. SONIA SOTOMAYOR, SOTOMAYOR HEARINGS: THE COMPLETE TRANSCRIPT (July 14, 2009), available at <http://latimesblogs.latimes.com/washington/2009/07/sotomayor-hearings-complete-transcript-4.html> (saying that “American law does not permit the use of foreign law or international law to interpret the Constitution” but that “there are some situations in which courts are commanded by American law to look at what others are doing [such as treaties and contracts]”).

97. See, e.g., *id.* (quoting Senator Schumer as asking “what do you believe is the appropriate role of any foreign law in the U.S. courts?”).

98. *Id.* (stating that “American law does not permit the use of foreign law or international law to interpret the Constitution” but that “there are some situations in which courts are commanded by American law to look at what others are doing,” including treaties and contracts).

99. RESPONSES TO SESSIONS, *supra* note 85, at 1–2.

jurisprudence.¹⁰⁰ She also stated that *Roper* and *Lawrence* did not treat the decisions of foreign courts as “controlling authority.”¹⁰¹

Although she answered questions concerning the Court’s past use of foreign law, she avoided answering the question of how *she* would use it. For example, she avoided the question of whether it would be appropriate to consider the practices of other countries when interpreting the Second Amendment by responding that she could not address that issue as relevant cases “are currently pending before the Court.”¹⁰²

Although Sotomayor has not had many opportunities to rely upon foreign or international law in interpreting domestic law, the cases and other materials discussed above demonstrate that she tends to rely on precedent. In a broad sense, there is precedent, though troubled and divisive precedent, of the Supreme Court using the jurisprudence of foreign courts to aid in its task of constitutional interpretation.¹⁰³ Sotomayor’s article in *The International Judge* indicates that she has at the least considered what effect such jurisprudence should have. Perhaps consistent with her demonstrated adherence to the principle of stare decisis, her speech to the ACLU of Puerto Rico suggests that she would not fail to consider a possible legal argument for the simple reason that its basis lies in lessons learned from cases outside of the United States.

However, the following questions remain open: 1) how much weight she will grant foreign legal arguments; and 2) whether she will extend the practice of looking to foreign jurisprudence to aid her in her interpretation of constitutional issues beyond the contexts of the Eighth and Fourteenth Amendments.

She indicated in her hearings that neither she nor the majority opinions in *Roper* and *Lawrence* considered decisions of foreign courts to be “controlling authority.”¹⁰⁴ She also did not join Justices Scalia and Thomas in renouncing the consideration of foreign court decisions.¹⁰⁵ Indeed, her speeches and writings suggest that she will at least consider arguments rooted in foreign jurisprudence to guide her interpretation of domestic law. Furthermore, her acceptance of *Roper* and *Lawrence*, as well as her general adherence to precedent, suggest that her use of foreign jurisprudence will accord foreign legal ideas the same weight as they were accorded in those cases. She may argue that she is only looking to such decisions for ideas. However, those who see the use of foreign law in *Roper* and *Lawrence* as elevating the status of foreign court decisions to that of controlling authority will likely see this as the subrogation of domestic law to foreign law.

Sotomayor’s view of *Roper* and *Lawrence* as having used foreign law as a source of ideas and her general adherence to precedent may suggest that she will extend this use of foreign jurisprudence beyond the interpretation of Eighth and Fourteenth Amendment issues. Both cases may be seen as standing for the general principle that when there is not a national consensus on a morally charged legal

100. *Id.* at 13.

101. *Id.* at 16.

102. *Id.* at 2.

103. *Roper v. Simmons*, 543 U.S. 551, 561 (2005).

104. *RESPONSES TO SESSIONS*, *supra* note 85, at 16.

105. *Id.* at 17 (“[Their] criticism does not support the conclusion that American judges should ignore entirely the decisions of foreign courts. In some limited circumstances, decisions of foreign courts can be a source of ideas, just as law review articles or treatises can be sources of ideas.”).

issue, one may look to the views of foreign courts in search of an international consensus. If these cases are seen in this light, it becomes increasingly likely that Sotomayor will extend this use of foreign law to other legal issues when there is a risk that the law in question contradicts the international consensus on the matter and no national consensus exists.

VI. CONCLUSION

The picture that emerges of Sotomayor is that of a judge who varies in her use of international law depending on the circumstances of the case and the legal issues at hand. If her past treatment of international law is indicative of how she will treat international legal issues in the future, one may expect that she will: (1) hold Congressional enactments of treaty provisions to the same rigors of judicial scrutiny as she would with any other law; (2) show deference to decisions of other branches when enforcing laws which are motivated in part by concerns over the separation of powers and sovereignty; (3) show deference to the decisions of the executive by requiring clear evidence that the executive has chosen not to participate in the enforcement of foreign-tax judgments by other countries in American courts before enforcing such judgments; (4) grant considerable weight to the interpretations of foreign courts when interpreting treaties; (5) consider international factors considered by the legislature in enacting a statute when she is faced with applying it; and (6) subordinate foreign customary law to domestic law.

However, many questions follow from her jurisprudence that cannot be answered easily. For example, will she recognize claims arising out of customary international law that are not substantively indistinguishable from claims existing in domestic law? Generally, her holdings have been so narrow in addressing only the case in front of her that it is difficult to predict how she will treat new international legal issues that come before her.

The one feature shared by her disposition of international legal issues is that they had a strong basis in precedent. Does this mean we can expect her to be consistent with her past work when disposing of these same issues anew on the Supreme Court? If she truly is devoted to the principle of *stare decisis*, and if the fact-patterns are substantially similar to those in the cases she has already disposed of, one may reasonably expect that her application and interpretation of the law would not differ to the extent that there is already Supreme Court precedent for the same outcome and reasoning. However, one must bear in mind that she is no longer a circuit court judge; she is now a Supreme Court Justice. So, if she believes a case is wrongly decided, she can overturn it without facing the consequence of being overturned by a higher court. Whether she will seize this newly-found freedom,¹⁰⁶ or whether she will continue to show a strong adherence to the principle of *stare decisis* remains unclear.

As this paper has already pointed out, Sotomayor has not had much of an opportunity to consider foreign domestic law in interpreting the U.S. Constitution. However, she has expressed a willingness to look to it as a source of ideas in both

106. RICHARD A. POSNER, *HOW JUDGES THINK* 9–11 (2008) (arguing that this freedom is bounded by political factors, personal factors, background experience, strategic concerns, institutional factors, and preconceptions, in addition to several other considerations).

her speeches and her writings. Furthermore, she claims that the use of international law in *Roper* and *Lawrence* falls into her category of accepted use. Given her past adherence to the principle of *stare decisis*, it is unlikely that she would routinely use this method of interpreting domestic law. However, the views expressed in her speeches suggest that, if she believes it to be beneficial in a given circumstance, she may, on occasion, look to foreign law. She may even extend its use beyond the contexts of the Eighth and Fourteenth Amendments—the two contexts in which this method has already been employed.

Abbott will be one of our first indications of whether Sotomayor will continue to treat international legal issues in same manner as she did while on the Second Circuit. Both the facts and the legal issues presented in *Abbott* are nearly identical to those of *Croll*. Thus, *Abbott* serves as a near perfect vehicle through which to see whether Sotomayor will stand by her previous treatment of questions of international law and whether she will continue to bring her open-minded view regarding the use of foreign jurisprudence. Will she continue to value the interpretation of international agreements by “our sister signatories”? Will she once again claim that there is a clear majority consensus among the decisions of foreign courts on the question of whether a *ne exeat* clause confers “rights to custody” upon a parent under the Hague Convention? Perhaps even more interesting is the question of whether she will define what constitutes a sufficient majority-consensus among signatory nations to compel American courts to follow a specific interpretation of a treaty provision. Fortunately, we will not have to wait long to catch a glimpse of how Sotomayor’s new position will affect her treatment of international law.¹⁰⁷

107. *Abbott v. Abbott*, 129 S.Ct. 2859 (June 29, 2009) (No. 08-645) (granting certiorari).