Don't Stop the Clock: Why Equitable Tolling Should Not Be Read into the Hague Convention on International Child Abduction

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DON’T STOP THE CLOCK: WHY EQUITABLE TOLLING SHOULD NOT BE READ INTO THE HAGUE CONVENTION ON INTERNATIONAL CHILD ABDUCTION

Abstract: Article 12 of the Hague Convention on the Civil Aspects of International Child Abduction allows an abducting parent to avoid the return of the child if the parent can show that more than a year has passed since the wrongful removal or retention of the child, and that the child is well settled in his or her new environment. In cases where concealment of the abducted child prevented a parent from filing a claim within one year of the abduction, the U.S. Courts of Appeals for the Ninth and Eleventh Circuits have applied equitable tolling to delay the start of the temporal limitation. More recently, however, the U.S. Courts of Appeals for the First and Second Circuits have rejected the application of equitable tolling. The U.S. Supreme Court will hear arguments on this issue in December 2013. This Note argues that the text, drafting history, and underlying purposes of the Convention fail to support the application of equitable tolling. It then explains that the Eleventh and Ninth Circuits applied equitable tolling to the Convention—despite a lack of support for doing so—because they adhered to the American legal tradition of placing the rights of parents ahead of the rights and interests of children. Ultimately, this Note recommends that the Supreme Court reject the application of equitable tolling and instead instruct lower courts to consider the child’s concealment as part of their analysis of whether the child is well settled in his or her new environment. This proposed approach is consistent with the text and underlying goals of the Convention, and—like the application of equitable tolling—will work to deter child abductions.

Introduction

Estelle Bocquet and Kamal Ouzid had a child together in Miami, Florida in 1996.1 The couple lived with their child, Noe, in Miami from 1996 to 1998.2 In 1999, Bocquet returned to France and enrolled Noe in a French preschool.3 The family lived together in France until Au-

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1 Bocquet v. Ouzid, 225 F. Supp. 2d 1337, 1340 (S.D. Fla. 2002). Bocquet is a French citizen and Ouzid is an Algerian citizen. Id.
2 Id. at 1341.
3 Id. Noe was going to start school in September, but Ouzid took him on several trips, and as a result Noe did not start until December 1999. Id.
gust 2000. Then, one day, Bocquet returned home from work to find that Ouzid had taken Noe to Algeria. Bocquet quickly filed a complaint with the police, and attempted to exercise her custodial rights through a French-Algerian Treaty. Bocquet also tried to visit her son in Algeria, but Ouzid and his family refused to help her obtain the necessary visa. Bocquet finally obtained a visa to visit Algeria, but Ouzid left for America with Noe on the same day that Bocquet arrived in Algeria. After more than a year without seeing her child, Bocquet travelled to Miami in October 2001 and Ouzid finally allowed her to have a supervised visit with Noe. In March 2002, Bocquet obtained a French divorce decree that awarded her sole custody of Noe. With this decree in hand, Bocquet filed a petition in an American court under the Hague Convention on the Civil Aspects of International Child Abduction (Convention), which allows a court to order the prompt return of a child who has been removed in violation of a foreign custody order. Accordingly, Bocquet was finally allowed to advocate for the return of her child, but more than a year after his removal.

Bocquet’s agonizing experience is one of many cases that illustrate the human aspect that prompted both the adoption of the Convention and the decision of the United States to ratify it. Despite the Conven-

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4 Id.
5 Id. at 1341–42.
7 Bocquet, 225 F. Supp. 2d at 1342 (explaining that in order for a non-Algerian to obtain an Algerian visa, an Algerian landowner must extend an invitation).
8 Id.
9 Id. Bocquet was allowed to visit with Noe over a period of ten days. Id. These visits were permitted only in public places and in the presence of Ouzid. Id. During the month leading up to the visits, Ouzid and the former couple’s mutual friends continued to refuse to give her Noe and Ouzid’s address. Id.
10 Id. at 1343.
12 See Bocquet, 225 F. Supp. 2d at 1343.
tion’s goal of deterring the wrongful removal of children, under normal circumstances Bocquet would have no recourse available because of an exception found in Article 12 of the Convention that was available to Ouzid: the well-settled defense.\textsuperscript{14} Under the well-settled defense, a court may refuse to return a child if the respondent shows by a preponderance of the evidence that: (1) the petition was filed more than a year after the alleged wrongful removal; and (2) the child is settled in his or her new environment.\textsuperscript{15} This defense recognizes that the swift return of a child following a prolonged absence, without a judicial review of the merits of the custody claims, may not always be in the child’s best interests.\textsuperscript{16}

Despite the fact that Noe was retained in violation of Bocquet’s custodial rights for more than a year before Bocquet filed her petition under the Convention, in 2002 in \textit{Bocquet v. Ouzid}, the U.S. District Court for the Southern District of Florida held that the well-settled defense should not apply to Noe’s abduction because of the doctrine of equitable tolling.\textsuperscript{17} Guided by this doctrine, the court concluded that the one-year period under the well-settled defense should not start until the date when Bocquet learned of Noe’s address in the United States.\textsuperscript{18} As such, the court determined that Bocquet’s petition had been filed within the one-year period, and therefore Ouzid was barred from raising the well-settled defense.\textsuperscript{19}

Equitable tolling can render inapplicable the well-settled defense simply by manipulating the timing of the case, rather than determining whether or not the child is well settled.\textsuperscript{20} Because the application of equitable tolling manipulates the start of the one-year clock, it eviscer-

\begin{itemize}
  \item \textsuperscript{14} \textit{Bocquet}, 225 F. Supp. 2d at 1348. This Note refers to this defense as the “well-settled defense” or the “Article 12 defense,” though it is also known as the “settled defense” or “now-settled defense.”
  \item \textsuperscript{15} 42 U.S.C. § 11603(e); Convention, \textit{supra} note 11, art. 12.
  \item \textsuperscript{16} Pérez-Vera, \textit{supra} note 13, at 458.
  \item \textsuperscript{17} \textit{Bocquet}, 225 F. Supp. 2d at 1348 (citing Lops v. Lops, 140 F.3d 927, 946 (11th Cir. 1998) (noting that the district court had applied equitable tolling because it could not imagine a federal statute that did not apply such a doctrine in situations where the wrongdoer’s actions caused the delay in the commencement of proceedings); see \textit{infra} notes 79–81 and accompanying text (describing the doctrine of equitable tolling).
  \item \textsuperscript{18} \textit{Bocquet}, 225 F. Supp. 2d at 1348.
  \item \textsuperscript{19} \textit{Id}.
  \item \textsuperscript{20} See, e.g., \textit{id}. Of course, in some situations, even if a court equitably tolls the one-year period until the petitioner discovers the child, the petitioner’s filing could still be untimely. See \textit{Anderson v. Acree}, 250 F. Supp. 2d 872, 875 (S.D. Ohio 2002) (holding that equitable tolling was inapplicable, but noting that even if the doctrine were applicable, the petition would still be untimely because it was filed more than a year after the discovery of the child’s whereabouts).
\end{itemize}
ates the purpose of the well-settled defense: to leave in place children who have been living in their new environment for over one year.\textsuperscript{21} The Bocquet court reasoned—as have other American courts—that without equitable tolling, the well-settled defense would serve to encourage the concealment of abducted children.\textsuperscript{22} The Bocquet court also joined some of its sister courts in analogizing the one-year period to a statute of limitations, and noted that equitable tolling is traditionally read into federal statutes containing such limitations.\textsuperscript{23} Accordingly, these courts placed the deterrence of wrongful removal, and therefore the custodial rights of the left-behind parent, above the interests of the abducted child in maintaining the stability of his or her new environment.\textsuperscript{24}

Although courts are well-intentioned in adopting this approach to the well-settled defense, other courts are critical of the application of equitable tolling in such cases.\textsuperscript{25} These latter courts have reasoned that the drafters of the Convention unambiguously included the one-year time period in recognition that it might be in the best interest of the child to remain with the abducting parent when he or she has lived in

\textsuperscript{21} See infra notes 121–140 and accompanying text.
\textsuperscript{23} Bocquet, 225 F. Supp. 2d at 1348; see Font Paulus, 2012 WL 2524772, at *7; Gatica, 2010 WL 6744790, at *7; In re Ahumada Cabrera, 323 F. Supp. 2d at 1313; Mendez Lynch, 220 F. Supp. 2d at 1362–63. Alternatively, some courts have applied equitable tolling while explicitly rejecting the argument that the one-year period is similar to a statute of limitations. See, e.g., Gonzalez, 2004 WL 1202729, at *11; Belay, 272 F. Supp. 2d at 563.
\textsuperscript{24} See infra notes 141–172 and accompanying text (discussing how American courts apply equitable tolling to protect parental custody rights at the expense of children’s rights and interests).
\textsuperscript{25} See, e.g., Yaman v. Yaman, 730 F.3d 1, 12–15 (1st Cir. 2013) (noting the lack of support for equitable tolling in the Convention’s text, drafting history, and decisions of sister signatories); Lozano v. Alvarez, 697 F.3d 41, 51–54 (2d. Cir. 2012) (noting the lack of support in both the text of the Convention and the drafting history of the well-settled defense), cert. granted, 81 U.S.L.W. 5696 (June 24, 2013) (No. 12-820); Nunez v. Ramirez, No. CV 07-01205-PHX-EHC, 2008 WL 898658, at *6 (D. Ariz. Mar. 28, 2008); Matovski v. Matovski, No. 06 Civ. 4259(PKC), 2007 WL 2600862, at *12 (S.D.N.Y. Aug. 31, 2007); Anderson, 250 F. Supp. 2d at 875. During the drafting period of the Convention, the United States was unsuccessful in seeking the inclusion of multiple time limits. See Merle H. Weiner, Uprooting Children in the Name of Equity, 33 Fordham Int’l L.J. 409, 437 (2010). The United States also pushed for an eighteen-month time limit, but this proposal was also rejected. See id.
this new environment for such a long time.\textsuperscript{26} To justify this conclusion, courts have noted the lack of support for equitable tolling in the Convention’s text and its drafting history.\textsuperscript{27} Moreover, these courts have explained that the analogy to a statute of limitations is inapt because unlike in the case of a statute of limitations—in which a person’s right to redress is terminated at the statute’s expiration date—the Convention continues to require the return of the child after the one-year period expires.\textsuperscript{28} The goals of the Convention, and the interests of children like Noe, would be better served by a more thorough application of the second prong of the well-settled defense: the inquiry into whether the child is settled in his or her new environment.\textsuperscript{29} The second prong of the defense allows for a more probing analysis of what is in the best interests of the child in a manner that is both faithful to the Convention’s texts and goals, and, like the application of equitable tolling, should deter the concealment of children.\textsuperscript{30}

Despite the good intentions of the courts that apply equitable tolling to the well-settled defense, courts should ultimately not read equitable tolling into the Convention.\textsuperscript{31} The text and the drafting history directly contradict the application of this doctrine to the well-settled defense.\textsuperscript{32} In applying this doctrine, courts have prioritized the interests of the left-behind parent over the interests of the child.\textsuperscript{33} The proper balance of both the parent’s and the child’s interests, however, is already provided for in the second prong of the Convention’s well-

\textsuperscript{26} Nunez, 2008 WL 898658, at *6; Matovski, 2007 WL 2600862, at *12; Anderson, 250 F. Supp. 2d at 875; Toren v. Toren, 26 F. Supp. 2d 240, 244 (D. Mass. 1998), vacated, 191 F.3d 23 (1st Cir. 1999).

\textsuperscript{27} See Nunez, 2008 WL 898658, at *6 (noting the drafters’ clear intent to include the one-year period); Matovski, 2007 WL 2600862, at *12 (describing the drafters’ consideration of alternatives to the one-year period, but recognizing their ultimate decision to include the temporal limitation); Anderson, 250 F. Supp. 2d at 875 (noting both the absence of language in the Convention supporting the application of equitable tolling and the clear intent of the drafters to include a single time limit).

\textsuperscript{28} See Yaman, 730 F.3d at 12–16; Lozano,697 F.3d at 52; Nunez, 2008 WL 898658, at *6; Matovski, 2007 WL 2600862, at *12; Anderson, 250 F. Supp. 2d at 875; Toren, 26 F. Supp. 2d at 244. Additionally, in 2013 in Yaman v. Yaman, the U.S. District Court for the District of New Hampshire declined to adopt the analogy to a statute of limitations because the presumption for equitable tolling applies to statutes, not international treaties. 919 F. Supp. 2d 189, 196–97 (D.N.H. 2013), aff’d, 730 F.3d 1(1st Cir. 2013).

\textsuperscript{29} See infra notes 210–221 and accompanying text.

\textsuperscript{30} See Convention, supra note 11, art. 12; infra notes 202–262 and accompanying text.

\textsuperscript{31} See infra notes 210–262 and accompanying text.

\textsuperscript{32} See infra notes 106–120 and accompanying text.

\textsuperscript{33} See infra notes 152–201 and accompanying text.
settled defense: the settled inquiry. By allowing courts to decide cases on their merits in the context of the settled inquiry, this process will deter child abductions and serve the best interests of abducted children.

Part I of this Note begins by exploring the text, drafting history, and purposes of the well-settled defense. Part I then gives an overview of the doctrine of equitable tolling, and how American courts have applied it to the well-settled defense. Part II highlights the problems in applying equitable tolling to this defense. Part III argues that the current American approach in applying equitable tolling favors parental rights over the child’s rights and best interests. It also contends that courts applying equitable tolling are being guided in part by the American legal tradition of placing the rights of parents over the rights of children. Part IV recommends that the U.S. Supreme Court reject equitable tolling and instead require courts to take into account the concealment of the child as part of its inquiry into whether the child is well settled.

I. THE CURRENT STATE OF AMERICAN JURISPRUDENCE ON THE CONVENTION

Bocquet’s ordeal is one of a growing number of stories of international child abduction. There are many reasons why parents may be motivated to abduct their child in contravention of a former partner’s custody rights: as a way to protect what they view as the child’s best interests; as revenge on their ex-spouse or partner; as a way to continue contact with an ex-spouse or partner; or as a way to avoid domestic violence. Regardless of the motivation, the number of international child abductions is increasing. In 2011, 941 children were reported to

34 See infra notes 210–262 and accompanying text.
35 See infra notes 210–262 and accompanying text.
36 See infra notes 42–77 and accompanying text.
37 See infra notes 78–99 and accompanying text.
38 See infra notes 100–140 and accompanying text.
39 See infra notes 141–201 and accompanying text.
40 See infra notes 173–201 and accompanying text.
41 See infra notes 202–262 and accompanying text.
43 Id.
44 Id. The increase in abductions may be a result of easier travel options, increased social acceptance of transnational families, and increased divorce rates. Brian S. Kenworthy,
the Office of Children’s Issues in the U.S. Department of State as being abducted from the United States to another country.\(^{45}\) Moreover, the same office received 256 requests for the return of children who had been abducted from another country into the United States.\(^{46}\)

Prior to the Convention’s enactment, there was no uniform system for recognizing custody determinations made by foreign courts, and countries were hesitant or unwilling to enforce foreign custody orders.\(^{47}\) A parent seeking to avoid the enforcement of a custody order was thus encouraged to abduct his or her child as a means of forum shopping for a more sympathetic court.\(^{48}\)


The Convention’s stated objectives respond to this problematic behavior by striving to ensure the prompt return of children who were wrongfully abducted to another contracting state and to ensure that member states respect the custody and access rights under the law of other states.49 The Convention thus seeks not only to protect the custody interests of parents, but also the interests of contracting States in having their custody orders respected by other States.50 The Convention also seeks to protect children from the harm caused by abduction, which exemplifies the Convention’s understanding that the best interests of children are served by deterring wrongful removal from their habitual environment.51

Congress implemented the Convention through the International Child Abduction Remedies Act (“ICARA”).52 ICARA establishes the procedure by which the left-behind parent can assert his or her rights under the Convention and seek return of the child.53 Under ICARA, an

abductor has physical custody of the child, he or she was able to take the child to another court and relitigate the custody issue).

49 Convention, supra note 11, art. 1.
50 See id.
51 Id. pmbl.; Pérez-Vera, supra note 13, at 431–32; Eran Sthoeger, International Child Abduction and Children’s Rights: Two Means to the Same End, 32 MICH. J. INT’L L. 511, 525 (2011). This view enjoys evidentiary support. See Marilyn Freeman, The Effects and Consequences of International Child Abduction, 32 FAM. L.Q. 603, 605, 608, 610–12 (1998) (citing several studies that describe the traumatic effect of abduction on children). Abduction can upset a child’s sense of security and stability. Pérez-Vera, supra note 13, at 432. Children who are abducted can experience a sense of loss triggered by the sudden deprivation of relationships and their home environment. Freeman, supra, at 605; Wills, supra note 42, at 429. Children may also experience a sense of guilt for not contacting the left-behind parent. Freeman, supra, at 608. In addition, children may experience isolation stemming from a difficulty with the social and linguistic skills required in a new and unfamiliar culture. Id. at 604. One study conducted interviews with five children between the ages of six and eleven who had been abducted when they were between six and forty-two months old. Id. at 607–08. The study found that the amount of trauma a child experiences depends on the age of the child when abducted, how the abductor treats the child, how long the abduction continues, the child’s lifestyle and experiences during the abduction, and the type of support and therapy received once returned. Id. at 608. Significantly, the study concluded that longer abductions resulted in a more traumatic end to the abduction. Id. at 609.

53 See id. To initiate the process of seeking the return of a child who has been wrongfully removed or retained, an application must be filed with a Central Authority. Convention, supra note 11, art. 8. The application must contain information concerning: the identity of the applicant; the child and the person who allegedly wrongfully removed the child; the date of birth of the child; the grounds on which the applicant’s claim for return of the child are based; and the whereabouts of the child. Id. The application may also include a copy of decisions or agreements relating to the child’s custody. Convention, supra note 11, art. 8. Similarly, an application may also contain a statement of the relevant law from the left-behind parent’s state. Id.
applicant must first file an application with the Department of State, and then initiate judicial proceedings. To initiate judicial proceedings, the petitioner must file a petition in the federal or state court that has jurisdiction over the child’s location.

The Convention permits a number of defenses that are meant to address situations in which the immediate return of the child would not be in the child’s best interests. Accordingly, if a court finds that the respondent has successfully pled any of the defenses, the court may exercise its discretion to refuse to return a child, but does not have a duty to refuse the return. The well-settled defense is one such defense that, as demonstrated in the Bocquet case, applies when the respondent shows that the petition was filed more than a year after the child’s wrongful removal or retention.

As evident in Bocquet, courts faced with the well-settled defense have grappled with the decision of whether equitable tolling should be applied. This Part explores the various approaches American courts have taken with regard to equitable tolling of the one-year filing rule.

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55 42 U.S.C. § 11603(b).
56 Convention, supra note 11, arts. 12, 13, 17, 20; see Pérez-Vera, supra note 13, at 432. There are six defenses to the immediate return of a child. See Convention, supra note 11, arts. 12, 13, 17, 20. One such defense is that return would expose the child to a grave risk of physical or psychological harm. 42 U.S.C. § 11603(e); see Convention, supra note 11, art. 13. Another defense is that return would violate the fundamental protections of human rights and freedoms of the United States. 42 U.S.C. § 11603(e); Convention, supra note 11, art. 20. The court may also refuse return if the child objects to returning and the court finds that the child is of an age and maturity at which it is appropriate to consider his or her views. 42 U.S.C. § 11603(e); Convention, supra note 11, art. 13. The respondent could also show that the petitioner was not exercising his or her custody or access rights at the time of removal, or that he or she subsequently acquiesced to the removal. 42 U.S.C. § 11603(e); Convention, supra note 11, art. 13. If the abducting parent has obtained a custody decision in the United States, a court hearing a Convention petition can consider the reasoning underlying the U.S. custody decision, but cannot refuse return of the child solely because of the decision. See Convention, supra note 11, art. 17.
57 Pérez-Vera, supra note 13, at 460; see Convention, supra note 11, art. 18. There is some debate over whether courts can return a child after an affirmative defense has been demonstrated. Compare Yaman, 730 F.3d at 16–21 (analyzing the Convention and holding that a court does have the authority to return a child after the well-settled defense is successfully established), with Weiner, supra note 25, at 479–82 (examining the scholarly debate and arguing that the Convention does not give the court discretion to refuse to return a child where one of the defenses has been proven).
58 Bocquet, 225 F. Supp. 2d at 1347; see Convention, supra note 11, art. 12.
59 See Bocquet, 225 F. Supp. 2d at 1348.
60 See infra notes 63–99 and accompanying text.
Section A introduces the text, drafting history, and purpose of the well-settled defense, as well as a preliminary examination of equitable tolling. Section B explains how American courts have approached the application of equitable tolling to the well-settled defense.

A. The Well-Settled Defense and Equitable Tolling

The drafters of the Convention included the well-settled defense to recognize that the swift return of a child following a prolonged abduction, without a judicial review of the merits of the custody claims, may not always be in the best interest of the child. The drafters also included the one-year limit to avoid the difficult task of articulating a test that would measure if the child has become integrated in the new environment. The one-year time period is measured from the date of the wrongful removal or retention of the child to the date the left-behind parent commences proceedings. Under ICARA, the proceedings commence when the petition is filed in the court of appropriate jurisdiction in the United States. The language of the Convention makes clear that a court’s obligation to return a child continues beyond the one-year time limit if it cannot be shown that the child is settled in his or her current familial and social environment. Although the Convention does not list the factors that courts should use when evaluating whether a child is well settled, the burden of proving that the child is well settled rests with the abductor. The Department of State has interpreted the Convention to require substantial evidence of significant connections that the child has made to his or her new location.

This defense generated considerable debate when the member states of the Hague Conference first considered it. The continuing

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61 See infra notes 63–83 and accompanying text.
62 See infra notes 84–99 and accompanying text.
63 Pérez-Vera, supra note 13, at 458; see 42 U.S.C. § 11603(e) (2006); Convention, supra note 11, art. 12; supra note 15 and accompanying text (describing the two prongs of the well-settled defense).
64 See Pérez-Vera, supra note 13, at 458; Weiner, supra note 25, at 436.
65 Convention, supra note 11, art. 12; see 42 U.S.C. § 11603(f)(3).
67 See Convention, supra note 11, art. 12; Pérez-Vera, supra note 13, at 459.
70 See Pérez-Vera, supra note 13, at 458–60.
obligation of return after the one-year period was added in response to the concerns of some states that the one-year limit would form an inflexible boundary of the Convention’s applicability.\(^7\) The drafters ultimately ignored the U.S. concern that the one-year limit would be unworkable in a large country like the United States, where commencement of proceedings requires the difficult task of finding the precise jurisdiction in which the child is located.\(^72\)

The member states rejected an earlier approach that would have provided for a different time limit for concealed children.\(^73\) Specifically, the preliminary draft of the Hague Convention provided that if the child’s whereabouts were known, the time limit was six months from the wrongful removal.\(^74\) If the child’s whereabouts were concealed, the six-month period would run from when the child was discovered, but proceedings would still have to commence within one year of the wrongful removal.\(^75\) Ultimately, the Convention incorporated a single time limit under the well-settled defense for all abductions.\(^76\) In doing so, the signatory states rejected the preliminary draft of the Convention that incorporated two separate time limits.\(^77\)

Although the single, one-year limit was included to decrease confusion, the application of equitable estoppel or tolling to the one-year limit has produced considerable discord among American courts.\(^78\) Equitable estoppel applies to cases in which the abductor commits bad acts, usually secreting the child in an effort to delay the start of proceedings.\(^79\) Alternatively, equitable tolling arises in situations where ex-

\(^{71}\) Id. at 459. A preliminary draft that incorporated a discovery rule to delay the start of the time period was rejected. Id.; Weiner, supra note 25, at 434. The rejection of this rule was thought to improve the Convention because it eliminated the difficulties inherent in requiring proof of a parent’s inability to determine the location of the child. Pérez-Vera, supra note 13, at 458–60.

\(^{72}\) See 42 U.S.C. § 11603(b) (2006); Weiner, supra note 25, at 437. The United States also advocated for an eighteen-month time period, but this proposal also was rejected. See Weiner, supra note 25, at 437.

\(^{73}\) See Weiner, supra note 25, at 434.

\(^{74}\) Id.

\(^{75}\) Id.

\(^{76}\) Convention, supra note 11, art. 12; Pérez-Vera, supra note 13, at 459.

\(^{77}\) Weiner, supra note 25, at 435; see also Pérez-Vera, supra note 13, at 459 (noting that the single time limit was a vast improvement over a scheme with multiple time limits because this approach was clearer).

\(^{78}\) Pérez-Vera, supra note 13, at 459; Weiner, supra note 25, at 416. Compare Font Paulus, 2012 WL 2524772, at *8 (applying equitable tolling where a left-behind parent could not find child despite diligent efforts), with Matowski, 2007 WL 2600862, at *11–12 (refusing to apply equitable tolling where the child was hidden from the left-behind parent).

\(^{79}\) Weiner, supra note 25, at 414.
traordinary events beyond the petitioner’s control—and not the result of the respondent’s wrongdoing—cause a delay in the start of the proceedings. Although the origins of the two doctrines differ, in both situations the court will delay the start of the one-year clock until the date on which the petitioner had the ability to commence proceedings in the appropriate jurisdiction.

The Department of State, however, noted in the legal analysis it submitted to the Senate before ratification of the Convention that if a parent concealed a child’s whereabouts, it was “highly questionable” whether the abductor should be able to benefit from the one-year limit in the well-settled defense. Several appellate and lower courts responded by applying the doctrine of equitable estoppel to the well-settled defense in an effort to ensure that the abducting parent did not benefit from his or her own bad acts of concealing the child following the wrongful removal.

B. American Courts’ Approaches to Equitable Tolling

Several district courts have addressed whether equitable tolling should apply to the one-year limit of the well-settled doctrine. Orig-
nally, courts were hesitant to apply the doctrine.\textsuperscript{85} Since 2000, however, most courts that have considered the issue have applied equitable tolling.\textsuperscript{86}

In 2004, in \textit{Furnes v. Reeves}, the U.S. Court of Appeals for the Eleventh Circuit became the first appellate court to apply equitable tolling to the Convention’s well-settled defense.\textsuperscript{87} In 2008, in \textit{Duarte v. Bardales}, the U.S. Court of Appeals for the Ninth Circuit joined the Eleventh Circuit and held that equitable tolling applied to the one-year period established in the well-settled defense.\textsuperscript{88} The Eleventh and Ninth Circuits both noted that the failure to apply equitable tolling would significantly undermine the Convention’s goal of deterring abductions by rewarding parents who abduct and conceal children for more than a year.\textsuperscript{89} Both courts also likened the one-year period to a statute of limitations and noted the precedent that equitable tolling should customarily be read into statutes of limitations.\textsuperscript{90}

\textsuperscript{85} Weiner, supra note 25, at 409; see, e.g., \textit{In re Robinson}, 983 F. Supp. 1339, 1345 & n.10 (D. Colo. 1997) (acknowledging the possibility of applying equitable tolling but ultimately refusing to); Wojcik v. Wojcik, 959 F. Supp. 413, 420–21 (E.D. Mich. 1997) (refusing to consider the application of equitable tolling principles to the case).


\textsuperscript{87} 362 F.3d 702, 723 (11th Cir. 2004). The \textit{Furnes} court uses the term “equitable tolling,” but its analysis was based on equitable estoppel. \textit{See id.} (affirming the district court’s application of “equitable tolling . . . where the parent removing the child has secreted the child from the parent seeking return”).

\textsuperscript{88} \textit{Duarte}, 526 F.3d at 570. Despite using the term “equitable tolling,” the \textit{Duarte} court’s analysis revealed that it relied on equitable estoppel principles. \textit{See id.} (noting that equitable tolling should apply when there is evidence that the abducting parent concealed the child, and agreeing with other courts that reasoned that refusing to toll the start of the one-year time limit would reward the abducting parent for hiding the child). Although it did not fully address the issue, the U.S. Court of Appeals for the Fifth Circuit stated that the use of tolling for the well-settled defense was not clearly erroneous in its 2009 decision in \textit{Dietz v. Dietz}, 349 F. App’x 930, 933 & n.1 (5th Cir. 2009). The \textit{Dietz} court did not fully address the issue because the appellant did not raise it on appeal. \textit{Id.} Despite using the term “equitable tolling,” the \textit{Dietz} court analyzed the issue of equitable estoppel. \textit{Id.} at 933 n.1 (citing \textit{Furnes}, 362 F.3d at 723–24) (noting that petitioner was unsuccessful in establishing contact with her children because respondent’s family was unwilling to tell her their location).

\textsuperscript{89} \textit{Duarte}, 526 F.3d at 570; \textit{Furnes}, 362 F.3d at 723. In \textit{Duarte}, the court first noted that petitioner’s claim could fail simply because of the passage of one year. \textit{Id.} at 569. The court reasoned that the prejudicial effects of having an otherwise unavailable affirmative defense available to the abducting parent was largely why other courts had applied equitable tolling to the well-settled defense despite the absence of any indication in either the Convention or ICARA that such principles were to be used. \textit{Id.} at 569–70.

\textsuperscript{90} \textit{Duarte}, 526 F.3d at 570 (citing \textit{Young v. United States}, 535 U.S. 43, 49–50 (2002)); \textit{Furnes}, 362 F.3d at 723 (citing \textit{Young}, 535 U.S. at 49–50). There is even precedent within
In October 2012, in *Lozano v. Alvarez*, the U.S. Court of Appeals for the Second Circuit became the first appellate court to reject equitable tolling of the one-year limit for the well-settled defense. The U.S. Court of Appeals for the First Circuit followed suit in September 2013 in *Yaman v. Yaman*. Both courts noted that nothing in the text of the Convention or its drafting history referred to the date of discovery or a delay in cases of concealment, which suggested to them that a reasoned decision was made that concealment should not toll the start of the one-year period. The First and Second Circuits also reasoned that courts do not need to employ equitable relief for the well-settled defense, because courts may exercise their discretion to not return a child even after the one-year period. Noting that great weight is given to the executive branch’s interpretation of treaties, the First and Second Circuits agreed with the State Department’s position that the application of equitable relief was improper. The *Yaman* court adopted the Eleventh Circuit that holds that absent a congressional statement stating that tolling should not apply, courts should apply equitable tolling to all federal statutes of limitations. *Ellis v. Gen. Motors Acceptance Corp.*, 160 F.3d 703, 706–08 (11th Cir. 1998) (stating that “equitable tolling applies to all federal statutes unless the statute states otherwise”).

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91 See 697 F.3d at 51.
92 See 730 F.3d at 16.
93 See id. at 12–14; *Lozano*, 697 F.3d at 51–54.
94 See *Yaman*, 730 F.3d at 13; *Lozano*, 697 F.3d at 52.
95 See *Yaman*, 730 F.3d at 14–15 (citing Brief for the United States as Amicus Curiae Supporting Respondent, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012), cert. granted, 81 U.S.L.W. 3696 (June 24, 2013) (No. 12-820); *Lozano*, 697 F.3d at 54. Both courts noted that the weight to be given to an agency’s interpretation depended on its consistency, or lack thereof, with earlier interpretations. See *Yaman*, 730 F.3d at 14; *Lozano*, 697 F.3d at 54 n.14. The executive branch had given two previous statements on the application of equitable tolling to the well-settled defense: one in 1986 in its legal analysis of the Convention, and another in a 2006 questionnaire that examined the practical application of the Convention. See *Yaman*, 730 F.3d at 14–15; *Lozano*, 697 F.3d at 54 n.14; Appendix C—Legal Analysis of the Hague Convention on Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,509 (Mar. 26, 1986); HAGUE CONFERENCE ON PRIVATE INT’L LAW, COLLATED RESPONSES TO THE QUESTIONNAIRE CONCERNING THE PRACTICAL OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION 577 (2006), available at http://www.hcch.net/upload/wop/abd_prd02ef62006.pdf. The courts noted that both earlier executive branch statements had simply suggested that courts may consider the conduct of the abducting parent when exercising their equitable discretion after the one-year period had passed. See *Yaman*, 730 F.3d at 14–15; *Lozano*, 697 F.3d at 54 n.14. The *Lozano* court reasoned that these prior statements were consistent with the government’s current position that equitable tolling should not apply to the Article 12 defense, but concluded that courts should consider whether the child was concealed as part of the well-settled inquiry. See 697 F.3d at 54 n.14. The First Circuit refused to give much weight to the 2006 questionnaire response because it contained no analysis of the treaty, and only stated a general policy preference against incentivizing concealment. See *Yaman*, 730 F.3d at 15.
Lozano court’s holding that the Convention’s overarching goal of deterring child abduction was based on the assumption that the return of the child would be in the child’s best interest.96 Both courts also recognized that the Convention’s signatories had anticipated some situations, as embodied in the exceptions to the requirement of prompt return, in which the child’s countervailing interests would overcome this assumption.97 Accordingly, the Lozano court concluded that allowing equitable tolling would frustrate the well-settled exception and run counter to the true goal of the Convention: protecting the child’s best interests.98 The Yaman court took a somewhat softer approach, and simply held that the intentions of the Convention’s drafters were unclear.99

II. THE PROBLEMS INHERENT IN APPLYING EQUITABLE TOLLING PRINCIPLES TO THE WELL-SETTLED DEFENSE

The courts that apply equitable tolling to the well-settled defense treat it like a statute of limitations and assert that tolling furthers the Convention’s goal of deterring the abduction and concealment of children.100 The U.S. Courts of Appeals for the First and Second Circuits have criticized such a reading of the well-settled defense.101 These courts rely on the text, drafting history, and underlying purposes of the Convention to support their contention that equitable tolling should not be read into the well-settled defense.102

This Part considers the arguments made by critics of equitable tolling by analyzing the text, drafting history, and purposes behind the Convention.103 Section A first discusses the lack of support for equitable tolling in the text and drafting history of the Convention and

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96 Yaman, 730 F.3d at 15–16 (citing Lozano, 697 F.3d at 54); see Lozano, 697 F.3d at 53–54.
97 See Convention, supra note 11, arts. 12, 13, 17, 20; Yaman, 730 F.3d at 15–16; Lozano, 697 F.3d at 53.
98 Lozano, 697 F.3d at 53–54. The Lozano court specifically emphasized that the signatory states had considered an approach that would have included two time periods—based on whether the child had been concealed—but ultimately rejected this arrangement. Id.
99 See Yaman, 730 F.3d at 16.
100 See Duarte v. Bardales, 526 F.3d 563, 570 (9th Cir. 2008); Furnes v. Reeves, 362 F.3d 702, 723 (11th Cir. 2004).
101 See Yaman v. Yaman, 730 F.3d 1, 12–16 (1st Cir. 2013); Lozano v. Alvarez, 697 F.3d 41, 50–55 (2d. Cir. 2012), cert. granted, 81 U.S.L.W. 3696 (June 24, 2013) (No. 12-820); supra notes 91–99 and accompanying text (summarizing the courts’ reasoning for rejecting the application of equitable tolling to the well-settled defense).
102 See Yaman, 730 F.3d at 12–16; Lozano, 697 F.3d at 50–55; infra notes 106–140 and accompanying text (discussing the text, drafting history, and purposes of the Convention).
103 See infra notes 106–140 and accompanying text.
ICARA. Section B then explains why the goals of the Convention are not served by equitable tolling.

A. Text and Drafting History

Although the U.S. Courts of Appeals for the Ninth and Eleventh Circuits alluded to the purpose of the Convention when applying equitable tolling to the well-settled defense, there is nothing in the language of the Convention, its drafting history, or ICARA to support its application to situations where the abductor hid the child or administrative error caused a delay.

The language of Article 12’s well-settled defense includes a one-year time period that is measured from the date of the wrongful removal or retention of the child to the date the left-behind parent commences proceedings. ICARA explicitly adopted the terms of Article 12, and parents commence proceedings when they file a petition in the court with jurisdiction over the child’s location. Despite conceding the lack of textual support for their position, the Ninth and Eleventh Circuits held that equitable tolling should be read into the Convention in order to avoid significantly undermining the treaty’s goal of deterring child abduction. Conversely, the First and Second Circuits, have concluded that the language of Article 12 evinces the drafters’ intent to have a clear trigger date without the possibility of tolling. The First and Second Circuits reasoned that the drafters could have easily changed the start of the one-year period to the date

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104 See infra notes 106–120 and accompanying text.
105 See infra notes 121–140 and accompanying text.
106 Yaman, 730 F.3d at 12–14; Lozano, 697 F.3d at 50–55; see Weiner, supra note 25, at 434 (noting the lack of textual support for equitable tolling in Article 12); infra notes 107–120 and accompanying text. But see Duarte, 526 F. 3d at 570 (holding that equitable tolling should apply to the well-settled defense so that it does not undermine the Convention’s overarching purpose of deterring child abduction); Furnes, 362 F.3d at 723 (same).
107 See 42 U.S.C. § 11603(e) (2006) (stating that a respondent opposing the return of the child must prove, by a preponderance of the evidence, that: (1) more than a year has passed since the wrongful removal and (2) the child is settled in his or her new environment); id. § 11603(b), (f)(3) (defining “commencement of proceedings” as the filing of a petition in “any court which has the jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed”); Convention, supra note 11, art. 12.
108 See Duarte, 526 F.3d at 570; Furnes, 362 F.3d at 723.
109 See Yaman, 730 F.3d at 12–13; Lozano, 697 F.3d at 51 n.8.
that the left-behind parent discovered the child’s whereabouts, but that they decided against it.\textsuperscript{111}

In fact, the signatory states rejected the preliminary draft of the Convention, which contained a different time limit for children who had been concealed.\textsuperscript{112} A preliminary draft provided that if the child’s whereabouts were known, the time period was six-months from the date of the wrongful removal.\textsuperscript{113} If the child’s whereabouts were concealed, however, the six-month period would not begin until the child was discovered, allowing for a maximum of one year between the wrongful removal and the commencement of proceedings.\textsuperscript{114} The Ninth and Eleventh Circuits, however, did not address the drafting history in their analysis.\textsuperscript{115} Conversely, the First and Second Circuits held that this drafting history demonstrated a conscious choice on the part of the drafters to reject a different time limit when children are concealed.\textsuperscript{116}

When interpreting a treaty, courts begin with the text of the treaty.\textsuperscript{117} An important piece of textual interpretation involves analyzing the drafters’ intent.\textsuperscript{118} The Ninth and Eleventh Circuits spent very little time analyzing the Convention’s text, and wholly ignored the drafting history in their decisions to exercise equitable discretion and apply tolling.\textsuperscript{119} The First and Second Circuits, on the other hand, followed the

\textsuperscript{111} See Yaman, 730 F.3d at 13; Lozano, 697 F.3d at 51 n.8.
\textsuperscript{112} Pérez-Vera, supra note 13, at 459 (noting that the single time limit was a vast improvement over the scheme in a preliminary draft of the Convention); Weiner, supra note 25, at 434; see supra notes 73–75 and accompanying text (discussing the rejection of a preliminary draft that would have included two time limits: one for children who were not concealed and one for children who were concealed).
\textsuperscript{113} Weiner, supra note 25, at 434.
\textsuperscript{114} \textit{Id}.
\textsuperscript{115} See \textit{generally Duarte}, 526 F.3d 563 (applying equitable tolling principles to the well-settled defense without analyzing the treaty’s drafting history); Furnes, 362 F.3d 702 (same).
\textsuperscript{116} See Yaman, 730 F.3d at 13–14; Lozano, 607 F.3d at 52–53; see also Weiner, supra note 25, at 434 (contending that both the rejection of the preliminary draft with an extended time limit for concealed children and the common occurrence of abducting parents concealing their children suggest that the drafters were aware of concealment concerns but consciously rejected tolling).
\textsuperscript{117} Abbott v. Abbott, 560 U.S. 1, 10 (2010). The Supreme Court has noted the importance of following the language of international conventions and treaties. \textit{Id} at 9–10. The Court reasoned that a close reading of such agreements would keep the document’s standards and definitions unencumbered by local practices and would thus ensure uniformity among signatories. \textit{Id} at 12.
\textsuperscript{118} See \textit{id} at 18–20 (supporting the court’s textual analysis of a “right of custody” under Article 3 of the Convention by analyzing the drafters’ intent).
\textsuperscript{119} See \textit{Duarte}, 526 F.3d at 569–70; Furnes, 362 F.3d at 723. In its 2008 decision in \textit{Duarte v. Bardales}, the U.S. Court of Appeals for the Ninth Circuit only briefly analyzed the text of the Convention, and instead focused its analysis on why equitable tolling should be read
Supreme Court’s recommendations for treaty analysis by conducting an in-depth analysis of the text and drafting history.  

**B. Purposes of the Convention**

A proper analysis of the Convention’s defenses begins with the understanding that the goal of deterring child abduction is not paramount. The goal of deterring the abduction and concealment of children is important, but it is not the sole objective of the Convention. The Convention’s preamble explicitly provides that “the interests of children are of paramount importance in matters relating to their custody.” Deterrence of abduction is given a large role in the Convention but only because deterrence usually serves the interests of children. The swift return of abducted children based on the almost automatic recognition of a foreign custody order eliminates the benefit of abduction by ensuring that abducting parents cannot forum shop and relitigate custody disputes. The defenses were included, however, to recognize that the swift return of a child is not always in the best interests of the child.

U.S. law aims to deter child abductions, but does so without relying on equitable tolling principles. Parental child abduction is a crime in all states, and a parent who removes a child from the United States in

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120 See Yaman, 730 F.3d at 12–14; Lozano, 697 F.3d at 51–53 & n.8.

121 See Weiner, supra note 25, at 477 (arguing that courts should accept that Article 12’s purpose is not to deter child abductions, but rather to recognize that settled children have an interest in a court revisiting the merits of their custody determinations).

122 Convention, supra note 11, pmbl., art. 1; Pérez-Vera, supra note 13, at 432; Weiner, supra note 25, at 475.

123 Convention, supra note 11, pmbl.

124 See id.; Pérez-Vera, supra note 13, at 431–32 (noting that the true victim of kidnapping is the child who suffers from an upset in stability, loss of contact with the left-behind parent, and frustration with adapting to a new language and culture).

125 Blynn, supra note 48, at 356; see Pérez-Vera, supra note 13, at 429–30.

126 Lozano, 697 F.3d at 53; Pérez-Vera, supra note 13, at 432. The Convention does not include a specific examination of the best interests of the child because it is a vague standard, and because in the past courts often took advantage of the vagueness to substitute their own discretion for that of the foreign custody orders. Pérez-Vera, supra note 13, at 431.

127 See Weiner, supra note 25, at 454–56 (describing American laws that address child abduction and concealment).
contravention of another parent’s custody rights runs afoul of federal criminal law.\textsuperscript{128} Concealing a child during abduction is a more serious crime in some states, and other states make it a relevant factor during sentencing.\textsuperscript{129}

Courts can also ensure deterrence of child abduction by taking concealment of the child into account in denying abducting parents the benefits of the Convention’s defenses.\textsuperscript{130} This could potentially eliminate the benefit of concealment by foreclosing otherwise available defenses.\textsuperscript{131} For example, courts have held that concealment decreases the weight that should be given to a child’s preference to remain with the abductor.\textsuperscript{132}

Courts applying the doctrine of equitable tolling also reason that the one-year period is similar to a statute of limitations, which is traditionally tolled.\textsuperscript{133} Statutes of limitations provide that a plaintiff’s ability to file suit expires after a designated passage of time.\textsuperscript{134} As noted by the First and Second Circuits, the one-year period in the well-settled defense is unlike statutes of limitations, because a court is not barred from ordering the return of a child after one year has passed.\textsuperscript{135}

Even if the one-year period functioned like a statute of limitations, the lack of any Congressional intent to treat it as such undercuts the strength of the Ninth and Eleventh Circuits’ analogy.\textsuperscript{136} The Supreme

\textsuperscript{128} See 18 U.S.C. § 1204 (2006) (making it a federal crime to remove a child from the United States in violation of parental rights, punishable by a fine and up to three years in prison); Weiner, supra note 25, at 454–55.\textsuperscript{129} Weiner, supra note 25, at 454; see, e.g., CAL. PENAL CODE § 278.6(3) (West 2008) (stating that a child’s concealment is an aggravating factor to be considered in a kidnapping sentencing); MO. ANN. STAT. §§ 565.150, 565.153 (West 2010) (stating that concealment elevates the crime of interference with custodial rights from a “class A” misdemeanor to a “class D” felony, and the length of concealment elevates the level of the felony).\textsuperscript{130} See Weiner, supra note 25, at 456–57 (noting that concealment is already taken into account to deny the affirmative defenses under Article 12).\textsuperscript{131} See id. at 457.\textsuperscript{132} See, e.g., id. at 456 (citing Wasniewski v. Grzelak-Johannsen, No. 5:06-CV-2548, 2007 WL 2344760, at *5 (N.D. Ohio Aug. 15, 2007) (noting that a mother’s attempt to isolate her child during his early childhood in the United States diminished the credibility of the child’s stated preference to remain in the United States)); see also infra notes 227–239 and accompanying text (discussing how courts weigh concealment against a finding that the child is of sufficient age and maturity to make an objection that stands as a defense to return).\textsuperscript{133} See, e.g., Duarte, 526 F.3d at 570; Furnes, 362 F.3d at 723.\textsuperscript{134} Katharine F. Nelson, The 1990 Federal “Fallback” Statute of Limitations: Limitations by Default, 72 Neb. L. Rev. 454, 457 (1993).\textsuperscript{135} See Yaman, 730 F.3d at 13; Lozano, 697 F.3d at 52.\textsuperscript{136} See Weiner, supra note 25, at 428–29 (arguing that the Eleventh Circuit’s application of equitable tolling to Article 12 was not supported by a detailed analysis of ICARA or the
Court has adopted a rebuttable presumption of applying equitable tolling when federal statutes are silent. But, the presumption of applying tolling is rebuttable by a showing that tolling would be incompatible with the legislative scheme. As the First and Second Circuits noted, the drafting history of the Convention demonstrates an intent to focus on the needs of the child in including the one-year time period—not seeking to deter child abductions. Thus, these courts reasoned that equitable tolling would be inconsistent with the Convention’s scheme.

III. Equitable Tolling: Ignoring Obvious Problems to Protect Parental Rights

American courts applying equitable tolling to the well-settled defense insist that the overarching goal of the Convention is to deter child abductions. Deterring child abductions can serve multiple purposes. The Convention presumes that deterring child abductions protects the best interests of the child in that it seeks to place the child in a stable environment. Deterring child abduction also serves to protect the custodial rights of the child’s parent. American law views the right to the custody and care of one’s child as a fundamental liberty interest that is protected by the Constitution, and deterring child abduction thus fits neatly into this constitutional framework.

The Convention, however, also includes defenses that recognize that the deterrence of child abduction through the swift return of the

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138 Id. at 51.
139 See Yaman, 730 F.3d at 13–16; Lozano, 697 F.3d at 52–53.
140 See Yaman, 730 F.3d at 13–16; Lozano, 697 F.3d at 51–54.
141 See Duarte v. Bardales, 526 F.3d 563, 570 (9th Cir. 2008) (noting that the Convention’s overarching goal is to deter child abduction, and that deterring child abduction requires the application of equitable tolling); Furnes v. Reeves, 362 F.3d 702, 723 (11th Cir. 2004) (same).
142 Pérez-Vera, supra note 13, at 429–30.
143 See Convention, supra note 11, pmbl.; Pérez-Vera, supra note 13, at 431; supra note 51 (citing arguments made by scholars on the traumatic effect that abduction has on children).
144 See Convention, supra note 11, art. 1; Pérez-Vera, supra note 13, at 430.
145 See Troxel v. Granville, 530 U.S. 57, 65 (2000) (noting that the interest of parents in rearing their children is one of the oldest fundamental liberty interests recognized by the American courts); see also infra note 152 and accompanying text (outlining Supreme Court precedent that supports the fundamental right to care for one’s children).
child does not always serve the child’s interests. The hesitancy of courts to undercut deterrence is apparent in their willingness to apply a doctrine to the well-settled defense that lacks support in the Convention’s text, drafting history, and purposes. This hesitancy demonstrates the preference of American courts for preserving parental rights.

This Part argues that the courts that apply equitable tolling are relying on the American legal tradition of prioritizing parental rights over children’s rights and interests. Section A demonstrates how courts that apply equitable tolling focus on parental rights to the detriment of the children’s rights and interests. Section B argues that these court decisions are in accordance with American jurisprudence on parental rights, which often minimizes the rights and interests of children.

A. The Role of Parental Rights in Equitable Tolling Decisions

The courts’ strong preference for preserving the rights of parents is well-established in American law. This preference can be seen in

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146 See Convention, supra note 11, arts. 12, 13, 17, 20; Pérez-Vera, supra note 13, at 432.
147 See supra notes 100–140 and accompanying text (discussing the text, drafting history, and purposes of the Convention).
148 See, e.g., Furnes, 362 F.3d at 723 (noting that equitable tolling is necessary to deter child abduction). Although this Note argues that children’s rights should be valued more than parental rights in these circumstances, this Note still recognizes that the abduction of one’s child is a traumatic event that has great effects on a parent. For example, many parents of abducted children in one study felt that the abduction was motivated by a desire to hurt them, with a much smaller percentage citing motivations of anger over the couple’s separation, and a desire to be with the child. Geoffrey L. Greif & Rebecca L. Hegar, Parents Who Abduct: A Qualitative Study with Implications for Practice, FAMILY RELATIONS, July 1994, at 283, 284. As a result, these left-behind parents often describe a great feeling of loss, as well as feelings of rage, loneliness, fear, and severe depression. See Freeman, supra note 51, 615–16 (noting that the pain is often described as “beyond endurance”). In addition, these parents often report physical symptoms, such as impaired sleep and loss of appetite. Id. at 616.
149 See infra notes 152–201 and accompanying text.
150 See infra notes 152–172 and accompanying text.
151 See infra notes 173–201 and accompanying text.
152 See Troxel, 530 U.S. at 65; Pierce v. Soc’y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that parents have a liberty interest in directing the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that parents have a right to the liberty to establish a home and raise their children). The Supreme Court first recognized this parental right in Meyer v. Nebraska in 1923, when it acknowledged that the right to “establish a home and bring up children” was part of the liberty guaranteed by the Constitution’s Fourteenth Amendment. See 262 U.S. at 399 (citing U.S. CONST. amend. XIV). Parents thus have a fundamental constitutional right to make decisions about how best to care for and raise their children absent a finding that they are unfit parents. See Troxel, 530 U.S. at 68–70.
the way that the courts applying equitable tolling consider the facts of
the cases before them. 153 Even if the child’s interests are mentioned
abstractly, such interests are quickly disregarded as courts focus on the
rights, actions, and interests of the parents. 154

For example, in 2004, in Duarte v. Bardales, the U.S. Court of Ap-
peals for the Ninth Circuit discussed the parents’ actions and interests
in great detail without delving into the children’s rights and inter-
ests. 155 The court mentioned the concern of uprooting the children,
but quickly deemed that concern was outweighed by the need to deter
abductions. 156 The Duarte court concluded that awarding the abducting
parent with an affirmative defense would encourage the abductions
and concealment of children. 157 In reaching this conclusion, the court
implicitly reasoned that it would be worse to award the abducting par-
ent access to an affirmative defense than it would be to remove the
children from their home of almost a year and a half. 158

When the Ninth Circuit discussed whether to apply equitable toll-
ing, it emphasized the prejudicial effects that the failure to file within
one year would have on the left-behind parent. 159 The court notably
did not mention the children’s ties to the community, family, or
friends. 160 In fact, the court never analyzed the children’s interests in
remaining settled in the same home. 161

Similarly, in its 2002 decision in Mendez Lynch v. Mendez Lynch, the
U.S. District Court for the Middle District of Florida relied on parent-
focused reasoning to support the application of equitable tolling. 162
The court reasoned that equitable tolling must apply to the one-year

153 See infra notes 155–172 and accompanying text.
154 See, e.g., Duarte, 526 F.3d at 570; Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d
1347, 1363 (M.D. Fla. 2002).
155 See Duarte, 526 F.3d at 565 (describing that “Baradales removed [the children] from
Mexico” and that “[i]t is undisputed that Bardales took the two youngest children without
Duarte’s knowledge or permission”).
156 See id. at 570.
157 Id.
158 See id. The father wrongfully removed the children from their mother’s custody in
Mexico during a visit in July 2003. Id. at 565. The mother promptly filed a Hague Petition
with the Mexican Central Authority, but due to unknown problems it was not filed in the
proper California court until April 2005. Id. at 565–66.
159 Id. at 569.
160 Id. at 569–70.
161 See Duarte, 526 F.3d at 570. The court noted that it “recognize[d] the serious con-
cerns with uprooting a child who is well settled regardless of whether the abducting parent
hid the child” but stated that “significant consideration” had to be given to the deterre-
rence of child abduction. Id.
162 See 220 F. Supp. 2d at 1363.
period to avoid rewarding a parent for abducting and concealing their children for more than a year. The court, however, did not mention, any concern for the effects of uprooting the children, or how applying equitable tolling would impact the children’s interests.

When discussing the facts in Mendez Lynch, the court highlighted the parents’ actions, but failed to note the interests of the children. The court first detailed the wrongdoing of the abducting mother. The court noted that she had taken the children while their father was on vacation without leaving any indication as to what happened to her or the children. The court then noted the tireless efforts of the left-behind father in his numerous attempts to find his children. The court concluded that the father’s efforts over the course of eleven months were unsuccessful as a result of the mother’s substantial undertaking to conceal herself and the children. Finally, the court noted that the father had spent time attempting to resolve the issue without resorting to court proceedings. Despite analyzing how the actions and interests of the parents impacted the application of equitable tolling, the Mendez Lynch court did not discuss what consideration should be given to the interests and rights of the children. Far from being analyzed, the children’s rights and interests were not even mentioned in the court’s reasoning to support its application of equitable tolling.

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163 Id. As an initial matter, the court determined that the one-year period was similar to a statute of limitations. Id. at 1362–63.
164 See generally id. (applying equitable tolling without considering or mentioning any concern of the effects of uprooting the children).
165 See id. at 1363.
166 Id.
167 Id. The mother abandoned the house, sold, shipped, or donated all of its contents, and left before the father returned from his vacation. Id. at 1352.
168 Mendez Lynch, 220 F. Supp. 2d at 1363. The father returned to his home in Argentina to find an empty house and immediately called friends and acquaintances to determine what had happened to his wife and children. Id. at 1352. Because no one knew where she had taken the children, the father went to the local police department to file a missing persons and robbery report. Id. The father also called airlines and immigration officials, and revoked his authorization for the children to be able to leave the country. Id. He then contacted Interpol and was able to determine that his wife had gone to the United States. Id. A month later, the father learned that his children and their mother were living in Miami, Florida, with a family with the last name Vazquez, so he called every phone number listed there under Vazquez. Id. at 1353.
169 Id. at 1352–53, 1363.
170 Id. at 1363.
171 See id. The court discussed the children’s interests in determining that they were not well settled. Id. The court conducted this analysis in the event that the court’s equitable tolling decision was overturned on appeal. See id.
172 See id. at 1362–63.
B. Subordination of Children’s Rights and Interests in American Courts

The lack of consideration of the child’s best interests in the equitable tolling cases reflects the overall subordination of children’s rights to parental rights in American law.\(^{173}\) In contrast to parents, whose rights are largely regarded as fundamental, children were traditionally seen as objects, without rights, to be used as resources for their parents.\(^{174}\) The recognition of children’s rights and interests has grown substantially, but remains much more amorphous than parental rights, and is most often left to varying state statutes and court decisions.\(^{175}\) Where children’s constitutional rights are recognized, they are limited, both by the parental right to control their children and the state’s power to police children’s behavior.\(^{176}\)

U.S. custody law, as with most family law issues, is determined by the individual states, and—in response to the perceived problem of unfettered judicial discretion—states began to enact legislation aimed at limiting a judge’s discretion in custody determinations.\(^{177}\) The laws that resulted from this movement vary from state to state in the weight they give to the welfare of the child.\(^{178}\) These laws range from those that make the welfare of the child the sole consideration in custody disputes, to those that do not mention the welfare of the child at all as a

\(^{173}\) Compare New Jersey v. T.L.O., 469 U.S. 325, 340–41 (1985) (noting that a minor’s right to privacy was limited by the adult administrators’ need to keep order), with Duarte, 526 F.3d at 570 (determining that concerns about deterring abductions that interfered with custodial rights of a parent outweighed concerns about the risk of uprooting the children).

\(^{174}\) Ruth Zafran, *Children’s Rights as Relational Rights: The Case of Relocation*, 18 Am. U. J. Gender Soc. Pol’y & L. 163, 179–80 (2010). A state’s power to police children’s behavior is broader than its power to police adult behavior. See Prince v. Massachusetts, 321 U.S. 158, 168 (1943) (recognizing that a state may exercise its police power over children to a greater extent than it can over adults); Zafran, *supra*, at 183.

\(^{175}\) See infra notes 183–201 and accompanying text (discussing children’s rights and interests as recognized by American law).

\(^{176}\) See H.L. v. Matheson, 450 U.S. 398, 409, 413 (1981) (holding that a statute that required parental notification of a minor’s decision to have an abortion was constitutional); Bellotti v. Baird, 443 U.S. 622, 638–39 (1979) (noting that legal restrictions on a minor’s liberty are important because they enhance the child’s chances for growth and maturity); Prince, 321 U.S. at 168 (holding that the state has broader power to control children’s actions than to control adult’s actions).

\(^{177}\) See Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 506 (2001) (discussing the legislative movement that resulted in several legislatures enumerating specific factors to be considered in child custody determinations); see also Simms v. Simms, 175 U.S. 162, 167 (1899) (noting that family law is traditionally left to the states).

Moreover, different states use different factors and presumptions to determine what constitutes the best interests of the child.\textsuperscript{179} Coupled with inconsistencies of opinion within each state, the wide variations among state statutes supports the criticism that the best interests of the child standard is too malleable and imprecise to provide any meaningful protection of children’s rights.\textsuperscript{181} Some commentators have proposed that the confusion surrounding the best interests standard allows courts and legislatures to create presumptions that favor the more well-defined rights of parents even as they claim to consider the welfare of the child.\textsuperscript{182}

\textsuperscript{179}See Glenn Cohen, \textit{Beyond Best Interests}, 96 MINN. L. REV. 1187, 1205 (2012) (noting that the welfare of the child is the sole consideration in thirty-five states); Dwyer, supra note 178, at 907 (noting that some states’ laws governing custody disputes do not mention the interests of the child); see, e.g., ALA. CODE § 30-3-1 (2011) (not mentioning best interests of the child); ALASKA STAT. § 25.24.150(c), (d) (2012) (listing only the welfare of the child); ARIZ. REV. STAT. ANN. § 25-403 (Supp. 2012) (same); D.C. CODE ANN. § 16-914(a)(3) (2001) (listing the welfare of the child as a primary factor); MASS. GEN. LAWS. ANN. ch. 208, § 31 (West 1998) (listing only the welfare of the child); OR. REV. STAT. § 107.137 (2011) (listing the welfare of the child as a primary factor); TEX. FAM. CODE § 153.002 (West 2003) (same).

\textsuperscript{180}See Dwyer, supra note 178, at 916–19. States may consider the preferences of the child, the primary parental caretaker prior to a divorce, parenting skills, stability of the home environment, fairness between the parents, welfare of the community, or behavior of the parent the court deems immoral. 27 C.J.S. Divorce § 1000 (2013); Dwyer, supra note 178, at 916–26; see, e.g., N.H. REV. STAT. ANN. § 461-A:6 (2012) (listing eleven factors to be considered in determining the child’s best interests). Some states also specifically exclude considerations of factors such as racial prejudice, religious practices of the parents, career commitments, or plans to relocate. Dwyer, supra note 178, at 926–29; see, e.g., MO. REV. STAT. § 452.375(8) (2012) (prohibiting the consideration of the parents’ age, sex, or financial status). States also employ varying presumptions in favor of joint custody, parental visitation if sole custody is awarded, custody to the primary caretaker, and allocation of custody based on the proportion of time each parent spent performing caretaking duties prior to the custody dispute. Dwyer, supra note 178, at 907, 911, 917–19, 932–33.

\textsuperscript{181}See Mary Becker, \textit{Judicial Discretion in Child Custody: The Wisdom of Solomon?}, 81 Ill. B.J. 650, 651 (1993) (noting that the best interests standard’s lack of guidance understandably leads judges to insert their own biases when making custody determinations); Stephen Melli, \textit{U.K. Refugee Lawyers: Pushing the Boundaries of Domestic Court Acceptance of International Human Rights Law}, 54 B.C. L. REV. 1123, 1140–41 (noting that the Convention requires primary consideration to be given to the best interests of the child, and describing the struggle in the United Kingdom to determine the meaning of the phrase); Rebecca M. Stahl, “Don’t Forget About Me”: Implementing Article 12 of the United Nations Convention on the Rights of the Child, 24 ARIZ. J. INT’L & COMP. L. 803, 820 (2007) (noting that, when analyzing what is in a child’s best interests, the judge has discretion over what factors to consider); Zafran, supra note 174, at 178 (noting that the best interests standard has been criticized for being subjective, vague, and malleable).

\textsuperscript{182}See Stahl, supra note 181, at 821 (quoting Hillary Rodham as saying in 1973 that the best interests test is a rationalization that allows judges to make determinations about a
Children’s rights are not as neatly defined as parental rights, and oftentimes receive less attention than parental rights. These rights are largely left to a combination of case law and state legislation that do not present a clear and uniform stance on children’s rights in America.

The Supreme Court has noted that the Constitution protects minors to an extent that is limited by the need to control, discipline, and parent them. For example, in 1969, in *Tinker v. Des Moines Independent Community School District*, the Supreme Court held that students had the right to freely express themselves, but noted that this right might not extend to cases in which school administrators reasonably forecast that a student’s expression would interfere with learning or student discipline. In 1985, in *New Jersey v. T.L.O.*, the Supreme Court similarly recognized a student’s privacy interest in not being unreasonably searched, but noted that the reasonableness standard was diminished in a school context where administrators had a substantial need to maintain order in schools. In 1981, in *H.L. v. Matheson*, the Supreme Court affirmed a minor’s right to an abortion, but qualified this right by upholding the constitutionality of a state law that required parental notice.

The Supreme Court has also restricted the judiciary’s role in protecting children’s rights and best interests by acknowledging a rebuttable presumption that nonabusive parents act in their children’s best interests (child’s future); Zafran, *supra* note 174 at 178 (noting that the best interests standard has been criticized for being subjective, vague, and malleable).

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185 See, e.g., Parham v. J.R., 442 U.S. 584, 600 (1979) (recognizing that children have a liberty interest in not being confined); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) (holding that students are persons who have fundamental rights, but that their rights are limited); *In re Gault*, 387 U.S. 1, 13, 30 (1967) (noting that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone,” but that proceedings involving juveniles do not need to conform with every aspect of adult criminal trials).
186 393 U.S. at 511, 514.
187 469 U.S. at 340–41.
188 450 U.S. at 409, 413. The *Matheson* Court emphasized that the state has an important interest in protecting adolescents, especially when there are significant medical, emotional, and psychological consequences involved in the procedure. *Id.* at 411. Moreover, the Court distinguished abortions from other medical procedures undergone later in pregnancy by noting that these other medical decisions were unlikely to involve potentially grave emotional consequences. *Id.* at 412–13. Despite its willingness to burden the rights of a minor to receive an abortion in *Matheson*, the Court had previously expressed an unwillingness to burden the same rights of an adult woman. *See, e.g., Doe v. Bolton*, 410 U.S. 179, 194–95 (1973) (holding that a state statute that required a woman seeking a first-trimester abortion to have it performed in a specially-accredited hospital was unconstitutional).
interests.\textsuperscript{189} This recognition is based on the law’s presumption that parents act with greater maturity and experience than their children, and that the natural bonds of affection between parent and child would typically lead a parent to act in their child’s best interests.\textsuperscript{190}

Some state legislation indirectly grants rights to children.\textsuperscript{191} For example, certain legislation prohibits some types of parental conduct toward children, such as physical abuse and neglect.\textsuperscript{192} These rights are also sometimes indirectly granted through the obligations that correspond with parental rights, such as the obligation to meet the health, education, and welfare needs of their child.\textsuperscript{193} Although the rights protected vary among states, they often include the right of children to be with their natural born parents, the right to good physical care, the right to education, and the right to be protected from physical harm.\textsuperscript{194}

The eminence of parental rights also limits the ability of states to protect the constitutional and statutory rights that children enjoy.\textsuperscript{195} For example, when a state takes actions to protect children’s constitutional rights, courts ask whether the state action would be “unduly

\textsuperscript{189} Parham, 442 U.S. at 602. When a parent is abusive or neglectful, the presumption that they are acting in the best interests of their child is rebutted, and a court may act to override their decisions. \textit{Id.} The proper application of statutes that pertain to minors sometimes requires courts to review parental decision-making absent evidence of abuse or neglect. \textit{See Troxel}, 530 U.S. at 69–70. In these cases, courts are required to give special weight to parents’ decision making. \textit{See id.}

\textsuperscript{190} See \textit{Troxel}, 530 U.S. at 68; \textit{Parham}, 442 U.S. at 602.


\textsuperscript{192} \textit{See, e.g., Neb. Rev. Stat.} § 28-707 (Supp. 2012) (making it a crime for an adult to cruelly confine or punish a child, deprive a child of necessary food, clothing, or shelter, or put a child in a situation where his or her mental health is at risk). Many states also have a mandatory reporting system for child abuse. \textit{See Thompson Reuters/West, Mandatory Child Abuse Reporting (Statutes)} 1 (2012).

\textsuperscript{193} \textit{De Francis, supra note} 191, at 8–9.

\textsuperscript{194} \textit{Id.; see, e.g., Ga. Code Ann.} § 37-7-146 (2012) (stating that a child has a right to a free, public education even if it is provided in a treatment facility).

\textsuperscript{195} \textit{See Parham}, 442 U.S. at 600, 606 (recognizing that children have constitutional rights, but that their rights are entwined with parental rights and their protection cannot unduly trench on parental rights); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 75 (1976) (analyzing whether parental rights justified a statute that restricted minor’s right to abortion); Howard Davidson, \textit{Children’s Rights and American Law: A Response to What’s Wrong with Children’s Rights}, 20 \textit{Emory Int’l L. Rev.} 69, 70 (2006). Although the United States has not ratified the International Convention on the Rights of the Child, the legal rights enumerated in it have guided legislatures and courts in upholding certain rights of children. \textit{See Zafran, supra note} 174, at 182.
trenching” on the exercise of parental rights. The fear of infringing on parental rights has caused the term “children’s rights” to be omitted—with few exceptions—from the titles of statutes.

Children’s rights are not consistently recognized, and receive less attention from American courts than do parental rights. Although several states list child welfare as the primary consideration in custody determinations, the inconsistency of custody opinions based on similar facts has led some to postulate that the courts are merely claiming to consider the welfare of the child. Children’s rights are defined by a jumble of case law and statutes that primarily focus on protecting children from negative adult behavior. These rights are often limited and sometimes completely disregarded at the expense of parental rights.

IV. The Settled Inquiry: Why Courts Can Follow the Convention’s Text and Still Protect Parental Rights

American courts can continue to place substantial focus on parental rights when considering the well-settled defense. But instead of protecting parental rights through the application of equitable tolling, courts should factor their concerns about parental rights into the second prong of the well-settled defense, which asks whether the child is settled in his or her new environment. By taking this approach, American courts will be able to continue protecting parental rights while also remaining faithful to the text, drafting history, and goals of the Convention. The majority of courts have turned to equitable toll-

196 See Parham, 442 U.S. at 606; see also Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) (beginning its analysis of the constitutionality of a state statute by examining the extent to which it burdens the parental right to care for a child).

197 Davidson, supra note 195, at 70. States have, however, adopted the “Children’s Bills of Rights” for children under the care of the state. See, e.g., Tex. Fam. Code Ann. § 263.008 (West 2012) (listing the rights of children in “foster care”).

198 See supra notes 183–197 and accompanying text.

199 See supra notes 177–182 and accompanying text.

200 See supra notes 183–197 and accompanying text.

201 See supra notes 185–197 and accompanying text.

202 See infra notes 222–262 and accompanying text.

203 See infra notes 210–262 and accompanying text.

204 See infra notes 210–262 and accompanying text; see also Weiner, supra note 25, at 478–79 (arguing that courts should consider concealment as part of the settled inquiry). The suggestions that this Note proposes are largely limited custody disputes arising out of countries that are Convention signatories. This is because courts are less likely to enforce custody orders from countries that are not signatories to the Convention. June Starr, The
ing to achieve this resolution even when it is clearly in conflict with the Convention’s text and drafting history. The Supreme Court granted certiorari for the U.S. Court of Appeals for the Second Circuit’s 2012 decision in Lozano v. Alvarez, and is scheduled to hear oral arguments on this issue in December 2013. This Part explains why the Supreme Court should reject the application of equitable tolling and how courts should conduct the well-settled inquiry. Section A explains why the one-year period should not be manipulated through the application of equitable tolling. Section B then demonstrates how courts can protect parental rights through the well-settled inquiry and explains why this approach should be adopted.

A. The One-Year Period Should Not Be Manipulated

When considering the Convention’s well-settled defense, courts should consider only the child’s best interests. Although important, deterrence of the abduction and concealment of children is not the only objective of the Convention. The Convention’s preamble explicitly provides that “the interests of children are of paramount importance in matters relating to their custody.” The defenses were included to recognize that deterrence of child abductions through the return of children is not always in the best interests of the child. The Convention’s


207 See infra notes 210–262 and accompanying text.

208 See infra notes 210–221 and accompanying text.

209 See infra notes 222–262 and accompanying text.

210 See Weiner, supra note 25, at 477 (arguing that Article 12 should be read to protect the interests of the child).

211 See Convention, supra note 11, pmbl., art. 1; Pérez-Vera, supra note 13, at 432; Weiner, supra note 25, at 475.

212 See Convention, supra note 11, pmbl.

213 See Pérez-Vera, supra note 13, at 432.
drafters rejected initial proposals that included extended time frames for cases in which a parent was found to have concealed the child’s whereabouts.\(^\text{214}\) Thus, the single time frame represents the drafters’ reasoned judgment on the best way to protect children’s interests in cases with prolonged abductions.\(^\text{215}\)

Evidence supports the drafters’ belief.\(^\text{216}\) Children who have been living with the abducting parent for a long period of time report feeling a strong bond with the abducting parent.\(^\text{217}\) They also often voice anger and confusion toward the left-behind parent who did not come and get them, or may blame themselves for not making contact with the left-behind parent.\(^\text{218}\) Further, if the children were abducted at a very young age, they might not even recognize the left-behind parent.\(^\text{219}\)

The one-year limit thus functions as a recognition that abruptly separating the child from the abducting parent, and returning the child to the left-behind parent may do more harm than good.\(^\text{220}\) Thus, the second prong of the defense, the settled inquiry, ensures that this possibility is considered before the court blindly and unintentionally inflicts a second trauma on the child.\(^\text{221}\)

B. Reaching the Settled Inquiry Will Not Encourage Abductions

Even if a court finds the focus on parental rights persuasive, it should embrace the settled inquiry for the same policy reason that courts have cited in support of the application of equitable tolling: deterrence of child abductions through the elimination of the benefit of concealment.\(^\text{222}\) If the court considers the issue of whether a child is settled, the court can aptly regard concealment of a child as supporting

\(^{214}\) Weiner, \textit{supra} note 25, at 434; see Pérez-Vera, \textit{supra} note 13, at 459; \textit{supra} notes 73–75 and accompanying text (discussing the rejection of a preliminary draft that included a longer time limit for cases involving concealed children).

\(^{215}\) See Weiner, \textit{supra} note 25, at 434–37 (describing the debate among the Convention’s drafters regarding the inclusion of a single time frame and their ultimate decision to adopt it).

\(^{216}\) See Freeman, \textit{supra} note 51, at 608–10.

\(^{217}\) \textit{Id.} at 609.

\(^{218}\) \textit{Id.} at 608.

\(^{219}\) \textit{Id.} at 610.

\(^{220}\) Pérez-Vera, \textit{supra} note 13, at 458 (noting that the one-year time limit functions as a recognition that return of a child might not be in the child’s best interests after the child has become settled); see Convention, \textit{supra} note 11, art. 12.

\(^{221}\) See Pérez-Vera, \textit{supra} note 13, at 459 (noting that the settled inquiry is largely unguided, and thus left to the discretion of the court hearing the petition); Weiner, \textit{supra} note 25, at 485 (noting that the settled inquiry allows for more meaningful review).

\(^{222}\) See Weiner, \textit{supra} note 25, at 456–57.
a finding that the child is not settled. In this way, although the abducting parent may have opened up a possible defense through concealment, the parent’s actions may demonstrate that the child is not “settled.” This would essentially eliminate the benefit of concealment, and therefore discourage a parent from taking such a drastic action.

Courts should have little difficulty in using the fact that the child was abducted and concealed as evidence that the child is not well settled. In fact, courts have already adopted a similar approach when denying abductors’ claims to the defense that the child objects to the return. Children who are abducted for long periods of time and are isolated are more likely to express a preference for remaining with the abducting parent. Thus, the cases involving this defense often involve competing tensions similar to the ones present for the well-settled defense—namely, the desire to follow the text of the Convention versus the desire to prevent an abducting parent from benefitting from concealing the child. In response to this tension, courts have held that

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223 See id. at 456–57; see also Lops v. Lops, 140 F.3d 927, 946 (11th Cir. 1998) (noting that the court should consider any active measures taken to conceal the child in determining whether the child is settled).

224 See Weiner, supra note 25, at 457 (discussing how weighing concealment as a factor against return discourages concealment).

225 See id. (discussing how weighing concealment as a factor against return discourages concealment).

226 See infra notes 227–233 and accompanying text.

227 See, e.g., Wasniewski v. Grzelak-Johannsen, No. 06-CV-2548, 2007 WL 2344760, at *5 (N.D. Ohio Aug. 14, 2007) (noting that a mother’s attempt to isolate her child during his early childhood in the United States diminished the credibility of the child’s stated preference to remain in the United States); Gonzalez v. Nashor Lurashi, No. Civ.04-1276(HL), 2004 WL 1202729, at *5 (D.P.R. May 20, 2004) (noting that the child’s objection to return is not conclusive because he had been isolated from the left-behind mother and sister for over a year and was heavily influenced by the abductor); see also Weiner, supra note 25, at 456–57 (mentioning the use of concealment as a factor in determining the weight that should be given to a child’s preferences under other Convention defenses).

228 See Freeman, supra note 51, at 609; see also supra notes 217–219 and accompanying text (discussing the effects of abduction on a child’s perceptions of the left-behind parent).

229 Compare Tsai-Yi Yang v. Fu-Chiang Tsui, 499 F.3d 259, 280 (3rd Cir. 2007) (noting that the child’s objection to return stemmed from years of wrongful retention, and therefore concluding that allowing the abductor to claim this as a defense would reward the abductor’s wrongful acts), with Mendez Lynch v. Mendez Lynch, 220 F. Supp. 2d 1347, 1363 (M.D. Fla. 2002) (noting that the well-settled defense was only available because a wrongful retention lasted for more than a year, and concluding that allowing the defense would serve to reward that parent’s misconduct).
concealment decreases the weight that should be given to a child’s preference to remain with the abductor.\textsuperscript{230}

For example, one court reasoned that a child’s objection should not be accorded great weight when the abducting parent had succeeded in isolating the child for an extended period of time.\textsuperscript{231} Implicit in the court’s reasoning was that the boy could not reasonably be expected to prefer his habitual residence and the left-behind parent when he had not seen either for over a year, and had only limited communication with the left-behind parent during that time.\textsuperscript{232} The court emphasized that the abducting parent’s efforts to isolate the child specifically spoke to an undue influence over the child’s opinion.\textsuperscript{233}

The judicial approach to the child’s objection demonstrates a willingness to enter into fact-sensitive inquiries.\textsuperscript{234} Courts already analyze a child’s age and maturity to determine how much weight should be given to the child’s preference to remain with the abducting parent.\textsuperscript{235} If the child is of sufficient age and maturity, the court may—but does not have an obligation to—refuse to order return based solely on the objection.\textsuperscript{236} Courts thus have to engage in a second fact-sensitive inquiry to determine the proper weight of the child’s objection.\textsuperscript{237}

\begin{footnotes}
\footnotetext{230}{See Weiner, supra note 25, at 456 (citing Wasniewski, 2007 WL 2344760, at *5); supra note 227 and accompanying text (discussing cases in which courts gave less weight to a child’s preference because the abducting parent isolated the child).}

\footnotetext{231}{See Wasniewski, 2007 WL 2344760, at *1, *5.}

\footnotetext{232}{See id.}

\footnotetext{233}{Id. at *5; see also Appendix C—Legal Analysis of the Hague Convention on Civil Aspects of International Child Abduction, 51 Fed. Reg. 10,503, 10,510 (Mar. 26, 1986) (noting that a child’s objection to return should be accorded little weight where it is the product of the parent’s undue influence).}

\footnotetext{234}{See Weiner, supra note 25, at 456; see, e.g., Wasniewski, 2007 WL 2344760, at *5; Tsai-Yi Yang v. Fu-Chiang Tsui, No. 2:03-cv-1613, 2006 WL 2466095, at *15–17 (W.D. Pa. Aug. 25, 2006), aff’d 499 F.3d 259 (3rd Cir. 2007); Gonzalez, 2004 WL 1202729, at *5.}

\footnotetext{235}{See Wasniewski, 2007 WL 2344760, at *5 (finding that child was not of adequate age or maturity to support refusing his return because the child had a level of maturity slightly less than one would expect of a thirteen-year-old boy, his objection to his return was too general, and the abducting parent had isolated him and exhibited a high level of influence over the child’s decisions). Because there is no age cut-off at which courts should not consider a child’s preference, courts must engage in a fact-specific inquiry to determine how much weight should be given to the child’s preference based on the child’s age and maturity. See Convention, supra note 11, art. 13; see also Pérez-Vera, supra note 13, at 433 (noting that all attempts to determine a minimum age for this defense had failed because any suggested age seemed arbitrary).}

\footnotetext{236}{de Silva v. Pitts, 481 F.3d 1279, 1286 (10th Cir. 2007). Courts more closely scrutinize the child’s age and maturity when the child’s objection is the sole defense to return. See id.}

\footnotetext{237}{See, e.g., Gonzalez, 2004 WL 1202729, at *5 (noting that the child had reached an age and maturity at which it was proper to take into account his objection, but diminishing the}
with the child’s objection have noted that spending a longer time with the abducting parent, especially in isolation if the child is concealed, can unfairly influence a child’s preference to remain with the abducting parent.238 Thus, the courts already have engaged in fact-sensitive inquiries that measure how concealment of the child should affect the weight given to the child’s objection to remain with the abducting parent.239

Without tolling the one-year time period, the well-settled defense, just like the child’s objection defense, provides little guidance to cabin a court’s discretion.240 Accordingly, courts will have to analyze various facts to determine whether a child is well settled.241 Despite similar issues facing courts in confronting the child objection defense, courts have proven that they are willing to jump into the mire of a largely unguided factual inquiry.242 This inquiry will allow courts to weigh concealment when considering whether to apply the defense, just as courts have been willing and able to when considering the child objection defense.243

Furthermore, the finding that the petition was filed after the one-year period does not necessarily mean the child is settled.244 Courts that have addressed the settled inquiry often find that concealed children—even if they have been in the country for more than a year—are not settled.245 These courts analyze the stability of the abducting parent’s life-

significance of the objection because the child had been heavily influenced by the abductor while isolated from the left-behind mother and sister for more than a year).


240 See Pérez-Vera, supra note 13, at 433 (noting that the child’s objection as an exception to return does not contain an age minimum, and the application of the exception is left to the discretion of the authority making the return determination); id. at 459 (noting that there is nothing in the Convention to guide the settled inquiry).

241 See, e.g., Bocquet, 225 F. Supp. at 1348–49 (holding that the one-year period should be equitably tolled, but using a number of factors to analyze the settled inquiry in the event that the one-year period should not be tolled).


244 See, e.g., Bocquet, 225 F. Supp. 2d at 1348–49.

245 See, e.g., Fernandez-Trejo v. Alvarez-Hernandez, No. 8:12-cv-02634-EAK-TBM, 2012 WL 6106418, at *3–4 (M.D. Fla. 2012); Burdett, 2003 WL 23105201, at *4; Bocquet, 225 F. Supp. 2d at 1348–49. But see Belay v. Getachew, 272 F. Supp. 2d 553, 561–64 (D. Md. 2003) (noting that a child was well settled and applying equitable tolling to make the well-settled defense unavailable to the abductor). Because of the uncertainty surrounding whether equitable tolling should apply, several lower courts have held that equitable tolling applies, and then gone on
style and employment and whether the child has established family, community, and school ties. An abducting parent who is attempting to conceal a child may isolate the child from the community, move residences several times, switch schools, or attempt other similar tactics. Courts that have addressed the settled inquiry have already used these facts to find that a child was not settled. Moreover, some courts have explicitly weighed active measures taken to conceal the child against a finding that the child is settled.

The Supreme Court should reject the use of equitable tolling, and instead instruct lower courts to reach the settled inquiry as part of an analysis that is more faithful to the text and purposes of the Convention, and still protects parental rights by deterring child abductions. The Court should embrace the settled inquiry as a way to remain faithful to the text of the Convention. The inquiry is an explicit part of the Convention’s text that should be addressed if the child was wrongfully removed or retained over a year before the commencement of proceedings. As previously acknowledged by the Supreme Court, uniformity in interpretation of this Convention is of particular importance because international cooperation is one of the Convention’s fundamental aspects. Adhering to the Convention’s text by reaching to conclude, in the event that the application of equitable tolling were overturned, that the child was not well settled. See, e.g., Alvarez-Fernandez, 2012 WL 6106418, at *3–4; Burdett, 2003 WL 23105201, at *4; Bocquet, 225 F. Supp. 2d at 1348–49.


247 See, e.g., Alvarez-Fernandez, 2012 WL 6106418, at *4 (noting that the child had lived in three different homes in fifteen months); Giampaolo v. Erneta, 390 F. Supp. 2d 1269, 1282 (N.D. Ga. 2004) (noting that the child had lived in three different homes and attended three different schools in two years); Mendez Lynch, 220 F. Supp. 2d at 1363 (noting that the children had lived in seven different homes in almost a year-and-a-half and the abducting parent prevented contact with the left-behind parent); Bocquet, 225 F. Supp. 2d at 1349–50 (noting that the child moved frequently, did not have any family in the country, and had not attended school, a play group, a religious institution, or participated on any sports team).


249 See, e.g., Lops, 140 F.3d at 946; Mendez Lynch, 220 F. Supp. 2d at 1363.

250 See infra notes 251–262 and accompanying text.

251 See supra notes 106–120 and accompanying text (discussing the text and drafting history of the Convention).

252 See Convention, supra note 11, art. 12.

253 See Abbott v. Abbott, 560 U.S. 1, 16 (2010) (noting that uniform interpretation is of particular importance for the Convention). The Convention relies on the cooperation of member states to ensure the achievement of two goals: (1) the prompt return of wrong-
the settled inquiry will help courts to ensure such uniformity of interpretation among all jurisdictions.\textsuperscript{254}

The settled inquiry also gives courts an opportunity to ensure that the child’s interests are truly of paramount importance as required by the Convention.\textsuperscript{255} The Convention’s drafters acknowledged the importance of deterrence, and that the prompt return of abducted children would serve that function.\textsuperscript{256} The drafters felt that, in general, prompt return was in the child’s best interest.\textsuperscript{257} They acknowledged, however, that such a prompt return might not be in the child’s interest when a child had become settled in his or her new environment.\textsuperscript{258} In rejecting an extended time period for children who were concealed, the drafters expressed a preference for keeping the child with the abducting parent—and thereby avoiding the retraumatization of the child through a second abrupt removal—even if this encouraged abductors to hide their children for an extended period of time.\textsuperscript{259}

Finally, the Court should embrace the settled inquiry as an opportunity to deter child abduction and protect the rights of left-behind parents.\textsuperscript{260} Just as courts have already done in cases involving children’s objections to return, courts should engage the fact-sensitive settled inquiry and consider concealment as a factor against allowing the child to stay with the abducting parent.\textsuperscript{261} This approach allows the court to negate any benefit of concealment, and thus ensure that protecting parental rights remains a central concern.\textsuperscript{262}

\textbf{Conclusion}

In adopting equitable tolling when considering the well-settled defense, American courts have placed the deterrence of child abduc-

\textsuperscript{254}See Abbott, \textit{supra} note 13, at 435.

\textsuperscript{255}See Convention, \textit{supra} note 11, pmbl.

\textsuperscript{256}Pérez-Vera, \textit{supra} note 13, at 429.

\textsuperscript{257}Id. at 431–32.

\textsuperscript{258}Id. at 458.

\textsuperscript{259}See \textit{id.} at 458–59; \textit{supra} notes 121–132 and accompanying text (discussing the purposes of the Convention).

\textsuperscript{260}See Weiner, \textit{supra} note 25, at 478–79; \textit{supra} notes 222–249 and accompanying text.

\textsuperscript{261}See \textit{supra} notes 222–243 and accompanying text (discussing how courts weigh concealment against the child’s desire to stay with the abducting parent).

\textsuperscript{262}See \textit{supra} notes 227–239 and accompanying text (noting that weighing concealment against keeping the child with the abducting parent will eliminate the possible benefit of raising an Article 12 defense).
tions, and thus the custody rights of the left-behind parent, above all other considerations. In doing so, they have ignored the text, drafting history, and underlying purposes of the Convention. As shown by the reasoning underlying their application of equitable tolling, these courts have placed undue importance on the interests of the parent to the detriment of the child’s interests. This approach mirrors the overall emphasis on parental rights in American law that limits and sometimes overrides children’s rights and interests. Instead of using this approach, the courts should pursue deterrence through the well-settled inquiry by weighing abduction and concealment against a finding that the child is settled. This approach will allow courts to adhere to the text of the Convention, properly emphasize children’s interests, and avoid rewarding parents who abduct and conceal their children.

Because there is little guidance in the Convention on how to conduct the settled inquiry, courts could potentially reach the settled inquiry and still continue to allow parental rights to dominate their analysis of whether the child is settled. If the Supreme Court determines that equitable tolling should not apply, the settled inquiry could thus become just another refuge for the same bias.

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