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Playing Solomon: Federalism, Equitable Discretion, and the Hague Convention on the Civil Aspects of International Child Abduction

Elizabeth A. Rossi* and Brett Stark**

ABSTRACT

The Hague Convention on the Civil Aspects of International Child Abduction was drafted “to secure the prompt return of children wrongfully removed to or retained in any Contracting State” and “to ensure that the rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.” To that end, when a child is wrongfully removed from his country of habitual residence in violation of a valid custody order, and less than one year has elapsed since the date of abduction, the Convention provides a single remedy, set out in Article 12: return of the child “forthwith.” Article 12 also provides that if more than one year has elapsed since the date of abduction, a child must still be returned, unless he is “now settled”

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in his new environment. Federal circuit courts have addressed whether the one-year time period in Article 12 may be tolled to prevent an abducting parent who successfully conceals her child for more than one year from benefiting from the so-called “settled defense.” This Article focuses on a legal question that is intertwined with the equitable tolling question: whether the Convention or its implementing legislation grants United States federal or state courts equitable discretion to return a child deemed settled. This Article argues that, in light of the Convention’s text and drafting history, principles of federalism, and the legislative history of the Convention’s implementing legislation, federal courts lack such authority entirely, and state courts possess it pursuant only to state family law.

“If ever there were an area in which federal courts should heed the admonition of Justice Holmes that ‘a page of history is worth a volume of logic,’ it is in the area of domestic relations.”¹

“[I]f children were chattel, I would take the children from Mrs. Yaman and give them to Mr. Yaman. But children aren’t chattel and the Convention doesn’t treat children as chattel. It treats children as human beings and recognizes that they have a strong interest in being reunited with the parent . . . from whom they were wrongfully removed. But they also have a strong interest in living their li[ves] where they’re settled that ought not [lightly] [] be disturbed.”²

I. INTRODUCTION

Linda Margherita Yaman, an American citizen, met Ozgur Yaman, a Turkish citizen, while Ozgur was pursuing post-graduate studies at Wayne State University in Michigan.³ They married in 1997.⁴ By all accounts, their first years together were

1. *Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921)).

2. Transcript of Bench Trial at 77–78, *Yaman v. Yaman*, 919 F. Supp. 2d 189 (D.N.H. 2013), ECF No. 165.

3. *See Yaman v. Yaman*, 919 F. Supp. 2d 189, 190 (D.N.H. 2013).

4. *Id.*

happy ones.⁵ In 2004, however, after the couple moved to Turkey to raise their family, Linda's mother told Linda that Linda's grandmother had seen Ozgur sexually abusing the couple's older daughter.⁶ Unable to prove or disprove the allegation, Linda became increasingly paranoid that her husband was molesting their daughter.⁷ She grew preoccupied with identifying signs of abuse and terrified that she was failing to protect her daughters.⁸ Ozgur, who repeatedly denied the allegation, became frustrated with his wife's accusations and her refusal to believe him over her mother.⁹ Linda's mother "was very upset, horrified, very angry at [her]" for staying with Ozgur and told Linda "that [she] was a bad mother" for staying with "an abuser."¹⁰

The couple started marriage counseling and, unable to convince Linda that he had not sexually abused their daughter, Ozgur moved out of the family home.¹¹ In February 2005, he filed for divorce, citing the irretrievable breakdown of the marriage.¹² A Turkish family court conducted an extensive investigation into the abuse allegation and, in March 2006, concluded that it was false.¹³ The court granted sole custody of the children to Ozgur, though the girls remained in Linda's custody while she appealed the decision.¹⁴ The Turkish Supreme Court of Appeals affirmed the custody decision on April 3, 2007, and Linda again appealed the decision.¹⁵

While the divorce and custody proceedings were ongoing, Linda devised a plan to flee Turkey with the children.¹⁶ The girls' passports were in a safe at Ozgur's parents' house, and Linda

5. Transcript of Bench Trial at 20–21, 29, *Yaman v. Yaman*, 919 F. Supp. 2d 189 (D.N.H. 2013), ECF No. 170.

6. *Id.* at 24–25.

7. *Id.* at 31.

8. *Id.* at 31–33.

9. *Id.* at 74.

10. *Id.* at 47 (testimony of Linda Yaman).

11. *Id.* at 73–74.

12. *See Yaman*, 919 F. Supp. 2d at 191.

13. *Id.* at 191.

14. *Id.*

15. *Id.*

16. Transcript of Bench Trial at 128, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170; see Nadya Labi, *The Snatchback*, THE ATLANTIC (November 1, 2009), available at <http://www.theatlantic.com/magazine/archive/2009/11/the-snatchback/307704/> (last visited January 14, 2014).

knew she would be unable to obtain them without revealing her intention to leave Turkey.¹⁷ Undeterred, she contacted Gus Zamora—a former United States Army Ranger and self-described “snatchback” professional who specializes in returning children to their custodial parents¹⁸—and hired him at a cost of \$70,000, paid by her parents, to help her and her daughters get out of Turkey without their passports.¹⁹

Meanwhile, on July 16, 2007, the court denied Linda’s second appeal, and on August 3, 2007, the Turkish Family Court entered its final ruling, awarding custody to Ozgur and ending the appeals process.²⁰ Ozgur learned of the court’s decision on August 6,²¹ but by the time Ozgur and his lawyers attempted to implement the custody order, Linda and the girls were already gone.

On August 11, Ozgur went to Linda’s house to see his daughters and discovered that no one was home.²² He immediately went to the police,²³ who later issued a warrant for Linda’s arrest.²⁴ Two days later, Ozgur successfully moved the court to issue a travel ban prohibiting the girls from leaving Turkey—to no avail.²⁵ By then, Linda and the children had already fled Turkey overnight in a scuba diving powerboat bound for Greece.²⁶ Once in Greece, Linda applied for passports for her daughters.²⁷ She lied on the passport application forms, claiming that the girls’ passports were stolen and that her husband had

17. Transcript of Bench Trial at 133, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170; Transcript of Bench Trial at 105, *Yaman v. Yaman*, 919 F. Supp. 2d 189 (D.N.H. 2013), ECF No. 173.

18. Transcript of Bench Trial at 128, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170; see Labi, *supra* note 16.

19. Transcript of Bench Trial at 129, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170.

20. *Yaman*, 919 F. Supp. 2d at 191.

21. Transcript of Bench Trial at 47, *Yaman v. Yaman*, 919 F. Supp. 2d 189 (D.N.H. 2013), ECF No. 174.

22. *Id.* at 50.

23. *Id.*

24. *Id.* at 59.

25. *Id.* at 51.

26. Transcript of Bench Trial at 104, *Yaman*, 919 F. Supp. 2d 189, ECF No. 173.

27. Transcript of Bench Trial at 133, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170; Transcript of Bench Trial at 105, *Yaman*, 919 F. Supp. 2d 189, ECF No. 173.

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abandoned them.²⁸ The embassy denied the applications.²⁹

With no passports for her daughters and no ability to fly to the United States, Linda looked for somewhere else they could settle temporarily. She decided to travel to Andorra, a small³⁰ country that is located between Spain and France and is not a member of the European Union.³¹ Linda and her daughters took a boat from Greece to Italy and then drove an RV through Italy.³² She then rented a car and drove from Italy to France.³³ When she crossed the border into Andorra, Linda hid the children under pillows in the backseat of the car to avoid requests from border security to see the girls' passports.³⁴ While Linda and the girls were in Andorra, Dateline NBC, a television newsmagazine that airs investigative feature stories,³⁵ interviewed Linda and aired her story on television, but the show kept her location secret.³⁶

They lived in Andorra for about two and a half years. During this time, Ozgur continued searching for his children. He communicated with officials in Turkey and the United States.³⁷ Ozgur filed a criminal complaint with the police in Turkey. As of January 2013, the date of the hearing, there was an outstanding warrant for Linda's arrest in Turkey.³⁸ Ozgur requested the help

28. Transcript of Bench Trial at 133, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170.

29. Transcript of Bench Trial at 107, *Yaman*, 919 F. Supp. 2d 189, ECF No. 173. The trial testimony does not indicate the reason for the denial.

30. The CIA website describes Andorra as roughly 2.5 times the size of Washington, D.C. It has a population of 85,293 people. See Central Intelligence Agency, *The World Factbook*, Andorra, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/an.html>.

31. Transcript of Bench Trial at 110, *Yaman*, 919 F. Supp. 2d 189, ECF No. 173.

32. Transcript of Bench Trial at 137–38, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170.

33. *Id.*

34. *Id.*

35. See *About the Show*, Dateline NBC, <http://www.nbcnews.com/id/3032600/#54003247> (last visited January 21, 2014).

36. Transcript of Bench Trial at 131, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170; *Dateline: On the Run* (NBC television broadcast Sept. 10, 2010), available at http://insidedateline.nbcnews.com/_news/2010/09/10/5085975-on-the-run (last visited January 14, 2014).

37. Transcript of Bench Trial at 45, *Yaman*, 919 F. Supp. 2d 189, ECF No. 173.

38. Transcript of Bench Trial at 59, *Yaman*, 919 F. Supp. 2d 189, ECF No. 174.

of Interpol, an international police organization,³⁹ to search for his children, but the agency was unable to help because Ozgur did not have his daughters' fingerprints.⁴⁰ He searched the Internet to find information about Linda, her parents, and his daughters, but discovered addresses only in Oregon and Michigan, and soon learned that the girls were not there.⁴¹

Eventually, Linda secured one-time-use passports for her daughters so they could enter the United States. They arrived in April 2010 and later settled in New Hampshire.⁴² Ozgur received notice from the State Department when the passports were issued.⁴³ He contacted a lawyer in the United States to help him locate his children and bring them back to Turkey.⁴⁴ In late 2011 or early 2012, Ozgur finally learned from the United States State Department that his daughters were in New Hampshire.⁴⁵ In June 2012, he filed a petition pursuant to the 1980 Hague Convention on the Civil Aspects of International Child Abduction⁴⁶—implemented in the United States by the International Child Abduction Remedies Act (“ICARA”)⁴⁷—seeking a court order requiring his ex-wife to return the children to him.⁴⁸ Linda opposed the petition, arguing that the girls faced a grave threat of harm if they were returned to Ozgur in Turkey and that the petition should be denied because the girls were settled in New Hampshire.⁴⁹

The District Court of New Hampshire conducted a three-day hearing in January 2013 under the Hague Convention. The court found that: (1) Linda had failed to provide clear and convincing

39. See *Overview*, INTERPOL.NET, <http://www.interpol.int/About-INTERPOL/Overview> (last visited Dec. 12, 2013).

40. *Id.* at 58, 60.

41. *Id.* at 62.

42. Transcript of Bench Trial at 127, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170.

43. *Id.* at 67.

44. *Id.* at 71.

45. *Id.*

46. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49 [hereinafter *Hague Convention*].

47. 42 U.S.C. §§ 11601–11611 (2013).

48. *Yaman*, 919 F. Supp. 2d at 191.

49. See *id.*

evidence of any abuse by Ozgur;⁵⁰ (2) she had violated a Turkish custody order by fleeing and actively concealing the children after leaving Turkey;⁵¹ and (3) Ozgur had searched in good faith for his children.⁵² The court then considered Linda's argument that the children were settled in New Hampshire. Ozgur asked the court to equitably toll the one-year period in Article 12 of the Convention, which creates an exception to return when children are settled in their new environment. Specifically, Ozgur asked the court to toll the one-year period until the date on which he was finally able to locate his daughters. He also argued in the alternative that the court should preclude Linda from raising the settled defense at all because she actively concealed the children, making it impossible for him to file his claim within the one-year period. The court rejected both of these equitable arguments and concluded that the children were settled in the United States within the meaning of Article 12.

In light of the court's conclusion, Ozgur then asked the court to exercise "equitable discretion" and issue a return order for his children, notwithstanding the court's finding that they were now settled.⁵³ The court denied Ozgur's request,⁵⁴ concluding that neither the Hague Convention nor its implementing legislation granted federal courts the power to return a settled child.⁵⁵

On appeal, the First Circuit affirmed the district court's decision denying Ozgur's petition, reaffirming its ruling that the Convention does not permit equitable tolling, but rejecting the district court's ruling that it lacked equitable discretion to return

50. Transcript of Bench Trial at 53, *Yaman*, 919 F. Supp. 2d 189, ECF No. 165.

51. Transcript of Bench Trial at 3–4, 68, *Yaman*, 919 F. Supp. 2d 189, ECF No. 173.

52. Transcript of Bench Trial at 109, *Yaman*, 919 F. Supp. 2d 189, ECF No. 167.

53. See Petitioner's Supplemental Memorandum in Support of Motion to Preclude Respondent from Presenting the Affirmative Defense of "Settledness," *Yaman*, 919 F. Supp. 2d 189, ECF No. 143.

54. Transcript of Bench Trial at 81, *Yaman*, 919 F. Supp. 2d 189, ECF No. 165.

55. *Id.* at 15 (concluding "that I lack equitable discretion to order the return of a settled child"); *id.* at 73 (concluding by a preponderance of the evidence that the children are settled in New Hampshire); *id.* at 80–81 ("So, I'm not going to order return under the Hague Convention and I'm resolving this case with respect to the Hague Convention claim and directing that judgment be entered for the respondent.").

a settled child.⁵⁶ Instead, the First Circuit held that “Article 12 [] does provide a mechanism to prevent misconduct from being rewarded without resort to equitable tolling,” namely, “equitable discretion.”⁵⁷ Despite the First Circuit’s decision to reverse the district court on the equitable discretion issue, it affirmed the district court’s decision denying Ozgur’s petition because the district judge had also held that, even if the court had equitable discretion, in light of all the relevant factors, he would not exercise it in this case.⁵⁸

Using the *Yaman* case as its primary lens, this Article examines the text and history of the Hague Convention and ICARA, principles of federalism and international comity, and the rules of federal jurisdiction and concludes that the district court in the *Yaman* case correctly concluded that neither the Convention nor ICARA grants courts equitable discretion to return a settled child. Part II maps the legal background of the Hague Convention, describing the criteria for establishing a *prima facie* case and the defenses available to rebut it. Part III analyzes the text and drafting history of the Convention, as well as decisions of foreign courts, and argues that the Convention does not authorize courts to exercise equitable discretion to return a settled child.

Part IV examines the legislative history of ICARA and determines that Congress implemented the Convention without modifying or expanding the powers provided by it. Part V argues that an exercise of equitable discretion invites a proscribed “custody-type” decision that Congress prohibited federal courts from making, and also invites courts to rebalance competing interests that the drafters of the Convention carefully weighed in writing Article 12. Part VI concludes that, though a United States court may order the return of a settled child, that order may be issued pursuant only to domestic family law and may not be issued pursuant to the Convention or ICARA. In other words, in the American judicial system, it is only state courts—not federal

56. *Yaman v. Yaman*, 730 F.3d 1, 12–17 (1st Cir. 2013).

57. *Id.* at 13 (quoting *Lozano v. Alvarez*, 697 F.3d 41, 52 (2d Cir. 2012) (“[T]he way the provision functions renders this sort of equitable relief unnecessary.”)).

58. See Transcript of Bench Trial at 80–81, *Yaman*, 919 F. Supp. 2d 189, ECF No. 165.

courts—that “play Solomon.”⁵⁹

II. LEGAL BACKGROUND OF THE 1980 HAGUE CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION

A. *The Hague Convention: An explanation of a Prima Facie Case and the defenses available under Articles 12, 13, and 20*

The Hague Convention⁶⁰ was adopted in 1980 by the Fourteenth Session of the Hague Conference on Private International Law.⁶¹ Its two main purposes were “to secure the prompt return of children wrongfully removed to or retained in any Contracting State” and “to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.”⁶² The drafters wanted to address the problem of international child abductions occurring during domestic disputes and divorce proceedings.⁶³ The United States is a Contracting State, and Congress implemented the Convention through ICARA.⁶⁴ In 2012, there were a total of 1,143 applications seeking the return of 1,617 children⁶⁵ submitted to the United States Central Authority, which oversees

59. *Thompson v. Thompson*, 484 U.S. 174, 186 (1988); *see* 1 *Kings* 3:16–28.

60. The Hague Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 49 [hereinafter *Hague Convention*].

61. *See Asvesta v. Petroutsas*, 580 F.3d 1000, 1003 (9th Cir. 2009).

62. *Hague Convention*, *supra* note 46, art. 1.

63. *See Abbott v. Abbott*, 560 U.S. 1, 8 (2010) (“The Convention was adopted in 1980 in response to the problem of international child abductions during domestic disputes.”); *Miller v. Miller*, 240 F.3d 392, 398 (4th Cir. 2001) (“The primary purpose of the Hague Convention is ‘to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court.’”) (quoting *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) [hereinafter *Friedrich I*]); *Feder v. Evans–Feder*, 63 F.3d 217, 221 (3rd Cir. 1995) (“[the Convention] is designed to restore the ‘factual’ status quo which is unilaterally altered when a parent abducts a child and aims to protect the legal custody rights of the non-abducting parent.”); *Shalit v. Coppe*, 182 F.3d 1124, 1127 (9th Cir. 1999) (“The Hague Convention . . . addressed the increasing problem of international child abduction in the context of international law while respecting rights of custody and visitation under national law.”).

64. 42 U.S.C. §§ 11601–11611 (2013).

65. *2012 Outgoing Case Statistics*, U.S. DEPARTMENT OF STATE, available at http://travel.state.gov/abduction/resources/resources_3860.html#statistics.

implementation of the Convention in the United States.⁶⁶

A parent seeking the return of a child abducted to the United States (the left-behind parent) may file a petition pursuant to both the Convention and the enforcement provisions of ICARA in either state or federal court.⁶⁷ The left-behind parent must satisfy the elements of a *prima facie* case as set out in Article 3 of the Convention by proving that the child was wrongfully removed from the child's habitual residence in violation of a valid custody order issued in a Contracting State.⁶⁸ Importantly, a hearing conducted pursuant to the Convention "is not meant . . . to inquire into the merits of any custody dispute underlying the petition for return."⁶⁹ Instead, the sole purpose of the hearing is to determine in which jurisdiction the parents must settle their custody dispute.⁷⁰ Neither ICARA nor the Convention vests judicial or administrative authorities with the power to resolve an underlying custody dispute.⁷¹ In fact, each document states explicitly that it does not confer such power.⁷² Instead, the Convention provides a single remedy, set out in Article 12: "the return of the child forthwith."⁷³

The return remedy, however, is not absolute. The Convention provides several defenses, each of which was intended to be construed "narrowly."⁷⁴ Article 13, for example, states that a

66. *Hague Convention*, *supra* note 46, arts. 6, 7 (providing that each Contracting State shall establish a "Central Authority" to ensure compliance with the Convention).

67. 42 U.S.C. § 11603(b) (2013).

68. *Hague Convention*, *supra* note 46, art. 3a; *see Asvesta v. Petroutsas*, 580 F.3d 1000, 1003 (9th Cir. 2009); *Friedrich v. Friedrich*, 78 F.3d 1060, 1064 (6th Cir. 1996) [hereinafter *Friedrich II*].

69. *Duarte v. Bardales*, 526 F.3d 563, 569 (9th Cir. 2008) (internal citation and quotation marks omitted).

70. *See* 42 U.S.C. § 11601(b)(4) (2013); *Barzilay v. Barzilay*, 536 F.3d 844, 847 (8th Cir. 2008); HAGUE INTERNATIONAL CHILD ABDUCTION CONVENTION LEGAL ANALYSIS, 51 Fed. Reg. 10494, 10511 (Mar. 26, 1986) [hereinafter *State Department Analysis*].

71. 42 U.S.C. § 11601(b)(4); *Hague Convention*, *supra* note 46, art. 19.

72. 42 U.S.C. § 11601(b)(4) ("The Convention and this chapter empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims."); *Hague Convention*, *supra* note 46, art. 19 ("A decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue.")

73. *Hague Convention*, *supra* note 46, art. 12.

74. *See e.g.*, *Danaipour v. McLarey*, 286 F.3d 1, 14 (1st Cir. 2002)

court applying the Convention “is not bound to order the return of the child” if the person opposing return demonstrates that “there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.”⁷⁵ A respondent may also argue under Article 13 that the left-behind parent was failing to exercise his custody rights at the time of removal; the left-behind parent consented to or acquiesced in the removal; or the child objects to being returned and “has attained an age and degree of maturity at which it is appropriate to take account of its views.”⁷⁶ Article 20 provides an additional defense, stating that “return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.”⁷⁷

If more than one year has passed since the date of abduction, a respondent may pursue an additional defense pursuant to the second sentence of Article 12,⁷⁸ as Linda Yaman did.⁷⁹ That provision states that “even where the proceedings have been

(“Exceptions to the general rule of expedient return . . . are to be construed narrowly.”); *Asvesta v. Petroutsas*, 580 F.3d 1000, 1004 (9th Cir. 2009) (citing the *Pérez-Vera Report* and the State Department’s interpretation of the Convention *infra*) (“Although these exceptions or defenses are available, numerous interpretations of the Convention caution that courts must narrowly interpret the exceptions lest they swallow the rule of return.”). In her report, Convention Reporter Elisa Pérez-Vera observed that “a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child’s residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.” Elisa Pérez-Vera, EXPLANATORY REPORT ON THE 1980 HAGUE CHILD ABDUCTION CONVENTION 435, ¶ 34 (1982), available at <http://www.hcch.net/upload/expl28.pdf> [hereinafter *Pérez-Vera Report*]. Expressing similar concerns, the U.S. State Department has noted that, “[i]n drafting Articles 13 and 20 [of the Report], the representatives of countries participating in negotiations on the Convention were aware that any exceptions had to be drawn very narrowly lest their application undermine the express purposes of the Convention—to effect the prompt return of abducted children.” *State Department Analysis*, *supra* note 70, at 10509.

75. *Hague Convention*, *supra* note 57, art. 13(b).

76. *Id.* at art. 13.

77. *Id.* at art. 20.

78. *Id.* at art. 12.

79. *Yaman v. Yaman*, 730 F.3d 1, 3 (1st Cir. 2013).

commenced after the expiration of the one year referred to in the preceding paragraph, [the judicial or administrative authority] shall also order the return of the child, *unless it is demonstrated that the child is now settled in its new environment.*⁸⁰ Thus, if more than one year has passed since the date of abduction, the abducting parent may argue that the child should not be returned because the child is “now settled” in the country to which the child was abducted.

The drafters debated extensively the length of time during which the return remedy in Article 12 should be readily available. They realized that the time period would have to address a number of competing interests, including protecting a child’s interest in not being repeatedly uprooted, advancing the Convention’s goal of deterring child abduction and concealment, and enforcing valid custody orders.⁸¹ The drafters also wanted to ensure that hearings pursuant to the Hague Convention could be conducted quickly.⁸²

The drafters considered a number of ways to balance these interests.⁸³ One proposal was to include two time periods: a shorter one for cases in which the child’s location was known, and a longer one for cases in which the child had been concealed.⁸⁴ Another proposal was to toll the beginning of the time period within which a child must be returned “forthwith” until the child was discovered or should have been discovered.⁸⁵ The drafters were concerned, however, that a discovery rule of any sort would raise complicated “proof problems” that might prolong a hearing.⁸⁶ Thus, the drafters also considered a single time period and debated the appropriate length; they discussed a six-month time period,⁸⁷ an eighteen-month time period,⁸⁸ and a one-year time

80. *Hague Convention*, *supra* note 46, art. 12 (emphasis added).

81. HCCH, *Child Abduction*, in ACTES ET DOCUMENTS DE LA QUATORZIÈME SESSION 168 (1980) [hereinafter *Preparatory Work*].

82. *Pérez-Vera Report*, *supra* note 74, at 465.

83. *See Yaman*, 730 F.3d at 12; *Lozano v. Alvarez*, 697 F.3d 41, 53–54 (2d Cir. 2012).

84. *Preparatory Work*, *supra* note 81.

85. *Id.* at 231–32.

86. *See, e.g., Preparatory Work*, *supra* note 81 at 291; *Pérez-Vera Report*, *supra* note 74, at 459.

87. *Preparatory Work*, *supra* note 81, at 292.

88. *Id.* at 216, 315.

period with a mechanism to revise the time period in light of the lessons learned as countries implemented the Convention over subsequent years.⁸⁹ The drafters eventually agreed to include a single time period⁹⁰ of one year,⁹¹ though the United States remained concerned that such a short period of time “may benefit those abductors who have the financial means and the aid of relatives or friends to arrange for life underground.”⁹²

The Article 12 settled defense was central to the outcome of the *Yaman* case. Ozgur filed his petition in June 2012, almost five years after August 2007, when Linda fled with the children in violation of a valid Turkish custody order.⁹³ Linda conceded that Ozgur had satisfied the elements of a *prima facie* case.⁹⁴ Thus, the hearing focused on the defenses Linda raised, especially the settled defense and whether the one-year period in Article 12 may be tolled due to concealment.⁹⁵ Ozgur also argued that, even if the court permitted Linda to raise the Article 12 defense and concluded that the girls were settled in New Hampshire, the court retained “equitable discretion” to return the children, and should exercise that discretion in this case and return the girls.⁹⁶

The concepts of equitable discretion and equitable tolling are closely related. So, before addressing equitable discretion—the heart of this Article—it is necessary to explain the circuit split related to equitable tolling of the one-year period in Article 12.⁹⁷

89. *Id.* at 292.

90. *Id.*

91. *Id.* at 292–93.

92. *Id.* at 242 (proposing that Article 12 include two time periods, a one-year time period for cases in which the child was not concealed, and a two-year time limit for cases of concealment).

93. *See Yaman v. Yaman*, 919 F. Supp. 2d 189, 191 (D.N.H. 2013).

94. *See* Transcript of Bench Trial at 3–4, 68, *Yaman*, 919 F. Supp. 2d 189, ECF No. 173.

95. *See* Transcript of Bench Trial at 2–9, *Yaman*, 919 F. Supp. 2d 189, ECF No. 165. Linda also argued pursuant to Article 13 that, in light of Ozgur’s alleged sexual abuse of the older daughter, the girls faced a grave risk of harm if they were returned to Turkey. *Id.* The court concluded that Linda failed to prove the defense by “clear and convincing evidence.” *Id.* This Article focuses solely on the Article 12 settled defense, though the authors note that Article 13 also presented contentious issues for the parties in the *Yaman* case.

96. *Id.* at 12; Petitioner’s Supplemental Memorandum in Support of Motion to Preclude Respondent from Presenting the Affirmative Defense of “Settledness” at 15, *Yaman*, 919 F. Supp. 2d 189, ECF No. 143.

97. The Supreme Court will decide during the October 2013 term

B. *Article 12 and the “Settled” Defense: A closer look at the circuit split related to equitable tolling*

The outcome of the *Yaman* trial hinged in significant part on the court’s interpretation of Article 12, specifically, whether the start of the one-year period within which a child must be returned “forthwith” could be equitably tolled to preclude an abducting parent who concealed her child from raising the settled defense. Article 12 states:

Where a child has been wrongfully removed or retained in terms of Article 3 and . . . a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith . . . The judicial or administrative authority, even where the proceedings have commenced after the expiration of the period of one year[,] . . . shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.⁹⁸

Five circuit courts—most recently, the First Circuit in *Yaman*—have considered whether the one-year time period set out in Article 12 may be equitably tolled in cases in which the abducting parent has concealed the child: the Fifth,⁹⁹ Ninth,¹⁰⁰ and Eleventh¹⁰¹ Circuits have concluded that the Convention permits equitable tolling, and the First¹⁰² and Second¹⁰³ Circuits have held that it does not. The Supreme Court granted certiorari in *Lozano v. Alvarez*, the Second Circuit case, and will resolve the circuit split this term.¹⁰⁴

whether Article 12 of the Hague Convention permits equitable tolling. *See Lozano*, 697 F.3d 41, *cert. granted*, 133 S. Ct. 2851 (U.S. June 24, 2013) (No. 12–820).

98. *Hague Convention*, *supra* note 46, art. 12.

99. *Dietz v. Dietz*, 349 Fed. Appx. 930, 933–35 (5th Cir. 2009).

100. *Duarte v. Bardales*, 526 F.3d 563, 565 (9th Cir. 2008).

101. *Furnes v. Reeves*, 362 F.3d 702, 723 (11th Cir. 2004).

102. *Yaman v. Yaman*, 730 F.3d 1, at 4 (1st Cir. 2013).

103. *Lozano v. Alvarez*, 697 F.3d 41, 45 (2d Cir. 2012).

104. *See id.*, *cert. granted*, 133 S. Ct. 2851 (U.S. June 24, 2013) (No. 12–820).

1. Decisions by the Fifth, Ninth, and Eleventh Circuits

Treating the one-year period in Article 12 as a statute of limitations, the Eleventh Circuit stated in *Furnes v. Reeves* “that equitable tolling may apply to ICARA petitions for the return of a child where the parent removing the child has secreted the child from the parent seeking return.”¹⁰⁵ The court cited Supreme Court precedent on statutes of limitations, stating that “[i]t is hornbook law that limitations periods are customarily subject to equitable tolling, unless tolling would be inconsistent with the text of the relevant statute.”¹⁰⁶ There were numerous deficiencies in the court’s analysis. For example, it failed to address on what basis it concluded that the one-year period was a statute of limitations subject to equitable tolling,¹⁰⁷ Article 12’s textual silence on equitable tolling,¹⁰⁸ or the drafting history of the Convention.¹⁰⁹

Despite these defects, the Eleventh Circuit’s reasoning gained traction when the Ninth Circuit examined the issue and based its analysis largely on *Furnes*.¹¹⁰ The Ninth Circuit concluded in *Duarte* that “equitable principles may be applied to toll the one-year period when circumstances suggest that the abducting parent took steps to conceal the whereabouts of the child from the parent seeking return and such concealment delayed the filing of the petition for return.”¹¹¹ The court acknowledged concerns about uprooting a settled child notwithstanding the parent’s concealment¹¹² but stated that “we must give significant consideration to the overarching intention of the Convention” to deter child abduction.¹¹³ It concluded that “awarding an abducting parent an affirmative defense if that parent hides the child . . . would not only encourage child abductions, but also

105. 362 F.3d at 723.

106. *Id.*

107. *See Lozano*, 697 F.3d at 52 (explaining why the one-year period in Article 12 is not a statute of limitations).

108. *See Yaman v. Yaman*, 730 F.3d 1, 12 (1st Cir. 2013) (“The text of Article 12 does not address equitable tolling explicitly.”).

109. *See id.*; *see also Lozano*, 697 F.3d at 52–54.

110. *See Duarte v. Bardales*, 526 F.3d 563, 570 (9th Cir. 2008).

111. *Id.*

112. *Id.*

113. *Id.*

encourage hiding the child from the parent seeking return.”¹¹⁴ Thus, “consistent with the purpose of the Convention to deter child abduction,” the Ninth Circuit permitted equitable tolling of the one-year period in Article 12.¹¹⁵ In *Dietz v. Dietz*, the Fifth Circuit also held that a court may equitably toll the one-year period in Article 12.¹¹⁶ This case, however, “adds nothing to the debate because it address[ed] the issue in a summary fashion.”¹¹⁷

2. *Decisions by the First and Second Circuits*

The First and Second Circuits reached the opposite conclusion of that reached by the Fifth, Ninth, and Eleventh Circuits.¹¹⁸ In *Lozano v. Alvarez*, the Second Circuit focused first on the text of the Convention, noting that “[n]either Article 12 of the Hague Convention nor its implementing legislation, ICARA, explicitly permit[s] or prohibit[s] tolling of the one-year period before a parent can raise the now settled defense.”¹¹⁹ The *Lozano* court next explained that the one-year period should not be treated as a statute of limitations because “the settled defense merely permits courts to consider the interests of a child who has been in a new environment for more than a year before ordering that child to be returned to her country of habitual residency,”¹²⁰ in contrast to a statute of limitations after the expiration of which the ability to file is lost. In other words, regardless of how much time has passed, Article 12 does not prohibit a left-behind parent from filing a Hague petition.

Turning next to the drafting history of the Convention, the Second Circuit found support for its position in the history and purpose of Article 12. The court concluded that equitable tolling would be inconsistent with the treaty’s purpose.¹²¹ It closely

114. *Id.*

115. *Id.*

116. 349 Fed. Appx. 930, 931 (5th Cir. 2009).

117. *Yaman v. Yaman*, 919 F. Supp. 2d 189,196 (D.N.H. 2013).; *see Dietz*, 349 Fed. Appx. at 933 (stating simply and without further analysis that “[b]oth ICARA and the Convention make no mention of equitable tolling, yet it is well established in caselaw that it applies.”).

118. *See Yaman v. Yaman*, 730 F.3d 1, 4 (1st Cir. 2013); *Lozano v. Alvarez*, 697 F.3d 41, 45 (2d Cir. 2012).

119. *Lozano*, 697 F.3d at 51.

120. *Id.* at 52.

121. *Id.*

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analyzed the report by Hague Conference Reporter Elisa Pérez-Vera, in which Pérez-Vera stated that “a concern for children’s ‘true interests’ was the primary reason the signatory states ‘drew up the Convention.’”¹²² Based on the Pérez-Vera Report, the court observed that “the Convention is not intended to promote the return of a child to his or her country of habitual residency irrespective of that child’s best interests; rather, the Convention embodies the judgment that *in most instances*, a child’s welfare is best served by a prompt return to that country.”¹²³ In assessing the drafters’ intent with respect to equitable tolling, the court noted the drafters’ consideration and ultimate rejection of alternative proposals for shorter and longer time periods, and for two time periods: one for cases in which the child was not concealed, and a second, longer time period for cases in which the child was concealed.¹²⁴

The *Lozano* court explained that the drafters explicitly acknowledged the problem of concealment and that they viewed a single, one-year time period as the “least bad” means of reconciling the child’s interest in stability with the goal of deterring child abductions.¹²⁵ The Second Circuit concluded that “the Convention’s drafting history strongly supports [the] position that the one-year period in Article 12 was designed to allow courts to take into account a child’s interest in remaining in the country to which she has been abducted after a certain amount of time has passed.”¹²⁶ Equitable tolling, the court believed, would undermine that purpose.¹²⁷

122. *Id.* (quoting *Pérez-Vera Report*, *supra* note 74, at 431, ¶¶ 23–24).

123. *Id.* at 53 (emphasis in the original).

124. *Id.*

125. *Id.*

126. *Id.* at 54.

127. *Id.* The court also noted that permitting equitable tolling in cases of concealment would implicate “the inherent difficulty in having to prove the existence of those problems which can surround the locating of [a] child.” *Id.* In other words, permitting equitable tolling would introduce proof problems related to whether, how, and for how long the abducting parent concealed the child, and also related to the left-behind parent’s efforts to locate the child. These evidentiary issues could prolong what is supposed to be a swift, straight-forward hearing to effectuate or deny the return of an abducted child. This is, in fact, exactly what happened in the *Yaman* case when the parties introduced evidence relating to Linda’s efforts to conceal the children Ozgur’s efforts to locate them. *See* Transcript of Bench Trial at 116-19, *Yaman*, 919 F. Supp. 2d 189, ECF No. 173; *see also* Transcript of Bench Trial

The Second Circuit next addressed the contrary decisions from the Fifth, Ninth, and Eleventh Circuits.¹²⁸ It explained that the Eleventh Circuit permitted equitable tolling for two reasons: first, to prevent rewarding a parent's misconduct with an affirmative defense and; second, because it believed that equitable tolling should be read into every statute of limitations unless Congress stated otherwise.¹²⁹ Finding both of these justifications for equitable tolling unpersuasive, the Second Circuit stated that the second argument failed because, "[u]nlike a statute of limitations," which would prohibit a parent from filing a return petition after one year had expired, the well settled defense "merely *permits* courts to consider the interests of a child" before ordering the child's return.¹³⁰ The Eleventh Circuit's first justification failed, the Second Circuit explained, because "the Convention expressly provided a mechanism other than equitable tolling to avoid rewarding a parent's misconduct—[the] discretion to order the return of a child, even when a defense is satisfied."¹³¹ Thus, the availability of equitable discretion to return a settled child, in the Second Circuit's view, constituted a justification for rejecting equitable tolling. The court, however, did not identify the source of a court's equitable discretion to return a settled child or elaborate on what factors a court should consider in exercising equitable discretion to return a settled child.

The First Circuit's decision in *Yaman* tracked the Second Circuit's equitable tolling analysis, first addressing the text of the Convention and then turning to its drafting history, Executive Branch interpretations of Article 12, decisions of courts of other signatory nations, and other federal circuit courts' opinions.¹³² The First Circuit joined the Second Circuit in concluding that the

at 3-16, 126-33, 139-40, *Yaman*, 919 F. Supp. 2d 189, ECF No. 170; Transcript of Bench Trial at 53-73, 108-32, *Yaman*, 919 F. Supp. 2d 189, ECF No. 174.

128. *Id.* at 55.

129. *Id.* at 55.

130. *Id.* at 52 (emphasis added).

131. *Id.* (quoting *Blondin v. Dubois*, 189 F.3d 240, 246 n.4 (2d Cir. 1999) ("[E]ven where the grounds for one of the 'narrow' exceptions ha[s] been established, the district court is not necessarily bound to allow the child to remain with the abducting parent.")).

132. *See Yaman v. Yaman*, 730 F.3d 1, 2-16 (1st Cir. 2013).

one-year time period in Article 12 could not be equitably tolled.¹³³ Echoing the Second Circuit, it asserted that, “[e]ven if a child is found ‘now settled,’ an authority retains discretion to weigh against that finding of settledness considerations such as concealment before deciding whether to order return.”¹³⁴ It concluded that, although the time period may not be equitably tolled, principles of equity come into play because the language of Article 12 itself provides “a mechanism”—namely, equitable discretion—“to prevent misconduct from being rewarded.”¹³⁵ The First Circuit then provided a thorough explanation of its conclusion that courts have equitable discretion to return a settled child.¹³⁶

The First Circuit is the only circuit court to date to provide an in-depth analysis of the issues relating to equitable discretion. As such, the *Yaman* case provides a useful framework for the next section of this Article, which will use the *Yaman* opinion as a starting point for explaining why, contrary to the First Circuit’s conclusion, both the Convention and ICARA prohibit a court from exercising equitable discretion to return a child deemed “settled” in his new environment.

III. INTERPRETING THE HAGUE CONVENTION: WHY THE CONVENTION PROHIBITS COURTS FROM EXERCISING EQUITABLE DISCRETION TO RETURN A SETTLED CHILD

This section argues that the First Circuit erred in concluding that a court may return a settled child pursuant to Article 12 of the Convention. It argues that the First Circuit’s textual analysis reflects a misreading of the Convention’s language; that the court failed to properly interpret the drafting history of the Convention; that the court did not analyze the legislative history of ICARA and instead made incorrect assumptions about congressional intent; and, finally, that the court misapprehended the thrust of decisions from sister circuits and foreign courts, which do not provide as strong support for a finding of equitable discretion as the First Circuit suggested.

133. *Id.* at 16.

134. *Id.* at 13.

135. *Id.*

136. *See id.* at 12–22. This analysis is likely dicta, since it was not essential to the court’s decision. *See id.*

A. Textual Analysis

“The interpretation of a treaty, like the interpretation of a statute, begins with its text.”¹³⁷ Accordingly, in addressing whether the district court in *Yaman* had equitable discretion to return a settled child, the First Circuit started with the text of Article 12.¹³⁸ The court found textual support for equitable discretion, observing that “[t]o say that an authority ‘shall’ order return ‘unless’ a child is ‘now settled’ is not to say that an authority is prohibited from ordering the child returned if settledness is found.”¹³⁹ It acknowledged, but dismissed, the traditional principle of statutory construction—on which the district court relied—that Congress’s decision to omit a word or phrase from one section of a statute, but to include that same word or phrase in a closely related section of the same statute, must be deemed purposeful.¹⁴⁰ Applying that principle, the district court had reasoned that, if the drafters intended to grant discretion to reject a properly established settled defense and return a child anyway, they clearly knew how to do so, as evidenced by express grants of discretion to reject properly proved defenses under Articles 13 and 20.¹⁴¹

The First Circuit then directly compared the text of Article 12 with the text of Articles 13 and 20,¹⁴² and concluded that a grant of discretion to refuse the return of a settled child made sense in the context of the Convention as a whole, stating, “[i]t is consistent with the Convention’s overall structure that Article 12 leaves it within a court’s discretion whether to order the return of a ‘now settled’ child.”¹⁴³ The court noted that the Convention included “express requirements to order return” that corresponded to the “express reservations of discretion” contained “elsewhere in the Convention.”¹⁴⁴ It then argued by extension that because “the

137. *Abbott v. Abbott*, 560 U.S. 1, 10 (2010) (quoting *Medillín v. Texas*, 552 U.S. 491, 506 (2008)).

138. *Yaman*, 730 F.3d at 16.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 13.

143. *Id.* at 17.

144. *Id.* at 16–17 (“As we read them, Articles 13 and 20 contain express reservations of discretion to refuse to order return so as to qualify the express

Convention contains no express requirement to refuse to order the return of a child 'now settled,' there is no need to expressly reserve discretion so as to qualify any such requirement."¹⁴⁵

The First Circuit's analysis is flawed in several respects. The Convention contains only one "express requirement[] to order return": the return remedy expressed in sentence one of Article 12. That single express return requirement is qualified by defenses in Articles 13, 20, and 12.¹⁴⁶ While Articles 13 and 20 contain discretionary language,¹⁴⁷ Article 12 does not.¹⁴⁸ The First Circuit's explanation for why Articles 13 and 20 contain discretionary language, but Article 12 does not, is predicated on the court's incorrect assumption that the Article 13 and 20 defenses apply to separate return remedies. On the contrary, the defenses in Articles 12, 13, and 20 all qualify the same return remedy: the one set out in Article 12. Although the First Circuit is undoubtedly correct that "unless" does not necessarily mean "shall not," it is equally true that, when compared to the clear language of Articles 13 and 20, the absence of a prohibition on returning a settled child cannot be understood as a grant of equitable discretion to do so. A more straightforward reading of Article 12 suggests that the "unless" construction was intended as a prohibition on returning a settled child.¹⁴⁹

requirements to order return contained elsewhere in the Convention.").

145. *Id.* at 17 (emphasis added).

146. See *Pérez-Vera Report*, *supra* note 74, at 458 (characterizing the settled defense as a "condition[]" that attaches to the return remedy in Article 12); *id.* at 459 (explaining that the obligation to return a child forthwith "disappears whenever it can be shown that 'the child is now settled in its environment.'").

147. Article 13 states "the judicial or administration authority . . . is not bound to order the return of the child" if returning the child would expose the child to "a grave risk . . . [of] physical or psychological harm or otherwise place the child in an intolerable situation." *Hague Convention*, *supra* note 46, art. 13 (emphasis added). The language in Article 20 is similar: it states that "[t]he return of the child . . . may be refused" if return would violate principles of "human rights and fundamental freedoms." *Id.* at art. 20 (emphasis added).

148. Article 12 states that, after one year, a child shall be returned *unless* "the child is now settled in new environment." *Id.* at art. 12.

149. Cf. *Edwards v. Monumental*, 812 F. Supp. 2d 1263, 1273 (D. Kan. 2011) (interpreting the phrase in an insurance policy, "We will not pay a benefit for a Loss which is caused by, results from, or contributed to by taking any drug, medication, narcotic, or hallucinogen, unless prescribed by a Physician," to mean that an individual was precluded from recovering under

At least two Supreme Court Justices—preliminarily—read Article 12 not as a grant of equitable discretion, but as requiring a court to refuse to order the return of a child deemed settled. Justices Antonin Scalia and Elena Kagan explained their interpretation of the text of Article 12 during the *Lozano* oral arguments on December 11, 2013. Both Justices indicated that they viewed the second sentence in Article 12 as an express prohibition on return when a child is deemed settled.¹⁵⁰ Quoting from the Convention, Scalia stated that he assumed the phrase “shall order the return unless it is demonstrated that the child is now settled” in sentence two of Article 12 means that, if the child is settled, “you shall not order the return.”¹⁵¹ Justice Kagan agreed, stating that she interpreted Article 12 as follows: “[t]he first clause says ‘shall’ and the second clause says ‘shall not.’”¹⁵² She conceded that “there is an alternate reading where the first clause says ‘shall’ and the second clause essentially says ‘may or may not at your discretion,’” but noted that such an interpretation “would open up a big discretionary hole.”¹⁵³ The best reading of Article 12 is as a prohibition on the return of a settled child. Even assuming the text is ambiguous, however, the Convention’s drafting history contravenes the First Circuit’s interpretation.

B. *The Convention’s Drafting History*

When the text of a treaty is ambiguous, a court is entitled to invoke traditional rules of statutory construction.¹⁵⁴ It “may look

the plan for harm caused by substances taken “without the advice of a physician” but not for harm caused by “the taking of a substance under the advi[c]e of a physician”); *Hovila v. Tween Brands, Inc.*, 2010 WL 1433417 (W.D. Wash. Apr. 7, 2010) (unpublished) (stating that the “common definition of ‘unless’ required the court to conclude that the two categories following the word “unless” in the Telephone Consumer Protection Act “describe exceptions to the general rule requiring prior express consent before placing an artificial or prerecorded call.”).

150. See Transcript of Oral Argument at 37–38, *Lozano v. Alvarez*, 697 F.3d 41 (2d Cir. 2012), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-820_5368.pdf.

151. *Id.*

152. *Id.*

153. *Id.* at 38.

154. *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (citations and quotations omitted).

beyond the written words to the history of the treaty, the negotiations, and the practical construction adopted by the parties” to determine the meaning of the treaty.¹⁵⁵ An examination of the drafting history of the Convention demonstrates that the Convention prohibits courts and other adjudicating authorities from exercising equitable discretion to return a settled child.

1. *Analysis of Articles 12 and 18*

The drafting history of Articles 12 and 18 supports the conclusion that there is no residual discretion to return a settled child under Article 12. The Convention’s primary objective is to serve the best interests of the child,¹⁵⁶ and the drafters believed emphatically that, in the usual case, enforcement of a foreign custody order and deterrence of child abduction are in a child’s best interest.¹⁵⁷ At the same time, the drafters did not want the Convention to become a vehicle for reexamining a foreign court’s determination of a child’s best interests.¹⁵⁸ As the Convention

155. *Id.*

156. *See id.* at 172 (“Above all, it is obvious that the efforts made by the Hague Conference with a view to combat the international abduction of children are inspired by a desire to protect the interests of such children.”).

157. *Id.* (“Now, among the most objective aspects of that general *interest* of the child, there is the right not to be removed or retained in the name of a more or less questionable right over his person.”)(emphasis added).

158. *See, e.g., Summary of findings on a Questionnaire studied by International Social Service, Preliminary Document No 3 of February 1979* [ISS Summary], in *Preparatory Work, supra* note 81, at 182 (noting that though many countries apply the legal standard of “the best interests of the child” in making custody decisions, “it has appeared . . . that ‘the best interests of the child’ are valued differently in the various cultures. In some countries the religious education plays an important part . . . Furthermore, it is not clear whether the ‘interests’ of the child to be served are those of the immediate aftermath of the decision, of the adolescence of the child, of young adulthood, maturity, senescence or old age!”); *Report of the Special Commission by Elisa Pérez-Vera, in Preparatory Work, supra* note 81, at 178 (“As to the import of the return which is favoured by the Convention, we should point out that it does not settle, or seek to settle, the question of custodial rights.”); *Report of the Special Commission by Elisa Pérez-Vera, in Preparatory Work, supra* note 81, at 182 (“[T]he domestic jurisdictions have often in the past granted the custody in litigation to the person who has unlawfully removed or retained the child, and this in the name of the child’s interest. Often too, this decision seemed the best one to take, but we cannot ignore the fact that when internal authorities think in such a way they run the risk of expressing a particularism, be it cultural, social or other, of a

Reporter explained, the “best interests of the child” standard is so vague that it “resemble[s] more closely a sociological paradigm than a concrete juridical standard.”¹⁵⁹ Aware that making a custody determination in the best interests of the child would require a court to “delv[e] into the assumptions concerning the *ultimate* interests of a child which are derived from the moral framework of a particular culture,”¹⁶⁰ the drafters included a provision in the treaty explicitly forbidding a state from deciding the merits of a custody decision until a petition for return has been denied.¹⁶¹ A decision pursuant to the Convention, therefore, does not constitute a decision on the merits of a custody dispute.

Nothing in Article 12 or 18 undercuts the drafters’ intention to proscribe signatories from addressing the merits of a custody dispute pursuant to the Convention. Pérez-Vera noted that the decision on the appropriate time period in Article 12 “during which the authorities concerned must order the return of the child forthwith”¹⁶² was important because, to the extent that the return of an abducted child is presumed to be in the child’s best interest, “it is clear that after a child has become settled in its new environment, its return should take place only after an examination of the merits of the custody rights exercised over it—something which is outside the scope of the Convention.”¹⁶³ Pérez-Vera stated in her report that Articles 12 and 18 together address the “[d]uty to return the child” and “can be examined together since they complement each other.”¹⁶⁴ According to Pérez-Vera, Article 12 “highlights two cases”: (1) the duty to return where a petition has been filed within one year of abduction; and (2) “the conditions which attach to this duty where an application is submitted after the aforementioned time-limit.”¹⁶⁵

certain national community, thus, really, making a very subjective judgment on the other national community from which the child has been pulled.”)

159. *Pérez-Vera Report*, *supra* note 74, at 431, ¶ 21.

160. *Id.* (emphasis added).

161. *Hague Convention*, *supra* note 46, at art. 16. ICARA also forbids a United States court from determining the merits of any underlying custody dispute. *See* 42 U.S.C. § 11603 (2013).

162. *Pérez-Vera Report*, *supra* note 74, at 458, ¶ 107

163. *Id.*

164. *Id.* at 458, ¶ 106.

165. *Id.*

Rather than contradict the Convention's prohibition on merits decisions, Article 18 supports it. It states, "[t]he provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time,"¹⁶⁶ and is simply a reminder that signatories may apply their own domestic laws to reevaluate the merits of a custody dispute after finding that a child is settled. Some drafters felt that Article 18 was unnecessary; they thought it obvious that the Convention did not prevent states from applying their own domestic law. They considered eliminating it, noting that "there is always, even in the absence of a convention, the possibility of prescribing the child's return, after the affair has been examined on its merits."¹⁶⁷ In discussing Article 18, Pérez-Vera noted specifically that provisions of domestic law may be invoked "particularly in the situations envisaged in the second paragraph of article 12" where the return order is refused because the child is settled in its new environment.¹⁶⁸ Importantly, the United States' delegate to the conference understood Article 18 "as a facultative provision,"¹⁶⁹ intended only to make clear that the remedies provided by the Convention were not exclusive.

Article 18, thus, did not confer the power to return a child after the expiration of the one-year time period in Article 12.¹⁷⁰ Nor did it leave a "residual power in judges after the expiration of the time-limits in Article [12]."¹⁷¹ It "merely implied [that authorities] could use whatever proceedings or powers they possessed in domestic law,"¹⁷² especially in cases where a child had been deemed "settled."¹⁷³ Article 18 "underlines the non-exhaustive and complementary nature of the Convention" and "authorizes the competent authorities to order the return of the child by invoking other provisions more favourable to the attainment of this end."¹⁷⁴ Those "other provisions," must be

166. *Hague Convention*, *supra* note 46, art. 18.

167. *Preparatory Work*, *supra* note 81, at 202, ¶ 92.

168. *Pérez-Vera Report*, *supra* note 74, at 460, ¶ 112.

169. *Preparatory Work*, *supra* note 81, at 295.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Pérez-Vera Report*, *supra* note 74, at 460, ¶ 112.

174. *Id.* The text of ICARA reinforces this understanding. ICARA states: "Remedies under the Convention [are] not exclusive. The remedies

found—if at all—in domestic law and not in the text of the Convention. When read in the context of the Convention’s drafting history, it is clear that neither Article 12 nor Article 18 supports the conclusion that a court has equitable discretion pursuant to the Convention to return a settled child. Articles 13 and 20 reinforce this conclusion.

2. *Analysis of Articles 13 and 20*

The drafting history of Articles 13 and 20 further illustrates that Article 12 does not grant a court equitable discretion to return a settled child. Just as the Pérez-Vera report considered Articles 12 and 18 together,¹⁷⁵ it also considered Articles 13 and 20 together, captioning the section discussing them: “[p]ossible exceptions to the return of the child.”¹⁷⁶ This organization suggests that the drafters understood the Article 12 settled defense as different in kind from the defenses available under Articles 13 and 20, though they all provided exceptions to the same return remedy. Pérez-Vera noted that “the exceptions in these two articles do not apply automatically, in that they do not invariably result in the child’s retention.”¹⁷⁷ Rather, “the very nature of these exceptions gives judges a discretion—and does not impose upon them a duty—to refuse to return a child in certain circumstances.”¹⁷⁸ Perez-Vera made no similar observation regarding the settled defense in Article 12.

In the context of the Convention drafters’ goals and concerns, it makes sense that the drafters granted authorities discretion to return a child in the face of a successful Article 13 or 20 defense, but not after a determination that a child is settled; these defenses serve different purposes. The defenses available in Articles 13 and 20, and the discretion granted to a court to reject them, reflect the “fragile compromise[s] reached during the deliberations of the Special Commission.”¹⁷⁹ As to Article 13, it “was not intended to

established by the Convention and this chapter shall be in addition to remedies available under other laws or international agreements.” 42 U.S.C. § 11603(h) (2013).

175. *Pérez-Vera Report*, *supra* note 74, at 460 ¶ 106

176. *Id.* at 460 para. 3.

177. *Pérez-Vera Report*, *supra* note 74, at 460, ¶ 113.

178. *Id.*

179. *Id.* at 460, ¶ 116.

be used by defendants as a vehicle to litigate (or relitigate) the child's best interests."¹⁸⁰ To that end, "[o]nly evidence directly establishing the existence of a grave risk that would expose the child to physical or emotional harm or otherwise place the child in an intolerable situation is material to the court's determination."¹⁸¹ The child's interest in return to his habitual residence gives way only when return would expose the child to "physical or psychological danger" or "an intolerable situation."¹⁸² Article 13, in other words, is not a back-door to a merits hearing on custody rights.

Similarly, the Article 20 defense is to be narrowly construed. It is available only when "the fundamental principles of the requested State . . . do not permit" return.¹⁸³ "[I]t will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles."¹⁸⁴ Rather, for return to be rejected under Article 20, return must be prohibited by the requested states' internal law.¹⁸⁵ This provision "was the result of a compromise between those delegates which favoured, and those which were opposed to, the inclusion of a 'public policy' clause."¹⁸⁶ These defenses threatened to render the Convention a "dead letter"¹⁸⁷ because they implicated judgments about foreign countries' political, cultural, and religious traditions. The drafters accordingly intended them to be narrowly construed; hence, they incorporated grants of discretion to reject a successful defense under either Article.¹⁸⁸

180. *Id.*

181. *Id.*

182. *Pérez-Vera Report, supra* note 74, at 433, ¶ 30.

183. *Id.* at 461–62, ¶ 118.

184. *Id.*

185. *Id.*

[E]ven if its literal meaning is strongly reminiscent of the terminology used in international texts concerning the protection of human rights, this particular rule is not directed at developments which have occurred on the international level, but is concerned only with the principles accepted by the law of the requested state, either through general international and treaty law, or through internal legislation.

Id.

186. *Id.* at 433–34, ¶ 31.

187. *Id.* at 434–35, ¶ 34.

188. *See State Department Analysis, supra* note 70, at 10510.

Article 12, by contrast, does not similarly implicate political or cultural judgments. Rather, it allows for a basically objective examination of a child's status as settled, or not, in his new environment.¹⁸⁹ It permits examination of a child's life in the country to which the child was abducted and allows a court to determine whether the child would be better off—because he is settled where he is—remaining in that country while the parents dispute their custody rights, rather than being forcibly returned to the country from which he was abducted, only to face a heightened possibility of being subsequently returned to the country to which he was abducted and where he is “now settled.” The Article 12 settled defense and the one-year time period reflect the fact that the Convention's overarching goal was to protect a child's best interests, and that the drafters viewed returning a settled child as tantamount to treating the child as a “yo-yo.”¹⁹⁰

The foregoing discussion of the drafting histories of Articles 12, 18, 13, and 20 demonstrates that the discretion available to return a child in the face of a viable Article 13 or Article 20 defense is unavailable under Article 12, and that Article 18 does not represent a grant of equitable discretion to return a settled child. A determination of settledness neither requires an assessment of the child's ultimate best interests nor invites judgment regarding another signatory's social and cultural values; it simply permits the court to examine the child's degree of acclimation to her new environment, and if the child is deemed settled, requires the parties to litigate their custody dispute in the

189. See, e.g., *Lozano v. Alvarez*, 809 F. Supp. 2d 197, 231 (S.D.N.Y. 2011) (“Among the factors that courts have considered in determining whether or not a child has become settled are: ‘the age of the child[;] the stability of the child's residence in the new environment[;] whether the child attends school or day care consistently[;] whether the child attends church [or other religious institutions] regularly[;] the stability of the mother's employment[;] and whether the child has friends and relatives in the new area.’”) (quoting *In re Koc*, 181 F. Supp. 2d 136, 152 (E.D.N.Y. 2001)); *In re Filipeczak*, 513 Fed. Appx. 16, 19 (2d Cir. Feb. 27 2013) (stating that the Article 12 settledness standard “does not call for determining in which location the child is relatively better settled, but rather for determining whether the child has become so settled in a new environment that repatriation would be against the child's best interest”).

190. Transcript of Oral Argument at 55, *Lozano*, 697 F.3d 41, available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-820_5368.pdf.

country where the child presently resides.

C. *Decisions from sister circuits and foreign courts*

1. *Sister circuits*

Both the First and Second Circuits purported to find support for equitable discretion in decisions by sister circuits.¹⁹¹ For example, the First Circuit stated that “[w]hile no other circuit has addressed the ‘now settled’ defense in particular,” “[o]ther circuits agree that the Convention confers upon a federal district court the authority to order return even if a party establishes a ‘now settled’ defense.”¹⁹² Notwithstanding the fact that these two statements are contradictory, neither the First nor the Second Circuit identified cases that are actually relevant to the question of whether courts possess equitable discretion pursuant to Article 12, as opposed to Articles 13 and 20. In fact, all of the cases that the First and Second Circuit cite trace back to the State Department’s legal analysis of Articles 13 *and* 20, and not Article 12. As already discussed, Articles 13 and 20, unlike Article 12, contain discretionary language by their own terms.

The Second Circuit, for example, found support for its finding of equitable discretion in *Blondin v. Dubois*, another Second Circuit decision. *Blondin*, however, involved the Article 13 grave risk defense.¹⁹³ In that case, the court stated that “[e]ven where the grounds for one of the ‘narrow’ exceptions ha[s] been established, the district court is not necessarily bound to allow the child to remain with the abducting parent.”¹⁹⁴ The *Blondin* panel in turn supported its statement with a Sixth Circuit case, *Friedrich v. Friedrich*, which stated in the context of the Article 13

191. *Lozano v. Alvarez*, 697 F.3d 41, 55 (2d Cir. 2012) (citing *Blondin v. Dubois*, 189 F.3d 240, 246 n.4 (2d Cir. 1999) (addressing the Article 13 grave risk defense)); *Yaman v. Yaman*, 730 F.3d 1, 20–21 (1st Cir. 2013) (citing *Feder v. Evans-Feder*, 63 F.3d 217, 226 (3d Cir. 1995) (addressing an Article 13 defense); *Friedrich v. Friedrich*, 78 F.3d 1060, 1067 (6th Cir. 1996) (addressing the discretion available to a court when a party raises an Article 13 or 20 defense); and *Miller v. Miller*, 240 F.3d 392, 402 (4th Cir. 2001) (addressing Article 13)).

192. *Yaman*, 730 F.3d at 20 (“Numerous circuits accept the general proposition that ‘courts retain the discretion to order return even if one of the [Convention’s] exceptions is proven.’”).

193. 189 F.3d at 246 n.4.

194. *Id.*

and 20 defenses that “a federal court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention.”¹⁹⁵

The *Friedrich* court rooted its claim to discretion in a Third Circuit case, *Feder v. Evans-Feder*,¹⁹⁶ in which the Third Circuit stated that “courts retain the discretion to order return even if one of the exceptions is proven.”¹⁹⁷ *Feder*, however, also implicated an Article 13 defense—and not the Article 12 well-settled defense.¹⁹⁸ The *Feder* court properly cited the Federal Register for support, which states that “a finding that one or more of the exceptions provided by Articles 13 and 20 are applicable does not make refusal of a return order mandatory. The courts retain the discretion to order the child returned even if they consider that one or more of the exceptions applies.”¹⁹⁹ While this analysis is undoubtedly true of those two articles, it says nothing about any equitable power that might exist under Article 12 to return a settled child. Instead of demonstrating why any equitable powers might exist under Article 12, these cases merely affirm the existence of discretionary authority pursuant to Articles 13 and 20. After tracing the *Lozano* and *Yaman* courts’ citation trails back to their origins, it is clear that no circuit court opinion can carry the weight the First and Second Circuits ask it to bear.

2. Foreign courts

The opinions of sister signatories are “entitled to great weight,”²⁰⁰ especially where, as here, Congress has expressly affirmed the value of uniform treaty interpretation in the text of the implementing legislation.²⁰¹ Foreign court decisions regarding equitable discretion to return a settled child pursuant to the

195. *Friedrich*, 78 F.3d at 1067 (citing *Feder* 63 F.3d at 226).

196. 63 F.3d at 226.

197. *Id.*

198. *See id.* at 221 (noting that the respondent argued her child faced a “grave risk” of “physical or psychological harm” and an “intolerable situation” if returned to Australia). The First Circuit cited to *Miller v. Miller*, 240 F.3d 392, 402 (4th Cir. 2001), which relied on *Feder* in discussing Article 13. *See also* *Yaman v. Yaman*, 730 F.3d 1, 20 (1st Cir. 2013).

199. *State Department Analysis*, *supra* note 70, at 10509.

200. *Abbott v. Abbott*, 560 U.S. 1, 67 (2010).

201. 42 U.S.C. § 11601(b)(3)(B) (2013).

Convention point in both directions. The *Yaman* court found support in decisions by the Court of Appeals for England and Wales, the Supreme Court of Ireland, and an analysis by the British House of Lords in *In re M*.²⁰² The First Circuit, however, failed to acknowledge the persuasive limits of these cases and ignored decisions from foreign courts that reached the opposite conclusion.

For example, while the British House of Lords in *In re M* ultimately agreed that the Convention does grant equitable discretion to return a settled child, the majority reached its conclusion “not without considerable hesitation.”²⁰³ One judge dissented, stating that “once a child has become settled, precisely because the purpose of the Convention to promote speedy return can no longer be achieved, the Convention ceases to play a role. Then, as article 18 envisages, the court is to have resort to its powers outside the Convention.”²⁰⁴ The *In re M* majority acknowledged this point, stating that “[i]n settlement cases . . . the major objective of the Convention cannot be achieved. . . . It cannot any longer be assumed that that country is the better forum for the resolution of the parental dispute.”²⁰⁵ Even after concluding that it had discretion to return a settled child, however, the House of Lords declined to exercise it, stating that “the policy of the Convention can carry little weight”²⁰⁶ against “powerful child-centric considerations.”²⁰⁷ Because of the father’s delay in filing a Hague petition, the Convention’s “primary objective cannot be fulfilled,” and “[t]hese children should not be made to suffer for the sake of general deterrence of the evil of child abduction world wide.”²⁰⁸

The First Circuit cited a case from the Supreme Court of Ireland, in which that court “arrived at a similar conclusion” and inferred a grant of discretion from Article 18.²⁰⁹ The Irish court,

202. *Yaman*, 730 F.3d at 20.

203. See *In re M*, [2007] UKHL 55, A.C. (H.L.) (appeal taken from Eng.), available at <http://www.publications.parliament.uk/pa/ld200708/ldjudgmt/jd071205/inrem%20-1.htm>.

204. *Id.* at ¶ 7.

205. *Id.* at ¶ 47.

206. *Id.* at ¶ 54.

207. *Id.* at ¶ 53.

208. *Id.* at ¶ 54.

209. *Yaman v. Yaman*, 730 F.3d 1, 20 (1st Cir. 2013) (citing *P. v.*

however, did not undertake an in-depth analysis of the equitable discretion issue and merely stated in a conclusory fashion that “this Court has a discretion as to whether to order [the child’s] return to Spain.”²¹⁰

Further weakening the First Circuit’s efforts to rely on support from the courts of other signatories are decisions from at least three foreign courts that have held that the Convention does not grant discretion to return a settled child. For example, an Australian court has stated:

[W]hile there is some suggestion in some English cases that a finding of “settled in a new environment” still leaves a discretion in the court to order the return of a child, I must respectfully disagree with those views. If those views are simply saying that by operation of common law or local statute law, as distinct from Hague Convention law, the court has jurisdiction to order the return of a child, then there is no dispute between myself and the other learned judges. If, however, it is suggested that within the four walls of the Hague Convention there is room for discretion in respect of a child who has met the criteria of being more than one year away from the wrongful retention or removal and now settled in its new environment, then in my view there is no such room.²¹¹

The court continued by analyzing the function of Article 18:

Art[icle] 18 does no more than indicate that the Convention makes up part of the law of a country exercising Convention powers and that it does not seek to codify the entire law relating to dealings with children about whom it is argued there are jurisdictional questions or about whom it is argued their welfare requires them to be taken to another country. In my view, if I concluded

B., [1999] 4 I.R. 185; [1999] 2 I.L.R.M. 401(Ir.), *available at* <http://www.hcch.net/incadat/fullcase/0391.htm>.

210. P. v. B., [1999] 4 I.R. 185; [1999] 2 I.L.R.M. 401(Ir.), *available at* <http://www.hcch.net/incadat/fullcase/0391.htm>.

211. *State Central Authority v. Ayob*, [1997] 21 Fam LR 567 (Austl.), *available at* <http://www.hcch.net/incadat/fullcase/0232.htm>. The Australian court confirmed this view in 2005. See FAMILY COURT OF AUSTRALIA ANNUAL REPORT 2005–2006 81, *available at* http://www.familycourt.gov.au/wps/wcm/resources/file/eb52a50eee4dced/Part_5_Significant_Judgments_AR06.pdf.

that this was a Hague child who had been wrongfully removed or retained, and that more than one year had passed prior to application being made, and I was satisfied the child was settled in her new environment, that would be the end of the matter under the Hague Convention and under the Regulations.²¹²

Courts in Hong Kong²¹³ and Canada²¹⁴ also have concluded that they lack discretion under the Convention to return a settled child. Although New Zealand courts have concluded that they *do* have discretion to return a settled child, that power arises under the Care of Children Act of 2004—which implemented the Convention in New Zealand—and expressly provides for such discretion.²¹⁵ Thus, at the very least, the First Circuit in *Yaman* overstated the extent to which decisions from foreign courts support its conclusion.

Because the Convention itself did not authorize states parties to return a settled child, a court may take such action only if it otherwise has the power to do so, for example, if its domestic implementing legislation permits it—as in New Zealand.²¹⁶ Thus, the next question this Article addresses is whether ICARA, the Convention’s implementing legislation in the United States, granted courts in the United States jurisdiction to return a settled child.

IV. ICARA DOES NOT EXPAND THE JURISDICTIONAL GRANT IN THE HAGUE CONVENTION.

The First Circuit argued that it did. It stated that a court’s “power to order the return of a settled child” stems from “federal

212. *Id.*

213. See Summary of A.C. v. P.C., *Hague Conference on Private International Law*, INCADAT, available at <http://www.incadat.com/index.cfm?act=search.detail&cid=825&lng=1&sl=1>.

214. See *Droit de la Famille* 2785, No. 500-09-005532-973, [1995] INCADAT 653, (Can. Q.C.C.A.), available at <http://www.incadat.com/index.cfm?act=search.detail&cid=653&lng=1&sl=2>.

215. See Care of Child Act 2004 § 106(1)(a) (N.Z.) (“[T]he court may refuse to make an order . . . for the return of the child if . . . the child is now settled in his or her new environment . . .”).

216. See *id.*

courts' broad equitable powers"²¹⁷ and the federal government's traditional role in "decisions bearing on foreign relations."²¹⁸ The court asserted that ICARA—though not the Convention itself—grants federal courts the power to return an abducted child, so that the court "assume[d]" that, in granting federal courts that power, Congress necessarily intended for federal courts "to bring their full toolkit to the assignment."²¹⁹ It acknowledged the district court's position that "a parent seeking the return of a settled child must go to state court (or convince a federal court to exercise pendant jurisdiction)," but expressed "doubt[] that Congress intended for this traditional separation of authority to apply in cases of international child abduction, which are matters not just of family law but also of international relations."²²⁰ The court, however, did not include any analysis of the legislative history of ICARA, which makes it clear that the jurisdictional grant in ICARA is coextensive with the powers conferred by the Convention and did not grant United States courts additional power to return a settled child.

An understanding of core principles of federal jurisdiction, including especially the so-called "domestic relations exception," is necessary to accurately assess the powers granted by the Hague Convention and ICARA. Federal courts derive their power to hear and decide cases from both the Constitution and Congress.²²¹ Article III, Section 1, of the Constitution states that the federal judicial power lies in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish,"²²² and reflects the "Madisonian Compromise"—which is "the standard view that the Constitution does not require Congress to create or to vest jurisdiction in any federal court except the Supreme Court."²²³ Article III, Section 2 establishes the outer limit of federal court jurisdiction.²²⁴ Congress thus has

217. *Yaman v. Yaman*, 730 F.3d 1, 17 (1st Cir. 2013).

218. *Id.* at 18.

219. *Id.* at 17.

220. *Id.* at 18.

221. *Sheldon v. Sill*, 49 U.S. 441, 442 (1850).

222. U.S. CONST. art. III, § 1.

223. Lumen N. Mulligan, *Did the Madisonian Compromise Survive Detention at Guantanamo?*, 85 N.Y.U.L. REV. 535, 535 (2010).

224. U.S. CONST. art. III, § 2.

plenary power to determine the scope of the federal courts' subject matter jurisdiction²²⁵ within the parameters of Article III, Section 2.²²⁶

Under these principles, “[b]oth the Constitution and an act of Congress must concur in conferring power upon the Circuit Courts,”²²⁷ and Congress may withhold jurisdiction over matters “in the exact degrees and character which to Congress may seem proper for the public good.”²²⁸ Relevant here is the Constitution’s grant of jurisdiction to cases “arising under . . . treaties”²²⁹ such as the Hague Convention, and the jurisdictional grant in ICARA, which provided both state and federal courts with “concurrent original jurisdiction of actions arising under the Convention,”²³⁰ and “empower[ed]” them “to determine only rights under the Convention and not the merits of any underlying child custody claims.”²³¹

The domestic relations exception is a principle of federal court jurisdiction, which states that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of United States.”²³² The domestic relations exception is not rooted in the Constitution.²³³ Instead, it is a “construction of the diversity statute.”²³⁴ Pursuant

225. Dating back at least to 1850, it has been black-letter law that the contingent nature of the lower federal courts implies the power to limit their jurisdiction. See *Sheldon*, 49 U.S. at 446.

226. *Ankenbrandt v. Richards*, 504 U.S. 689, 695 (1992) (stating that Article III “delineates the absolute limits on federal courts’ jurisdiction.”).

227. *Sheldon*, 49 U.S. at 442.

228. *Id.* (holding “the courts cannot exercise jurisdiction in every case to which the judicial power extends, without the intervention of Congress, who are not bound to enlarge the jurisdiction of the Federal courts to every subject which the Constitution might warrant.”).

229. U.S. CONST. art. III, § 2.

230. 42 U.S.C. § 11603(a) (2013).

231. 42 U.S.C. § 11601(b)(4) (2013).

232. *Ex Parte Burrus*, 136 U.S. 586, 593–594 (1890); *Ankenbrandt*, 504 U.S. at 694–95 (holding that the domestic relations exception divests federal courts of authority to hear custody disputes).

233. *Ankenbrandt*, 504 U.S. at 695 (“An examination of Article III, *Barber* itself, and our cases since *Barber* makes clear that the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts.”).

234. *Id.* at 700–01 (noting that “where Congress made substantive changes to the [diversity] statute in other respects . . . we presume, absent any indication that Congress intended to alter this exception . . . that

to it, Congress “divest[ed] the federal courts of power to issue divorce, alimony, and child custody decrees.”²³⁵ The rule is “supported by sound policy considerations,”²³⁶ as state courts have developed substantial expertise in divorce, alimony, and child custody decisions over time.²³⁷

Congress was acutely aware of the challenges associated with drafting implementing legislation for an international treaty that dealt with domestic relations and child custody issues.²³⁸ In considering whether to grant federal courts original concurrent jurisdiction of Hague cases, Congress recognized the unique challenges posed by the United States’ federalist system and debated how best to keep family law matters out of federal court.

Specifically, it considered whether federal courts should have original concurrent jurisdiction to hear Hague cases. The House of Representatives proposed a version of the law that permitted only state courts to hear Hague Convention cases. Supporters of this version looked to the domestic relations exception for support. Kevin R. Jones, representing the Department of Justice, testified

Congress ‘adopt[ed] that interpretation’ when it reenacted the diversity statute.”).

235. *Id.* at 703 (stating that “[g]iven the long passage of time without any expression of congressional dissatisfaction” the court reaffirmed the exception).

236. *Id.* at 704 (holding that the domestic relations exception divests federal courts of authority to hear custody disputes).

237. *Id.*

238. Congress has applied the domestic relations exception in drafting other federal statutes. For example, Special Immigrant Juvenile Status (“SIJS”) is an immigration benefit available to youth under twenty-one years of age who have been “abused, abandoned, and neglected” by one or both of their parents. INA § 101(a)(27)(J); 8 U.S.C. § 1101(a)(27)(J); 8 C.F.R. § 204.11(c) (2011). Though it is “[u]nquestionably” true that federal authority over immigration is “plenary and exclusive,” *Toll v. Moreno*, 458 U.S. 1, 26 (1982), in order for a child to become eligible for SIJS, he “must first seek a predicate or special findings order from a *state* court.” *Special Immigrant Juvenile Status*, VERA INSTITUTE OF JUSTICE 1 (January 2011) (emphasis added). The Violence Against Women Act (“VAWA”) presented similar issues. See WILLIAM H. REHNQUIST, CHIEF JUSTICE’S 1991 YEAR-END REPORT ON THE FEDERAL JUDICIARY 3 (1992) (lamenting that VAWA “would unnecessarily expand the jurisdiction of the federal courts” and “could involve the federal courts in a whole host of domestic relations disputes.”). In light of these concerns, VAWA was drafted to “protect state prerogatives and the federal docket.” Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1315 (1998).

that granting federal courts any role at all in ICARA cases would violate the domestic relations exception and that jurisdiction should be withheld for that reason. He drew an analogy to the Parental Kidnapping Prevention Act of 1980 (“PKPA”), arguing that although legal issues arising under ICARA originate in federal law, the substance of the issues is quintessentially family law, and therefore Hague cases should remain in state courts.²³⁹

The legislative debate also included discussion of *Thompson v. Thompson*, a Supreme Court case decided the same year that ICARA was enacted.²⁴⁰ In *Thompson*, the Court was asked to decide whether PKPA granted federal courts jurisdiction to hear PKPA cases. The Court concluded that federal courts lacked jurisdiction to hear disputes under PKPA for two central reasons: first, because the legislative history indicated that Congress had considered and ultimately rejected a jurisdictional grant to federal courts; and, second, because PKPA cases involved domestic relations matters and should therefore be reserved for more experienced state courts.²⁴¹ “Instructing the federal courts to play Solomon,” the Court wrote, “would entangle them in traditional state law questions that they have little expertise to resolve.”²⁴² Recognizing the domestic relations exception, the Court stated that even preliminary decisions on jurisdiction made by federal courts under PKPA could “involve the federal courts in substantive domestic relations determinations,” since jurisdiction can turn on “the child’s ‘best interest’ or on proof that the child has been abandoned or abused.”²⁴³

Such considerations applied with equal force to ICARA, according to the DOJ. “Just as with PKPA,” Jones maintained, disputes arising under ICARA would “require courts to consider

239. *A Bill to Facilitate Implementation of the 1980 Hague Convention on the Civil Aspects of International Child Abduction, and for Other Purposes: Hearing on S. 1347 before the Subcomm. on Courts and Admin. Practice of the S. Comm. on the Judiciary*, 100th Cong. 74 (1988) (Responses to Written Questions submitted by the Subcommittee, Thomas Boyd, Acting Assistant Attorney General of the United States) [hereinafter *Hearing before the S. Subcommittee*].

240. *See* 484 U.S. 174 (1988).

241. *Id.* at 174, 175–76.

242. *Id.* at 186.

243. *Id.* at 176–77.

traditional domestic relations inquiries.”²⁴⁴ Pointing to the settled exception in Article 12 of the Convention, Jones argued that such “fact specific” issues would “turn on the circumstances of the child,” which only state courts should address.²⁴⁵ Just because the legal standards are codified in an international convention, Jones argued, “does not change the fact that the principles expressed in them are akin to traditional domestic relations matters.”²⁴⁶

Jones also contended that state courts were more competent than federal courts to hear ICARA cases because they have traditionally had concurrent jurisdiction over cases arising under international treaties and are accustomed to interpreting and applying international law and to adjudicating questions of family law.²⁴⁷ Moreover, the Uniform Child Custody Jurisdiction Enforcement Act²⁴⁸ already empowered states to interpret and enforce foreign custody orders.²⁴⁹

244. *Hearing before the S. Subcommittee, supra* note 239, at 60 (statement of Kevin R. Jones, Deputy Assistant Attorney General for Legal Policy, Department of Justice).

245. *Id.* at 61.

246. *Id.*

247. *Id.* at 74 (citing Responses to Written Questions submitted by the Subcommittee, Thomas Boyd, Acting Assistant Attorney General of the United States)

. . . until 1980, jurisdiction in the district courts under 28 U.S.C. § 1331 was limited to cases involving a jurisdictional minimum amount. Thus, until 1980, even if a claim arose under a treaty or other federal law, but involved less than \$10,000, the claim would be resolved in state court . . . [e]ven today, where a case involves a federal issue . . . but the cause of cause of action does not ‘arise under’ a federal law or treaty . . . such federal law issues are routinely encountered and resolved in the state courts.

Id.

248. *See generally Applicability and Application of Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to International Child Custody and Support Actions*, 66 A.L.R. 269 (6th ed. 2011) (explaining that the UCCJEA, adopted by forty-nine states and the District of Columbia, “establishes the exclusive basis for jurisdiction over a child custody matter” and that “[f]oreign child custody or protection orders are now frequently recognized and enforced under the doctrine of comity, with state courts considering foreign countries as if they were states of the United States for jurisdictional purposes under the UCCJEA”); *see also* Child Custody Jurisdiction and Enforcement Act, Uniform Law Commission, <http://www.uniformlaws.org/Act.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act>.

249. *Hearing before the S. Subcommittee, supra* note 239, at 74.

Commenting on the House version of the law, Senator Byrd observed, “The reason that the House constructed this approach was out of concern that these cases would embroil the Federal courts in deciding child custody matters. I must say that I understand this concern . . . [N]one of the proponents of this bill . . . want[s] to see the Federal courts [] involved in deciding the underlying custody disputes.”²⁵⁰ Byrd argued, however, that, although Hague Convention cases involve “an underlying concern of child custody,”²⁵¹ because those cases would arise under an international treaty, parties would inevitably seek removal to federal court, thereby embroiling the parties in protracted litigation that would unnecessarily prolong what was meant to be a quick and efficient hearing.²⁵² Byrd therefore introduced an alternative version of the law that granted concurrent original jurisdiction to federal courts and was intended to forestall protracted litigation over jurisdictional issues that could delay resolution of Hague cases.²⁵³

Co-chairman of the Child Custody Committee of the Family Law Section of the American Bar Association, Patricia M. Hoff, also testified. She argued for concurrent state and federal jurisdiction and sought to diminish the relevance of the domestic relations exception. “Federal judges,” she argued, “have successfully adjudicated the tort claims stemming from parental kidnapping without becoming enmeshed in the merits of the underlying custody dispute.”²⁵⁴ They are equally able, she argued, to handle international abduction cases without becoming marred in child custody issues. Moreover, cases involving citizens of different countries implicated a heightened need for federal court

250. *Id.*

251. *Procedures to Implement the Convention on the Civil Aspects of International Child Abduction*, 134 CONG. REC. S3839, 3839-40 (daily ed. Apr. 12, 1988).

252. *Id.*

253. *See id.* (Senator Dixon advocated for “clear language on this sensitive matter of jurisdiction,” clarity necessary to avoid “an endless series of litigation” on the availability of federal forums in Hague Convention cases).

254. *International Child Abduction Act: Hearing on H.R. 2673 and H.R. 3971 before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 65 (1988) (testimony of Patricia M. Hoff, Co-Chairman, Child Custody Committee of the Family Law Section, American Bar Association) [hereinafter *Hearing Before the H.R. Subcommittee*].

jurisdiction that could neutralize “the spectre of local bias.”²⁵⁵ Ultimately, Congress voted to grant both state and federal courts original concurrent jurisdiction,²⁵⁶ concluding that it made sense to grant state and federal courts concurrent jurisdiction to avoid litigation over jurisdictional questions in light of the fact that, under ICARA, “the issues of treaty interpretation and child custody are inseparably combined.”²⁵⁷

Congress, however, still wanted to ensure that the language of the proposed implementing legislation sufficiently cabined child custody issues.²⁵⁸ For example, Senator Hatch sought to identify the specific “custody-related questions that may arise in the context of disputes under the Hague Convention.”²⁵⁹ He listed five situations involving “traditional[] custody-related matters handled by the States” that would arise under the Convention.²⁶⁰ Those matters were:

[W]hether or not a child has settled into its new environment, whether or not there is a grave risk that return of a child would expose him or her to physical or psychological harm or otherwise place the child in an intolerable situation, whether or not the parent from whom the child was taken was exercising rights of custody or had acquiesced in the removal of the child, whether or not the child has attained the age and degree of maturity at which it is appropriate [to] take account of its views, and whether or not any custody determinations have been rendered in the count[r]y receiving the request for the child’s return.²⁶¹

Senator Dixon confirmed that this list constituted “the extent of custody-type issues permitted under the Hague Convention.”²⁶²

255. *International Child Abduction Act: Hearing Before the Subcomm. on Admin. Law and Governmental Relations of the H. Comm. on the Judiciary*, 100th Cong. 66 (1998) (statement of Patricia M. Hoff, Co-Chairman, Child Custody Comm. of the Family Law Section, American Bar Association).

256. 134 CONG. REC. 6482.

257. *Id.* at 6484.

258. *See id.* at 6482–84.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

Thus, to the extent an outcome of a Hague case would require a “custody-type” decision other than those listed above, ICARA was presumed to prohibit it. An exercise of equitable discretion to return a settled child is outside the scope of those decisions which Congress authorized the federal courts to consider.

V. EXERCISING EQUITABLE DISCRETION CONTRAVENES THE DRAFTERS’
AND CONGRESS’ INTENT

A. *Equitable Discretion invites a prohibited “custody-type”
inquiry*

In practice, the exercise of equitable discretion, even when “not [] free-wheeling,”²⁶³ encroaches on areas of family law outside of the limits set by ICARA and the Convention. The *Yaman* and *Lozano* cases provide apt examples of why returning a settled child provokes litigation that mirrors in substance the merits of a custody decision—even if it does not result in a comprehensive custody hearing—and involves federal courts in domestic relations matters outside of what either the Convention or ICARA authorizes.

In *Yaman*, Ozgur argued that equitable discretion was appropriate given Linda’s “poor judgment” and its negative impact on the girls.²⁶⁴ Under his view, any “proper analysis” of whether to exercise equitable discretion required consideration of “the interests of the children and their ability to thrive in a stable environment.”²⁶⁵ These factors are the same types of factors that a family court considers when deciding child custody disputes, and are alien to cases under the Convention and ICARA.²⁶⁶ For example, New Hampshire courts consider “[t]he conduct of the parties” and “the ability of the parents to promote the welfare of the children”²⁶⁷ in making custody decisions. Ozgur’s argument is an apt illustration of the Pandora’s Box of domestic relations

263. Transcript of Oral Argument at 46, *Lozano*, 697 F.3d 41 (statement of Assistant Solicitor General), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-820_5368.pdf.

264. Transcript of Bench Trial at 79, *Yaman*, 919 F. Supp. 2d 189, ECF No. 165.

265. Brief for the Appellant at 67, *Yaman v. Yaman*, 730 F.3d 1 (1st Cir. 2013), Document No. 00116536505.

266. See *Del Pozzo v. Del Pozzo*, 309 A.2d 151, 152 (N.H. 1973).

267. *Id.* at 153.

issues that is opened through the exercise of equitable discretion. It impermissibly invites federal courts to consider factors that Congress explicitly sought to exclude from ICARA cases and that the domestic relations exception removes from federal jurisdiction. The First Circuit's contention that it possesses equitable discretion under the Convention and ICARA is belied by the practical implications of its exercise.²⁶⁸

B. Equitable Discretion impermissibly requires courts to ignore the drafters' carefully negotiated compromises

In *Lozano*, the Solicitor General attempted to identify the factors that a court may consider when applying equitable discretion.²⁶⁹ She argued that if a child is deemed settled, there is no obligation to return the child, but that the court must instead conduct an inquiry that is "guided by the objectives of the treaty."²⁷⁰ This open-ended standard, she claimed, should reflect the fact that the Convention "is really geared in the first place toward preventing abduction."²⁷¹

This view contravenes the drafters' intent because it invites courts to rebalance the objectives that the Convention drafters carefully weighed when drafting Article 12 and, especially, the one-year time period in which return "forthwith" is the prescribed remedy. As described above, the Convention's drafters concluded that, after a year, if a child is settled, the child should not be uprooted, either for the sake of preventing abductions²⁷² or for any

268. Additionally, neither court acknowledged the fact that these considerations are the same ones that will inevitably be litigated during the actual custody hearing. Raising them in the context of a Hague petition contravenes the intent of the drafters and Congress to ensure that a Hague proceeding is quick, efficient, and narrow, and that it does not morph into a custody hearing by another name.

269. See Brief for the U.S. as Amicus Curiae, *Lozano v. Alvarez*, No. 12-820, 2013 WL 2280948, at *11-15 (U.S. May 24, 2013).

270. Transcript of Oral Argument at 46, *Lozano*, 697 F.3d 41 available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-820_5368.pdf.

271. *Id.*

272. Although "there might in theory be some general deterrent effect against clever abductors if they know that they couldn't claim the benefit of settledness if they concealed the location of the child," the deterrent effect is speculative and likely to be limited. Transcript of Bench Trial at 79-80, *Yaman*, 919 F. Supp. 2d 189, ECF No. 165.

other reason. To do otherwise, as the district court stated in its bench ruling in *Yaman*, “would be to treat children like chattel, which they aren’t.”²⁷³ The drafters decided that the child’s well-being, once the child is settled and a year has passed, must not be compromised, notwithstanding the Convention’s objective to deter child abductions. As explained above, the drafting history demonstrates that the drafters knew they were drawing a line that represented the “least bad”²⁷⁴ solution to the problem of competing interests, specifically, a child’s interest in not being repeatedly uprooted—treated like a “yo-yo”²⁷⁵—and the drafters’ goal of deterring child abductions and concealment. To recast the Convention as being “really geared in the first place toward preventing abduction”²⁷⁶ is to rewrite and undo the priorities agreed upon by the drafters. The *Lozano* case illustrates that exercising equitable discretion to return a settled child invites a court to reevaluate policy questions that the drafters already considered and decided.²⁷⁷

VI. CONCLUSION: THE RETURN OF A SETTLED CHILD MAY BE ORDERED PURSUANT ONLY TO DOMESTIC FAMILY LAW.

The Article 12 settled defense, including the one-year period set out therein, reflects a careful balancing of the drafters’ interests in international comity and deterrence of child abduction, and a child’s interest in settlement. The Convention’s

273. *Id.*

274. *Lozano v. Alvarez*, 697 F.3d 41, 51 (2d Cir. 2012).

275. Transcript of Oral Argument at 55, *Lozano*, 697 F.3d 41 (statement by Justice Breyer), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-820_5368.pdf.

276. *Id.* at 46 (argument by Assistant Solicitor General Ann O’Connell).

277. The *Yaman* case likewise illustrates this point. On appeal, Ozgur urged the court to consider [f]our main sets of interest implicated by the Convention:

- 1) The interest in returning a child to her country of habitual residence and maintaining jurisdiction for child custody determinations there;
- 2) the interest in deterring child abductions;
- 3) the interest in affording the left-behind parent a remedy for the abduction;
- and 4) the interests of the children and their ability to thrive in a stable environment].

Brief for the Appellant at 67, *Yaman*, 730 F.3d 1, Document No. 00116536505. The drafters, however, already weighed these interests when they established the one-year time period in Article 12.

drafters concluded that, after a year, if a child is settled, a court may not order the child's return. They believed that a child's well-being, if he is settled and a year has passed, must not be compromised as punishment for the abducting parent's conduct, even if that means that the abducting parent benefits from abducting and concealing the child by having the ability to litigate the custody dispute in his or her home court. The First Circuit conceded in the *Yaman* case that the district court's concern that ordering the return of a settled child "would be in effect [to] rebalanc[e] competing public policy concerns that were already balanced by the drafters of the Convention,"²⁷⁸ would be valid if the language of Article 12 were mandatory.²⁷⁹ As argued in this Article, however, Article's 12's prohibition on returning a settled child *is* mandatory. Following a determination of settledness, a child should not bear the brunt of a punishment aimed at deterring his parent and other would-be abductors.

The text and drafting histories of the Convention and ICARA make clear that neither one authorizes a court to exercise equitable discretion to return a child deemed settled, and that such a grant would contravene several of the Convention's key policy concerns, as well as the domestic relations exception and the congressional record. When deciding Hague cases, federal courts are not entitled to wield all of the equitable tools in their "toolkit,"²⁸⁰ and if the return of a settled child is to occur, it must take place, if at all, pursuant to domestic law. As Article 18 makes clear, domestic courts may exercise any power they otherwise have to return an abducted child.²⁸¹ This article

278. *Yaman*, 730 F.3d at 16 n.15.

279. *Id.*

280. *Id.* at 17.

281. This is, in fact, what Ozgur Yaman did. He successfully secured a return order from a New Hampshire state court pursuant to the Uniform Child Custody Jurisdiction Enforcement Act. *See* Notice of Decision, In the Matter of Ismail Yaman and Linda Yaman, ECF No. 195-1. The New Hampshire court issued that decision without examining the merits of the custody decision. The authors of this article believe there may be preemption issues related to the New Hampshire court's decision to enforce the Turkish custody order under New Hampshire state law in the face of the federal district court's refusal to return the children under federal law. *Cf. In re T.L.B.*, 272 P.3d 1148, 1155 (Co. App. Ct. Jan. 19, 2012). Analysis of this issue, however, is outside the scope of this article.

Additionally, whether the district court could have exercised

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envisions a narrowly circumscribed role for federal courts adjudicating child abduction cases under the Hague Convention, a view that comports with the drafters' belief and Congress' acknowledgment that children must be treated as people, not property, and that no court should use the return of a child as a means of punishing a wrongdoing parent. Thus, in the United States—where Hague cases implicate principles of federalism, family law, and international law—state courts retain sole custody over the decision to return a settled child.

supplemental jurisdiction over Ozgur's state law cause of action (brought under the UCCJEA) is another important question that is outside the scope of this Article. The domestic relations exception is an exception to both diversity jurisdiction and supplemental jurisdiction. As explained in this article, Congress granted federal courts concurrent original jurisdiction over Hague cases in order to avoid provoking litigation that might arise if a litigant sought to remove a case to federal court under diversity jurisdiction. Nothing in the statute, however specifically addresses whether federal courts may exercise supplemental jurisdiction over related state claims. *Compare* Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified in relevant part at 42 U.S.C. § 13981 (1994)). It is clear, however, that Congress intended to preclude federal courts from adjudicating any custody-related question other than those that were specifically set out in the Convention. In light of ICARA's legislative history, Congress likely intended to preclude federal courts from exercising supplemental jurisdiction over claims the adjudication of which would contravene the domestic relations exception. It therefore would be inconsistent with ICARA for a litigant to use supplemental jurisdiction as a means of circumventing the express language in ICARA prohibiting courts from adjudicating custody disputes pursuant to it.