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Interstate Child Custody: Jurisdiction, Recognition, and Enforcement

Russell M. Coombs

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Interstate Child Custody: Jurisdiction, Recognition, and Enforcement

Russell M. Coombs*

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I. INTRODUCTION

During the past forty years, the law of jurisdiction and judgments in interstate child custody litigation has undergone two periods of major development and is just now entering a third period. After almost two centuries of nearly total disuse¹ of its power under the full faith and credit clause to "prescribe . . . the Effect" of judicial proceedings in sister states,² Congress recently superimposed upon an already complex system of federal and state law a new statute providing special rules affecting the making, enforcement, and modification of child custody decisions.³ The impact of this new legislation on custody proceedings may prove to be even greater than that of the two earlier upheavals. In addition, the enactment and implementation of the new statute, which some call the Wallop Act after its principal congressional sponsor,⁴ probably has given

1. See Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 4-6 (1945). But see 28 U.S.C. § 1738 (1976).

2. U.S. CONST. art. IV, § 1.

3. 28 U.S.C.A. § 1738A (West. Supp. 1980).

4. Senator Malcolm Wallop of Wyoming originally introduced the measure in Congress, 124 CONG. REC. 783-88 (1978), and until its enactment remained its most active and knowledgeable congressional proponent. The author of this Article conceived the legislation, wrote the first several drafts of it, see Notes,

the utility of the congressional full faith and credit power its clearest test to date.

In some respects, the subject of child custody constitutes a difficult test case for federal legislation on conflict of laws. Interstate parochialism and conflict have been the American tradition in custody cases.⁵ Uniform legislation recently adopted in most states,⁶ though initially perceived as a firm basis for interstate cooperation in child custody,⁷ has not produced consistent respect for sister states' proceedings and has generated important legal issues that some states have virtually ignored and others have resolved inconsistently.⁸ The application of the constitutional requirements of due process and full faith and credit to custody litigation remains unsettled.⁹ The Wallop Act, engrafted upon this web of inconsistent and unclear law, has been substantially misinterpreted.¹⁰ Commentators have described it as requiring full faith and credit for custody decrees, although it actually requires something quite different,¹¹ and they have imputed to it breadth of application¹² and preemptive effects¹³ beyond its explicit scope.

This Article identifies the legal questions created by the Wallop Act and by other recent developments in federal and state law, considers how some of these questions have been answered and how others should be handled, and suggests improvements in existing law for interstate child custody cases.

Drafts, and Memoranda (on file with the *Minnesota Law Review*) and participated as a Senate staff member and later as a witness and an informal consultant during its consideration in the Congress. See, e.g., *Parental Kidnaping Prevention Act of 1979, S.105: Joint Hearing Before the Subcomm. on Criminal Justice of the Senate Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources*, 96th Cong., 2d Sess. 133 & Addendum at 267 (1980) [hereinafter cited as *1980 Senate Hearing*].

5. See *infra* text accompanying notes 42-45, 53-54, 473-76.

6. Uniform Child Custody Jurisdiction Act (1968) [hereinafter cited as U.C.C.J.A.]. The U.C.C.J.A. text and notes are reproduced in 9 U.L.A. 111-170 (1979). See *infra* notes 56-60 and accompanying text.

7. See Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflict of Laws*, 22 VAND. L. REV. 1207, 1244 (1969); Project, *Uniform Child Custody Jurisdiction Act*, 5 PAC. L.J. 365, 371-74 (1974); Comment, *Legislative Opportunity for Oregon: The Uniform Child Custody Jurisdiction Act*, 7 WILLAMETTE L.J. 498, 509-10 (1971).

8. See *infra* text accompanying notes 79-80, 91-138, 512-49, 556-57, 559, 563-69, 581-83.

9. See *infra* text accompanying notes 141-52, 477-82.

10. See *infra* note 420.

11. See *infra* text accompanying notes 622-29, 729-32.

12. See *infra* text accompanying notes 295-302.

13. See *infra* text accompanying notes 647-726.

The Article briefly reviews the history of interstate competition over jurisdiction in "initial" custody proceedings—proceedings occurring when neither the forum state nor any other state has ever issued a custody order concerning the particular child.¹⁴ It then examines the present law governing initial jurisdiction and finds that state law still permits parochialism and interstate conflict, partially due to disparate interpretations and applications of provisions of the nearly ubiquitous Uniform Child Custody Jurisdiction Act (U.C.C.J.A.).¹⁵ The Article next considers the due process limits on jurisdiction when the interests of nonresident defendants are affected, and concludes that a few applications of the U.C.C.J.A. probably are unconstitutional.¹⁶ Then it interprets the provisions of the new congressional enactment on initial jurisdiction. The Article predicts that the effects of these provisions will be relatively minor, except that under certain circumstances they will preclude simultaneous proceedings in more than one state.¹⁷

After completing the discussion of initial jurisdiction, this Article examines the subjects of interstate recognition, enforcement, and modification¹⁸ of custody decrees. This part of the Article summarizes the history of comity and conflict between states making custody orders,¹⁹ considers the potential application of full faith and credit to custody decrees, and explores the possible legal and practical justifications for the Supreme Court's avoidance of the full faith and credit question when it decided several custody cases twenty to thirty years ago.²⁰ The Article next examines current state law, including the relevant U.C.C.J.A. provisions, and suggests that one of these provisions, largely ignored so far, can be interpreted to effect a major expansion of interstate issue preclusion.²¹ Other key provisions, as construed in this Article, require neither interstate claim

14. See *infra* text accompanying notes 34-54.

15. See *infra* text accompanying notes 55-140.

16. See *infra* text accompanying notes 141-294.

17. See *infra* text accompanying notes 295-449.

18. This Article uses "modification" of a custody order and other cognate terms to refer to the making of any custody order other than the first order concerning the child, regardless of whether the prior order was temporary, final, or *ex parte*, and regardless of whether it was made in the same court or state or a different one. This usage conforms to that in the Wallop Act and the U.C.C.J.A. See 28 U.S.C.A. § 1738A(b)(5) (West Supp. 1980); U.C.C.J.A. § 2(7) (1968). It is a departure from prior usage in some states. See, e.g., *Durfee v. Durfee*, 293 Mass. 472, 479, 200 N.E. 395, 399 (1936).

19. See *infra* text accompanying notes 450-76.

20. See *infra* text accompanying notes 477-509.

21. See *infra* text accompanying notes 510-49.

preclusion nor interstate issue preclusion, but only enforcement of and refusal to modify dispositions made in foreign²² proceedings.²³ The Article finds that some states interpret even this requirement so that uniformity is an exaggeration and comity is undependable.²⁴ Returning to consideration of federal full faith and credit, the Article suggests that, due to recent developments in custody law and practice, the Supreme Court's application of full faith and credit to custody litigation is now more appropriate and important than it would have been before these developments, at least as a requirement of interstate preclusion of relitigation of factual issues.²⁵ The Article's treatment of recognition, enforcement, and modification of decrees concludes by considering questions concerning the Wallop Act and the relationships among it, the U.C.C.J.A., and the due process and full faith and credit requirements. Interpretation of the Wallop Act yields two basic conclusions: it creates only narrow but firm duties to enforce and not to modify certain foreign custody decrees,²⁶ and it preempts very little state law.²⁷ The Article finds that the requirements of the Wallop Act, the U.C.C.J.A., and the due process and full faith and credit clauses are cumulative and conflict only in isolated situations.²⁸ It also observes that various jurisdictional criteria govern application of the respective provisions of the Wallop Act, the U.C.C.J.A., and the full faith and credit clause.²⁹ Consequently, it argues that state or federal law can preclude relitigation in one state of jurisdictional issues decided by another state, even though application of the federal and state child custody statutes depends upon the outcome of these jurisdictional issues.³⁰

The final part of the Article is a favorable assessment of the appropriateness of the respective roles now played by federal constitutional and statutory law and state law in this complex system of legal rules and principles.³¹ The Article approves of

22. References in this Article to "foreign" custody proceedings and decrees refer invariably to those of the sister states of the United States or of the District of Columbia, Puerto Rico, or the Virgin Islands. Conflict of laws in international custody litigation is beyond the scope of this Article.

23. See *infra* text accompanying notes 512-14, 550-53, 573-75, 584-600.

24. See *infra* text accompanying notes 554-72, 576-83.

25. See *infra* text accompanying notes 601-18.

26. See *infra* text accompanying notes 619-46.

27. See *infra* text accompanying notes 647-726.

28. See *infra* text accompanying notes 727-32.

29. See *infra* text accompanying notes 733-52.

30. See *infra* text accompanying notes 753-805.

31. See *infra* text accompanying notes 806-78.

the Wallop Act's novel exercise of the full faith and credit power, primarily because, although it is strict where it applies, the Act is so narrow and substantively neutral that policy making on child custody remains almost exclusively a function of the states. The Article suggests that this narrow federal Act may illustrate the limits more than the expanse of the utility of the congressional full faith and credit power.³² Finally, the Article briefly reiterates the changes and interpretations of state and federal law that would best permit states to serve policies underlying child custody law, while preserving appropriate limits on the role of federal law.³³

II. INITIAL JURISDICTION

Modern criteria for jurisdiction to make the initial award of a child's custody vary somewhat from state to state. The reasons for such variances are in part historical.

A. HISTORICAL BACKGROUND

Judicial decisions awarding or confirming the custody of children in the United States were rare until the mid-19th century, because the legislatures rather than the courts granted the few divorces that occurred before that time.³⁴ When the courts began to issue judicial decrees of custody, they generally found that they had initial jurisdiction to render such decrees only if the child were domiciled in the forum state.³⁵ For many years some authorities treated this ground as the only proper basis for initial jurisdiction,³⁶ but gradually a number of courts began to use other tests. The courts of some states, for example, claimed jurisdiction over the custody of any children physically present within those states.³⁷ Other courts held that personal jurisdiction over both parents was a sufficient basis for custody jurisdiction.³⁸

32. See *infra* text accompanying notes 859-70.

33. See *infra* text accompanying notes 879-88.

34. Ehrenzweig, *Interstate Recognition of Custody Decrees: Law and Reason v. The Restatement*, 51 MICH. L. REV. 345 (1953); Thomas, *Child Abuse and Neglect (pt. 1)*, 50 N.C. L. REV. 293, 306-25 (1972).

35. Ehrenzweig, *supra* note 34, at 346-47.

36. Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROBS. 819, 820-24 (1944); see, e.g., RESTATEMENT OF CONFLICT OF LAWS § 117 (1934).

37. Ratner, *Child Custody in a Federal System*, 62 MICH. L. REV. 795, 797 (1964); Stansbury, *supra* note 36, at 824.

38. See Comment, *Jurisdictional Bases of Custody Decrees*, 53 HARV. L. REV. 1024, 1026 (1940).

Until 1953, federal law placed virtually no limits on the freedom of a state to set its own jurisdictional standards in custody proceedings. Federal law did not regulate either the jurisdiction over a child or the jurisdiction over the subject of the child's custody.³⁹ State courts, therefore, could freely adopt one or more criteria of jurisdiction, reject others, and implement those choices not only in determining their own jurisdiction, but also in assessing whether to recognize the decrees of courts in other states. In 1953, the Supreme Court did announce that the Constitution required a court to have personal jurisdiction over the defendant in a custody proceeding.⁴⁰ Yet the Court failed to impose jurisdictional standards on the states beyond this limitation, and refrained from deciding whether the full faith and credit clause applies to child custody proceedings.⁴¹

In the absence of federal limits, many states were relatively aggressive in claiming broad initial jurisdiction for themselves.⁴² Courts occasionally declined to exercise jurisdiction if the circumstances of interstate cases seemed to justify such self-denial.⁴³ It was relatively common, however, for one court to apply its own state's jurisdictional standards and to decide the custody of a child, even though a court in another state had potential jurisdiction under its own law⁴⁴ or was exercising such jurisdiction in a pending suit for custody of the same child.⁴⁵

These jurisdictional rules and practices drew criticism. Commentators argued that basing jurisdiction on the domicile of the child in the forum state was a highly technical concept and inadequate to measure either a state's interest in the child⁴⁶ or the ability of its court to investigate and to determine

39. See Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42, 58-59 (1940).

40. *May v. Anderson*, 345 U.S. 528, 534 (1953); see *infra* text accompanying notes 141-51.

41. See *Webb v. Webb*, 451 U.S. 493, 495-96 (1981); *Ford v. Ford*, 371 U.S. 187, 192 (1962); *Kovacs v. Brewer*, 356 U.S. 604, 608 (1958); *May v. Anderson*, 345 U.S. 528, 533 (1953); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615-16 (1947); Note, *Ford v. Ford: Full Faith and Credit to Child Custody Decrees?*, 73 YALE L.J. 134, 135 (1963). *But cf.* Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 115 (cases indicate that if faced with the question, the Court would hold that custody decrees are not entitled to full faith and credit).

42. See Stansbury, *supra* note 36, at 827.

43. *Id.*

44. See, e.g., *Minick v. Minick*, 111 Fla. 469, 490, 149 So. 483, 492 (1933).

45. See, e.g., *Omer v. Omer*, 108 Kan. 95, 97, 193 P. 1064, 1065 (1920).

46. See, e.g., Stansbury, *supra* note 36, at 822-23.

that child's welfare.⁴⁷ Professor Stansbury urged the acknowledgment of concurrent jurisdiction between courts of two states if both states had substantial interests in the welfare of a child or in the preservation of the child's family unit, and suggested that the courts avoid potential conflicts by practicing self-restraint and comity.⁴⁸

The California Supreme Court adopted the latter approach to initial jurisdiction in its influential 1948 decision, *Sampsell v. Superior Court*.⁴⁹ In *Sampsell*, the court accepted several alternative bases of initial jurisdiction—domicile of the child, the child's physical presence, and personal jurisdiction over the parties—and instructed the lower California courts to defer to the courts of other states when they had more substantial interests in the child.⁵⁰ This approach to initial jurisdiction was later endorsed in the *Restatement (Second) of Conflict of Laws*⁵¹ and gained wide acceptance in state courts.⁵²

The courts that used this standard did not, however, adequately embrace its principle of deference. They generally seemed more willing to justify their own initial jurisdiction by using any of the three acceptable jurisdictional bases than to defer to the jurisdiction of other states.⁵³ The approach of *Sampsell* and the *Restatement (Second)*, therefore, merely encouraged parental self-help and forum shopping and often resulted in litigation in states lacking both appropriate connections with the child and adequate access to the evidence.⁵⁴

B. THE ERA OF THE U.C.C.J.A.

Due to the failure of the *Sampsell* approach, a new movement for reform of child custody conflicts law began. The genesis of the reform movement was Professor Ratner's proposal to adopt principles and rules allocating custody jurisdiction in most cases to the state where the child has his or her established home.⁵⁵ Building upon this proposal, the National Con-

47. See, e.g., Stumberg, *supra* note 39, at 62.

48. Stansbury, *supra* note 36, at 828-32.

49. 32 Cal. 2d 763, 197 P.2d 739 (1948).

50. *Id.* at 777-79, 197 P.2d at 749-50.

51. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971).

52. *Id.*, reporter's note.

53. See Bodenheimer, *supra* note 7, at 1214-15.

54. Ehrenzweig, *The Interstate Child and Uniform Legislation: A Plea for Extralittigious Proceedings*, 64 MICH. L. REV. 1, 3-4 (1965); Ratner, *supra* note 37, at 810-13.

55. Ratner, *Legislative Resolution of the Interstate Child Custody Problem*:

ference of Commissioners on Uniform State Laws, with cooperation from the American Bar Association, prepared and approved the U.C.C.J.A.⁵⁶ The Act prescribed criteria to govern initial jurisdiction,⁵⁷ as well as criteria to govern the enforcement and modification of decrees.⁵⁸ Initially, the states were slow to accept the Act, but passage of the U.C.C.J.A. gained momentum in the late 1970's.⁵⁹ By 1982, forty-seven states had either enacted the U.C.C.J.A. in its entirety or had adopted substantial portions of the Act.⁶⁰

A Reply to Professor Currie and a Proposed Uniform Act, 38 S. CAL. L. REV. 183 (1965); Ratner, *supra* note 37, at 810-13.

56. 9 U.L.A. 114 (1979).

57. See *infra* text accompanying notes 68-136.

58. See *infra* text accompanying notes 510-600.

59. The Act took effect in nineteen states between its promulgation in 1968 and the end of 1977, when the author conceived and drafted the Wallop Act; in another twenty-four states by the end of 1980, when Congress enacted the Wallop Act; and in four more states during 1981. For a list of enacting states and the effective dates of the statutes, see 9 U.L.A. 11 (Supp. 1982); S. KATZ, CHILD SNATCHING 125-29 (1981).

60. See ALA. CODE §§ 30-3-20 to -44 (Supp. 1981); ALASKA STAT. §§ 25.30.010 to .910 (1977); ARIZ. REV. STAT. ANN. §§ 8-401 to -424 (Supp. 1981); ARK. STAT. ANN. §§ 34-2701 to -2726 (Supp. 1981); CAL. CIV. CODE §§ 5150-5174 (West Supp. 1981); COLO. REV. STAT. §§ 14-13-101 to -126 (1974); CONN. GEN. STAT. ANN. §§ 46b-90 to -114 (West Supp. 1981); DEL. CODE ANN. tit. 13, §§ 1901-1925 (1981); FLA. STAT. ANN. §§ 61.1302-1348 (West Supp. 1981); GA. CODE ANN. §§ 74-501 to -525 (1981); HAWAII REV. STAT. §§ 583-1 to -26 (1976); IDAHO CODE §§ 5-1001 to -1025 (1979); ILL. ANN. STAT. ch. 40, §§ 2101-2126 (Smith-Hurd 1980); IND. CODE ANN. §§ 31-1-11.6-1 to -24 (Burns 1980); IOWA CODE ANN. §§ 598A.1 -25 (West 1981); KAN. STAT. ANN. §§ 38-1301 to -1326 (Supp. 1980); KY. REV. STAT. ANN. §§ 403.400 -630 (Bobbs-Merrill Supp. 1980); LA. REV. STAT. ANN. §§ 13:1700 to :1724 (West Supp. 1981); ME. REV. STAT. ANN. tit. 19, §§ 801-825 (1981); MD. ANN. CODE art. 16, §§ 184-207 (1981); MICH. COMP. LAWS ANN. §§ 600.651-673 (1981); MINN. STAT. §§ 518A.01-25 (1980); MO. ANN. STAT. §§ 452.440-550 (Vernon Supp. 1981); MONT. CODE ANN. §§ 40-7-101 to -125 (1981); NEB. REV. STAT. §§ 43-1201 to -1225 (Supp. 1980); NEV. REV. STAT. §§ 125A.010-250 (1979); N.H. REV. STAT. ANN. §§ 458A:1 to :25 (Supp. 1979); N.J. STAT. ANN. §§ 2A:34-28 to -52 (West Supp. 1981); N.M. STAT. ANN. §§ 40-10-1 to -24 (Supp. 1981); N.Y. DOM. REL. LAW §§ 75-a to -z (McKinney Supp. 1981); N.C. GEN. STAT. §§ 50A-1 to -25 (Supp. 1981); N.D. CENT. CODE §§ 14-14-01 to -26 (1981); OHIO REV. CODE ANN. §§ 3109.21-37 (Page 1980); OKLA. STAT. ANN. tit. 10, §§ 1601-1627 (West Supp. 1981); OR. REV. STAT. §§ 109.700-930 (1979); PA. STAT. ANN. tit. 42, §§ 5341-5366 (Purdon 1981); R.I. GEN. LAWS §§ 15-14-1 to -26 (1981); S.C. CODE ANN. §§ 20-7-782 to -830 (Law. Co-op. Supp. 1981); S.D. CODIFIED LAWS ANN. §§ 26-5-5 to -52 (Supp. 1981); TENN. CODE ANN. §§ 36-1301 to -1325 (Supp. 1981); UTAH CODE ANN. §§ 78-45c-1 to -26 (Supp. 1981); VT. STAT. ANN. tit. 15, §§ 1031 to 1051 (Supp. 1981); VA. CODE §§ 20-125 to -146 (Supp. 1981); W. VA. CODE §§ 48-10-1 to -26 (Supp. 1981); WIS. STAT. ANN. §§ 822.01-25 (West 1977); WYO. STAT. §§ 20-5-101 to -125 (1977).

In addition to these forty-seven states, Texas has enacted some of the U.C.C.J.A. provisions. See TEX. FAM. CODE ANN. § 14.10 (Vernon Supp. 1981). Thus, the only jurisdictions that have not yet enacted any substantial part of the U.C.C.J.A. are Massachusetts, Mississippi, the District of Columbia, Puerto Rico, and the Virgin Islands. This Article will refer to the District of Columbia, Puerto Rico, and the Virgin Islands, as "states," since the provisions of the Wal-

The Commissioners felt that previously existing rules governing initial jurisdiction engendered both vital legal and human problems. They believed that the *Sampsell* rules had resulted not only in the selection of inappropriate forums for custody litigation and in competition and conflict between courts of various states, but also in psychological harm to the children who were the objects of the litigation.⁶¹ They therefore designed jurisdictional rules to serve these various legal and human interests, explicitly identifying these interests in section 1 of the U.C.C.J.A.⁶² This section explains that the new rules were written to "assure that litigation concerning the custody of a child take place ordinarily in the state"⁶³ most closely connected to the child and family and most able to obtain significant evidence concerning that child's "care, protection, training and personal relationships."⁶⁴ The Act is designed to insure a decision by "that state which can best decide the case in the interest of the child."⁶⁵ It notes that the U.C.C.J.A. was designed to "avoid jurisdictional competition and conflict [between] states."⁶⁶ It also suggests that the statute was formulated to "deter abductions and other unilateral removals of children undertaken to obtain custody awards."⁶⁷ These three goals, the selection of an appropriate forum, the avoidance of interstate competition and conflict, and the deterrence of unilateral removals of children, are, therefore, the motivating force of the U.C.C.J.A.

1. *Flexible Accommodation of Conflicting Goals*

An inevitable tension exists among these goals. Criteria that would assign initial jurisdiction clearly and inflexibly to one state on the basis of facts outside the control of either par-

lop Act discussed in this Article are applicable to these jurisdictions. 28 U.S.C.A. § 1738A(b)(8) (West Supp. 1980). See also *supra* note 22.

61. See U.C.C.J.A. Commissioners' Prefatory Note, 9 U.L.A. 111-14 (1979).

62. U.C.C.J.A. § 1 (1968). This section contains the U.C.C.J.A.'s "general purposes."

63. *Id.* § 1(a)(3).

64. *Id.*

65. *Id.* § 1(a)(2).

66. *Id.* § 1(a)(1).

67. *Id.* § 1(a)(5). In including deterrence of abductions among the goals of the U.C.C.J.A., the Commissioners eschewed exclusive reliance on the deterrent effects of tort law, see RESTATEMENT (SECOND) OF TORTS § 700 (1976), criminal law, see, e.g., COLO. REV. STAT. § 18-3-304 (1978), and decisions against abductors on the merits in custody cases, cf. *Moniz v. Moniz*, 142 Cal. App. 527, 530, 298 P.2d 710, 711-12 (1956) (mother denied custody for disobeying court order to return children to jurisdiction).

ent would most forcefully deter parental abductions and forum shopping, and would most surely prevent conflicts between states. Such criteria would, however, certainly prevent some cases from being decided by the courts best situated under all the circumstances to gather the relevant evidence and to determine custody. The Commissioners dealt with this tension by including various standards governing the existence and exercise of jurisdiction that give a court considerable latitude in deciding to emphasize one goal over another.

To deter parental abductions and forum shopping and to minimize conflicts between states, two sections of the U.C.C.J.A. provide that the relocation of a child from one state to another shortly before the commencement of custody litigation ordinarily does not deprive the original state of initial jurisdiction or establish initial jurisdiction in the new state. One section essentially provides that states where children have lived for six months have jurisdiction even after their departure from those "home states" if the custody proceedings are commenced in those states before they have been absent six months.⁶⁸ The parallel provision prevents the states to which they are taken from acquiring jurisdiction as their new "home states" until they have lived there for six months.⁶⁹

The Commissioners recognized, however, that an extremely rigid rule establishing initial jurisdiction exclusively in the "home state" would, in some cases, frustrate their other stated goal favoring the litigation of custody in the most appropriate forum. They therefore created two additional bases for concurrent initial jurisdiction in section 3 of the Act, and defined them to give courts flexibility in their application. Under one of these bases, the child must be physically present in the state. He or she must be abandoned or it must be "necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse or is otherwise neglected [or dependent]."⁷⁰ The other basis requires only that it be

in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the

68. U.C.C.J.A. §§ 2(5), 3(a)(1) (1968).

69. *Id.*

70. *Id.* § 3(a)(3). State enactments have treated the bracketed language and other language in this paragraph differently. See 9 U.L.A. 125 (1979); *id.* at 15 (Supp. 1981); R. CROUCH, INTERSTATE CUSTODY LITIGATION 75-82 (1981); *infra* text accompanying notes 367-71.

child's present or future care, protection, training, and personal relationships.⁷¹

The Commissioners acknowledged that this latter jurisdictional test, which this Article will call the "significant connection" basis of jurisdiction, was a flexible one.⁷²

In section 8 of the Act, the Commissioners gave the state further opportunity to deter abductions and to minimize interstate competition. This section authorizes a state that has jurisdiction under the U.C.C.J.A. to decline to exercise jurisdiction "[i]f the petitioner for an initial decree has wrongfully taken the child from another state or has engaged in similar reprehensible conduct,"⁷³ but only if declination is "just and proper under the circumstances."⁷⁴ Section 8 gives the courts great flexibility in deciding whether to deter misconduct and to promote interstate harmony through its use of the undefined terms "wrongfully" and "similar reprehensible conduct," its qualification that declining to exercise jurisdiction based on such conduct must be "just and proper under the circumstances," and its provision that the court's power not to exercise its jurisdiction is discretionary.

Finally, in section 7, the Commissioners gave courts more freedom in choosing whether to select the most appropriate forum and to minimize interstate competition.⁷⁵ This section expressly gives a court that has jurisdiction the discretion to decline to exercise its jurisdiction if it is an inconvenient forum and another state's court is a more appropriate forum.⁷⁶ The discretionary nature of this provision highlights its flexibility. Moreover, in deciding whether to exercise its discretion under this provision, a court may consider whether "the exercise of jurisdiction by a court of this state would contravene any of the purposes stated [in the first section of the Act],"⁷⁷ one of which is the deterrence of abductions and similar conduct.⁷⁸ This forum non conveniens provision thus may also serve any of the three goals of the U.C.C.J.A.

The flexibility built into these jurisdictional standards does not, however, only facilitate the courts' selection among the U.C.C.J.A.'s competing policies. It also provides opportunities

71. U.C.C.J.A. § 3(a)(2) (1968).

72. U.C.C.J.A. § 3 Commissioners' Note, 9 U.L.A. 124 (1979).

73. U.C.C.J.A. § 8(a) (1968).

74. *Id.*

75. *See* U.C.C.J.A. § 7 Commissioners' Note, 9 U.L.A. 139 (1979).

76. U.C.C.J.A. § 7 (1968).

77. *Id.* § 7(c)(5).

78. *Id.* § 1(a)(5).

for courts to establish precedents that vary from state to state and that thereby undermine the apparent uniformity of jurisdictional rules among U.C.C.J.A. states. It more importantly provides a state substantial freedom to indulge a parochial preference for its own initial jurisdiction.

Given the long history of disagreement between the states over the criteria for determining initial jurisdiction and of the chauvinistic application of these criteria,⁷⁹ it is not surprising that state courts have used the latitude provided under the U.C.C.J.A. to continue to prefer their own jurisdiction over the jurisdiction of courts in sister states. For example, when some courts in U.C.C.J.A. states considered the question of jurisdiction under the Act when no prior foreign proceedings were pending and there were no foreign orders, they appeared unimpressed with claims that they lacked jurisdiction or should defer to the potential jurisdiction of another state.⁸⁰ They instead resolved ambiguities in the statutory language and conflicts between the goals of the U.C.C.J.A. in favor of their own jurisdiction.⁸¹ There are, however, relatively few reported cases of this kind. A state court's jurisdiction under the U.C.C.J.A. to make initial custody decrees is litigated more often in cases of concurrent attempts by two states to assume and to exercise such jurisdiction.

2. *Control of Concurrent Initial Proceedings Under the Uniform Act*

To prevent or to resolve conflicts between two courts, both of which have initiated custody proceedings, the U.C.C.J.A. sets forth, in addition to the criteria for establishing and declining initial jurisdiction, a provision in section 6(a) on concurrent proceedings. It forbids the courts of the enacting state to exercise jurisdiction "if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this Act, unless the proceeding is stayed by the court of the other state."⁸²

79. See *supra* text accompanying notes 35-38, 42-53.

80. See, e.g., *Dykes v. Dykes*, 395 So. 2d 188 (Fla. Dist. Ct. App. 1981); *Potter v. Potter*, 104 Misc. 2d 930, 430 N.Y.S.2d 201 (Fam. Ct. 1980). But see *Loper v. Superior Court*, 126 Ariz. 14, 612 P.2d 65 (Ct. App. 1980) (holding lower court abused discretion by denying without sufficient evidence and communication with foreign court a motion that it find itself an inconvenient forum).

81. See *Dykes v. Dykes*, 395 So. 2d 188, 190 (Fla. Dist. Ct. App. 1981); *Potter v. Potter*, 104 Misc. 2d 930, 932-34, 430 N.Y.S.2d 201, 203-05 (Fam. Ct. 1980).

82. U.C.C.J.A. § 6(a) (1968).

a. The Technique of Control

Section 6(a) is somewhat less subject to parochial abuse than the U.C.C.J.A.'s rules of jurisdiction,⁸³ clean hands,⁸⁴ and forum non conveniens⁸⁵ governing the existence and exercise of initial jurisdiction in the absence of a concurrent proceeding. This is clearly appropriate, because deference to another state is more vital to the goals of sound forum selection and interstate harmony when two states are asserting interests in a case than when another state is only potentially involved.

Section 6(a) partially achieves its greater inflexibility by prohibiting the court's exercise of initial jurisdiction, unlike the clean hands and forum non conveniens sections which give the court discretion to decline jurisdiction. This difference alone does not, however, explain the greater stringency of section 6(a). After all, the section 3 standards for the existence of jurisdiction are mandatory, yet courts have found in them latitude for chauvinism.⁸⁶ Section 6(a) is different, because the application of its prohibition partially depends upon the decision of a state other than the forum state. By properly entertaining a proceeding and failing to stay it, the court of the other state limits the freedom of the court of the forum state to prefer itself as the appropriate arena. This is unlike the jurisdictional criteria in sections 3, 7, and 8, in which the forum state resolves every issue, including whether "it is in the best interest of the child" that the forum have jurisdiction,⁸⁷ whether it or another state's court "is a more appropriate forum,"⁸⁸ and whether it "is just and proper under the circumstances" that the forum decline to exercise its jurisdiction.⁸⁹

By allowing another state to partially restrain the forum, the Commissioners used a technique that in theory could provide flexibility for the accommodation of the various purposes of the U.C.C.J.A. without allowing both states to use that flexibility to justify their own exercise of jurisdiction. A mechanical rule giving only one court, here the court that is first-in-time, the power to apply the U.C.C.J.A.'s flexible jurisdictional standards would permit that court to accommodate the conflicting goals of the legislation. Yet, because that court's applica-

83. *Id.* § 3. See *supra* text accompanying notes 70-72.

84. U.C.C.J.A. § 8 (1968). See *supra* text accompanying notes 73-74.

85. U.C.C.J.A. § 7 (1968). See *supra* text accompanying notes 75-78.

86. See *supra* text accompanying notes 79-80.

87. U.C.C.J.A. § 3(a)(2) (1968).

88. *Id.* § 7(a).

89. *Id.* § 8(a).

tion of those standards would bind the other court, the rule would also provide certainty and avoid conflict between the states.

This theoretical possibility is not, however, fully realized in section 6(a). Applicability of the section does not depend entirely or even primarily on decisions made by the court in which proceedings were first filed. Under this section, the court of the forum state can exercise its jurisdiction despite the prior proceeding if it concludes that the court of the other state is not "exercising jurisdiction substantially in conformity with this Act."⁹⁰ The forum court applies this test and uses the law of its state in doing so. Thus, even section 6(a) gives a state the authority to prefer itself as a forum over a state in which a prior proceeding is pending.

b. The Scope of Control

The degree of latitude provided in section 6(a) depends in part upon an issue of interpretation of its substantial conformity phrase, an issue that commentators have not discussed and courts have not critically examined.⁹¹ The problem lies in determining the provisions of the U.C.C.J.A. with which a foreign court must substantially conform to receive the respect mandated by section 6(a). By identifying these provisions, one circumscribes the freedom of the forum court to claim and to exercise jurisdiction, because the forum court may then properly consider only these provisions in deciding whether the foreign court acted in substantial conformity with the Act. An analysis of two U.C.C.J.A. provisions that have similar language can aid in resolving this question. Section 13 instructs a forum court to recognize and to enforce an initial or modification decree

of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.⁹²

Section 14(a) forbids the modification of a foreign decree unless, among other requirements, "the court which rendered the decree does not now have jurisdiction under jurisdictional pre-

90. *Id.* § 6(a).

91. See cases cited *infra* notes 135-36.

92. U.C.C.J.A. § 13 (1968).

requisites substantially in accordance with this Act.”⁹³

A court must at least satisfy the section 3 criteria for the existence of jurisdiction to entitle its proceedings to mandatory respect under sections 6(a), 13, and 14(a). The Commissioners certainly intended this requirement,⁹⁴ and the courts have recognized it.⁹⁵ But there is a question whether the foreign court must also conform to one or more of the mandatory or discretionary restrictions on the exercise of jurisdiction to earn such respect for its proceedings.⁹⁶ The mandatory provisions, found in sections 4, 5, 6(a), 8(b), and 14(a), deal with notice and opportunity to be heard,⁹⁷ concurrent litigation in two states,⁹⁸ the “unclean hands” of petitioners for modifications,⁹⁹ and petitions for modifications of foreign decrees still modifiable by the

93. *Id.* § 14(a).

94. See U.C.C.J.A. §§ 6, 13, 14 Commissioners’ Notes, 9 U.L.A. 135, 151, 154-55 (1979). A forum’s respect for foreign proceedings under sections 6(a) and 13 depends upon the foreign court’s satisfying section 3 at the time of the foreign proceedings. See *supra* text accompanying note 90; *infra* text accompanying notes 550, 554-67. Respect under section 14(a), in contrast, depends upon the foreign court’s ability to satisfy section 3 at the time of the proceeding in the forum. See *infra* text accompanying notes 574-78.

95. See, e.g., *In re McDonald*, 74 Mich. App. 119, 253 N.W.2d 678 (1977); *Williams v. Zacher*, 35 Or. App. 129, 581 P.2d 91 (1978).

96. The U.C.C.J.A. text consistently and clearly treats the criteria in section 3 as governing the existence of jurisdiction, and the criteria in sections 4, 5, 6, 7, 8, and 14 as governing the exercise of jurisdiction. See U.C.C.J.A. §§ 3 (prescribing circumstances under which a court “has” jurisdiction and providing that physical presence of a child is not alone sufficient to “confer” jurisdiction and is not a “prerequisite for” jurisdiction); 4 (making cross-reference to section 5); 5(a) (referring to notice required for the “exercise” of jurisdiction); 6(a) (prescribing circumstances under which a court must not “exercise” jurisdiction); 7(a) (authorizing a court under prescribed circumstances to decline to “exercise” jurisdiction); 8 (prescribing circumstances under which a court must or may decline to “exercise” its jurisdiction); 14(a)(1) (prescribing circumstances under which even a court that “has” jurisdiction must not “modify” a foreign decree).

Some language in the Commissioners’ Notes, however, seems to treat sections 8 and 14 as limiting the existence, not the exercise, of jurisdiction. See, e.g., U.C.C.J.A. §§ 3, 6 Commissioners’ Notes, 9 U.L.A. 125, 135 (1979). Nevertheless, in their Note to section 3, the Commissioners specifically mentioned the distinction between the section 3 rules that regulate the existence of jurisdiction and the sections 6 and 7 rules that determine whether it will be “exercised.” U.C.C.J.A. § 3 Commissioners’ Note, 9 U.L.A. 124 (1979). Their failure to make this distinction as clear elsewhere in the Notes probably resulted either from sporadic inattention to the distinction or from an attempt to make the Notes concise and readable. Courts and commentators have often drawn this distinction between existence and exercise of jurisdiction under the U.C.C.J.A. See, e.g., R. CROUCH, *supra* note 70, at xii, 16-30.

97. U.C.C.J.A. §§ 4, 5 (1968).

98. *Id.* § 6(a).

99. *Id.* § 8(b).

rendering states.¹⁰⁰ The discretionary provisions, found in sections 6(c), 7, 8(a), and the second sentence of section 8(b), may be applicable if another state is exercising jurisdiction,¹⁰¹ if another state would be a more convenient forum,¹⁰² or if the petitioner has "unclean hands."¹⁰³

A close look at the variation in language among sections 6(a), 13, and 14(a) reveals which of these mandatory and discretionary provisions the forum court may consider in deciding whether it is forbidden to exercise jurisdiction by section 14(a). Only section 14(a) refers solely to the existence of jurisdiction. In contrast, section 6(a) expressly refers to the exercise of jurisdiction, and section 13 uses language that may encompass exercise as well as existence of jurisdiction.¹⁰⁴ Read literally, therefore, section 14(a) prohibits the forum state, which shall be called state *B*, from modifying a decree of another state, which shall be called state *A*, if *A* has jurisdiction under "prerequisites substantially in accordance with"¹⁰⁵ those of section 3. Whether other sections require or indicate that *A* should decline to exercise its jurisdiction would, in other words, be irrelevant.

This interpretation of section 14(a) is reasonable. Unlike section 6(a), which makes state *A*'s present exercise of its jurisdiction exclusive,¹⁰⁶ and unlike section 13, which accords respect to state *A*'s past exercise of jurisdiction,¹⁰⁷ section 14(a) protects state *A*'s future exercise of modification jurisdiction.¹⁰⁸ Although one can argue that *B* should be able to evaluate *A*'s present or past compliance with the rules for exercising jurisdiction, it is sensible that *B* should not be able to evaluate *A*'s

100. *Id.* § 14(a).

101. *Id.* § 6(c).

102. *Id.* § 7.

103. *Id.* § 8(a), (b).

104. One variation, which is not pertinent to this discussion, is the distinction between one of the clauses of section 13, which omits the word "substantially," and the other clauses under discussion, all of which employ that word. See *supra* text accompanying notes 90-93. The variations among "prerequisites," U.C.C.J.A. § 14 (1968), "statutory provisions," *id.* § 13, and "standards," *id.*, seem insignificant, as do those among "conformity with," *id.* § 6(a), "accordance with," *id.* §§ 13, 14(a), and being "similar to" the Act or parts of it, *id.* § 13. For other variations within the U.C.C.J.A. that appear to be simply the results of unsystematic drafting, see *supra* note 96; *infra* notes 112, 376, 389.

105. U.C.C.J.A. § 14(a) (1968).

106. See Bodenheimer, *supra* note 7, at 1230.

107. See *id.* at 1220, 1235-36.

108. See U.C.C.J.A. § 14 Commissioners' Note, 9 U.L.A. 154 (1979) ("all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3").

likely future compliance with such rules, since it is improbable that *A* would violate them. First, the argument that *A* would violate section 6(a)'s prohibition against concurrent proceedings is circular; no state could properly exercise jurisdiction and thereby preempt *A* under section 6(a) unless *A* lacked jurisdiction for some reason other than section 6.¹⁰⁹ Second, state *A* could not violate the mandatory "unclean hands" rule of section 8(b), because 8(b) by its terms applies only to the modification of a decree "of another state." Thus, *A* could not violate section 8(b) by modifying its own decree.

Of course, state *A* could violate some jurisdictional rules in exercising its modification jurisdiction. It might, for example, deny notice, or opportunity to be heard, or violate sections 6(c), 7, or 8(a) in abusing its discretion to exercise jurisdiction.¹¹⁰ Neither the U.C.C.J.A. text nor the Notes, however, suggest that section 14(a) permits state *B* to conclude that state *A* "does not now have jurisdiction" under the Act merely if *B* predicts that *A* will err in one of those ways. Indeed, the Note to section 14 says that "all petitions for modification are to be addressed to the prior state if that state has sufficient contact with the case to satisfy section 3."¹¹¹ State *B*, therefore, apparently can exercise jurisdiction under 14(a) only if it determines that modification by state *A* would violate section 3, the section governing the existence of jurisdiction.

Because sections 6(a) and 13 do not, like section 14(a), in terms refer only to the existence of jurisdiction,¹¹² it is less clear under these sections which jurisdictional rules state *A*

109. Unless *A* lacked jurisdiction under section 3, the other state's exercise of jurisdiction would violate section 14(a), *see supra* text accompanying notes 104-10, would therefore not be "substantially in conformity with this Act," U.C.C.J.A. § 6(a) (1968); *see infra* text accompanying notes 119-34, and would consequently fail to make the bar of section 6(a) applicable to *A*.

110. *See* U.C.C.J.A. §§ 4, 5, 6(c), 7, 8(a) (1968). In some cases, a higher court of state *A* may decide that the abuse is great enough to warrant reversal of the lower court. *See, e.g.,* Winkelman v. Moses, 279 N.W.2d 897 (S.D. 1979).

111. U.C.C.J.A. § 14 Commissioners' Note, 9 U.L.A. 154 (1979).

112. *See supra* text accompanying note 104. In their Notes discussing these phrases, the Commissioners sometimes treated statutory language that by its terms or by implication governs the exercise of jurisdiction as though the language governs the existence of jurisdiction. *Compare* U.C.C.J.A. § 6(a) (1968) ("exercising jurisdiction substantially in conformity with this Act") *with id.* Commissioners' Note, 9 U.L.A. 135 (1979) ("have jurisdiction under the criteria of this Act"); *compare id.* § 13 ("made under factual circumstances meeting the jurisdictional standards of the Act") *with id.* Commissioners' Note, 9 U.L.A. 151 (1979) ("would have had jurisdiction under the facts of the case if this Act had been the law in the state"). It is clear, however, that they did not mean to indicate that section 3 provides the only criteria for application of the duties discussed in those Notes. *See infra* text accompanying notes 114-15.

must comply with to gain respect for its assertion of jurisdiction. Certainly state *B*, in applying section 6(a) or section 13, can at least determine if state *A* satisfied the section 3 rules governing the existence of jurisdiction.¹¹³ It is also clear that, in applying section 13, State *B* can consider whether *A* complied with sections 4 and 5; the Commissioners definitely viewed the sections 4 and 5 requirements of notice and opportunity to be heard as controls on the exercise of jurisdiction¹¹⁴ and clearly intended that their violation deprive state *A*'s proceedings of the protection of section 13.¹¹⁵ Courts applying the U.C.C.J.A. have agreed.¹¹⁶ In applying section 6(a), state *B*, by analogy, probably should be able to examine state *A*'s compliance with sections 4 and 5.¹¹⁷ But beyond these three sections—3, 4, and 5—it is uncertain which U.C.C.J.A. standards apply under sections 6(a) and 13. Because the statutory language provides no answer to this question,¹¹⁸ the Commissioners' Notes must be examined. In the Note to section 6(a) the Commissioners wrote that “[w]hen the courts of more than one state have jurisdiction under sections 3 or 14, priority in time determines which court will proceed with the action, but the application of the inconvenient forum principle of section 7 may result in the handling of the case by the other court.”¹¹⁹

113. See *supra* text accompanying notes 94-95.

114. See U.C.C.J.A. §§ 4, 5(a) (1968). See generally *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 987-88 (1960).

115. See U.C.C.J.A. § 12 (1968); *id.* §§ 4, 12 Commissioners' Notes, 9 U.L.A. 130, 150-51 (1979); *cf. id.* § 23 (reasonable notice and opportunity to be heard given to all affected persons required to extend U.C.C.J.A. to international area); *id.* Commissioners' Note, 9 U.L.A. 167-68 (1979) (treating reasonable notice and opportunity to be heard as prerequisites for international recognition and enforcement of custody decrees).

116. See, e.g., *Wenz v. Schwartz*, 598 P.2d 1086, 1096 (Mont. 1979), *cert. denied*, 444 U.S. 1071 (1980). But see *Youmans v. Youmans*, 276 S.E.2d 837, 840 (Ga. 1981).

117. The Commissioners failed to make this result as clear for section 6(a) as they did for section 13. Compare U.C.C.J.A. § 6 Commissioners' Notes, 9 U.L.A. 135 (1979) with U.C.C.J.A. §§ 12, 13 Commissioners' Notes, 9 U.L.A. 150, 151 (1979). Section 6(a) is like section 13 and unlike section 14(a), however, because a court of state *B* applying section 6(a) is able to determine the actual compliance of state *A*'s court with sections 4 and 5, not merely to predict *A*'s future compliance. See *supra* text accompanying notes 106-10. Given that the Commissioners intended application of section 13 to depend upon compliance with sections 4 and 5, see *supra* text accompanying note 115, and intended application of section 14(a) not to depend upon compliance with sections 4 and 5, see *supra* text accompanying notes 104-10, it is therefore reasonable, in the absence of clear language on the point in the statute or Commissioners' Notes, to interpret section 6(a) as similar in this respect to section 13, rather than to section 14(a).

118. See *supra* note 104.

119. U.C.C.J.A. § 6 Commissioners' Note, 9 U.L.A. 135 (1979).

Under this language, if proceedings are commenced in two states, both having jurisdiction under section 3, and if section 14 does not prohibit either of them from exercising jurisdiction due to the existence of a prior order,¹²⁰ then the state in which the second suit was begun, state *B*, must defer to state *A*. This statement implies that *A*, not *B*, applies section 7. State *A* can in its discretion defer to state *B* under section 7's *forum non conveniens* principles. State *B*, on the other hand, cannot employ section 7 to hold that *A* is not "exercising jurisdiction substantially in conformity" with the U.C.C.J.A. and thereby avoid its section 6(a) duty to defer to *A*'s prior proceeding.

This language also implies that *B* cannot avoid the application of section 6(a) by accusing *A* of violating the "unclean hands" rule of section 8(b); if *B*'s deferral to *A* is determined by "priority in time," then it is not determined by *B*'s application of section 8(b) to the litigation in *A*. A statement at the end of the same Note, however, seems to contradict this implication by intimating that state *B* can insist that state *A* comply with section 8(b): "Once a custody decree has been rendered in one state, jurisdiction is determined by sections 8 and 14."¹²¹ This statement is puzzling. One can avoid the contradiction between the two parts of the same Note by reading the statement as if it only suggests that section 6(a) is wholly inapplicable to modification proceedings. There is no apparent reason, however, to so limit the application of section 6. Moreover, the reference to section 14 earlier in the Note is inconsistent with this interpretation. The most reasonable way to avoid the internal contradiction is to assume the statement is not an interpretation of section 6. The statement is likely just a reminder to the reader that section 6 is not the only section restricting the exercise of jurisdiction to modify a decree.¹²² It is, in effect, a mere cross-reference to other limits on modification.

Other sections of the U.C.C.J.A. and their accompanying Notes also imply that sections 6(a) and 13 demand that state *A* conform only with the rules of sections 3, 4, 5, and 14, and not with the rules of sections 6, 7, and 8. Both section 12,¹²³ which

120. See *supra* note 96.

121. U.C.C.J.A. § 6 Commissioners' Note, 9 U.L.A. 135 (1979).

122. A similar reminder appears at the end of the Note to section 3, and could not have been intended other than as a mere reminder. *Id.* § 3 Commissioners' Note, 9 U.L.A. 125 (1979). The Note to section 3 does not discuss any of the duties created by sections 6, 13, and 14.

123. U.C.C.J.A. § 12 (1968).

describes the scope and effects of a decree,¹²⁴ and the accompanying Note make it clear that application of section 12 depends only upon the jurisdictional, notice, and hearing requirements of sections 3, 4, and 5. Neither section 12 nor its Note mentions the provisions of section 6, 7, or 8.¹²⁵ The Note to section 13 similarly states that the "jurisdiction" and "jurisdictional standards" referred to in three clauses of section 13 are "the requirements of section 3 in the case of initial decrees and . . . the requirements of sections 3 and 14 in the case of modification decrees."¹²⁶ Although it is not of any apparent significance, the failure to mention the notice and hearing requirements of sections 4 and 5 in the Notes to sections 6 and 13 is remarkable, especially since those requirements were mentioned in the section 12 Note.¹²⁷

It appears probable, therefore, that the Commissioners intended to allow state *B*, in applying sections 6(a) and 13, to examine only whether state *A* substantially conformed to the rules of sections 3, 4, 5, and 14. Under this interpretation, *B* must defer to *A* even if *B* believes that *A* should have declined to exercise its jurisdiction because of section 6, 7, or 8.

It is appropriate to exclude sections 6, 7, and 8 from *B*'s decision to exercise jurisdiction under section 6(a). First, it is unlikely that *A* will have violated section 6(a) in this context. If *B* is considering whether it can exercise jurisdiction under section 6(a), *A* is already exercising its jurisdiction in an ongoing concurrent proceeding, making it unlikely that there is yet a third state that is also exercising jurisdiction in the same case.¹²⁸ Second, although *A* is much more likely to have vio-

124. Section 12 identifies the parties bound by the decree and the interstate effects concerning them until the decree is duly modified. *Id.*

125. *See id.* Commissioners' Note, 9 U.L.A. 149-50 (1979).

126. *Id.* § 13 Commissioners' Note, 9 U.L.A. 151 (1979). The references to the requirements of section 14 in the Note to section 6, *see supra* text accompanying notes 119 & 121, and in the Note to section 13, refer only to the prohibition of modification in section 14(a) and not to the provisions of section 14(b). The latter subsection merely reminds the reader that modification can be prohibited not only by section 14(a), but also by section 8, and requires "due consideration" of documents concerning previous proceedings.

127. *See supra* text accompanying notes 113-17.

128. If the earliest of the three proceedings occurred not in states *A* or *B* but in a third state, *X*, one must consider two possibilities: one, at the time when the proceeding in *B* is filed, *X* may still have jurisdiction; or two, *X* may have lost jurisdiction. If *X* still has jurisdiction, then section 6(a) or section 14 bars not only *A* from exercising jurisdiction, but *B* as well. Thus, the question of whether *A*'s pending proceeding also bars *B*'s is irrelevant. If, on the other hand, *X* has lost jurisdiction, then the possibility that *A* earlier failed to comply with section 6(a) has little relevance to the current choice of a forum. State *A*

lated sections 7 and 8, the standards of those sections are so broad that letting *B* review *A*'s application of them would be unwise. The criteria of sections 7 and 8(a) are not only discretionary,¹²⁹ but also vague.¹³⁰ And even though section 8(b)'s requirements are ostensibly mandatory, its criteria are so vague that it too is essentially discretionary.¹³¹ To allow *B* to exercise jurisdiction concurrently with *A* if it concludes that *A* was abusing its discretion or was otherwise in error under such vague standards would severely undercut the effectiveness of section 6(a).

The vagueness of sections 7 and 8 also justifies excluding these sections from *B*'s application of section 13. It is obviously less wise, however, to exclude section 6(a) in this context. Section 6(a), unlike sections 7 and 8, provides criteria as specific and objective as the criteria of section 14, which the Commissioners apparently intended state *B* to consider in applying section 13. Thus, section 6(a) could probably limit the duty of recognition and enforcement without seriously undermining that duty.

It nevertheless seems preferable to exclude *A*'s compliance with section 6(a) from *B*'s consideration for two reasons. First, the language of the U.C.C.J.A. and of the Notes does not indicate that, in applying section 13, state *B* can consider *A*'s compliance with section 6(a). There is a possible indication in the Notes that *B* can consider *A*'s compliance with section 8,¹³² but there is no parallel indication concerning section 6. If one concludes, despite the Note language, that the interstate recogni-

is first-in-time as against *B*, and has jurisdiction otherwise consistent with the Act. Under these circumstances, *A*'s earlier error seems to be an inadequate reason for creating an exception to the first-in-time rule.

The earliest of the three proceedings may, however, have conceivably occurred in state *B* itself. Yet even if state *A* violated section 6(a) by exercising jurisdiction during the earlier litigation in *B*, *B* should not be free to exercise jurisdiction in a later proceeding while the suit in *A* is still pending. This situation would rarely arise; if the earlier *B* proceeding had resulted in an order, *A* would violate not only section 6(a), but also section 14(a), and would likely decline to exercise its jurisdiction. Moreover, on appeal of the case from the *A* trial court, the appellate court can either correct the court's error or find that no error occurred, which in either event would resolve the issue. See *infra* text accompanying notes 753-67.

129. See U.C.C.J.A. §§ 7, 8(a) (1968).

130. Section 7(a) uses standards of "inconvenience" and "appropriateness." *Id.* § 7(a). One of section 7(c)'s criteria refers to "contravention of the statutory purposes." *Id.* § 7(c)(5). Section 8(a) employs the vague requirements of "wrongfulness," "reprehensibility," "justice," and "propriety." *Id.* § 8(a).

131. Section 8(b) uses standards of "propriety" and "the interest of the child." *Id.* § 8(b).

132. See *supra* text accompanying note 121.

tion of state *A*'s proceedings is independent of state *A*'s conformity to section 8, it seems to follow that one must reach the same conclusion about section 6(a), because it has even less support in the Notes. Second, making compliance with section 6(a) a requirement under section 13 would broaden the class of decrees that other states cannot modify but need not recognize or enforce. These cases are in a limbo created by the interaction of sections 13 and 14(a).¹³³ Section 13 allows a state not to recognize and enforce decrees made in violation of sections 3, 4, 5, and 14, while section 14(a) stops a state from modifying some decrees that do not meet these same standards.¹³⁴ The results appear to be anomalous and unjustifiable. Adding section 6 to the sections that state *A* must comply with before it satisfies section 13 would increase the number of cases in this limbo.

It seems, therefore, that one should in this respect interpret sections 6(a) and 13 uniformly: they constrain state *B* if state *A* has conformed to the provisions of sections 3, 4, 5, and 14, whether or not state *A* has also conformed to sections 6, 7, and 8.

c. The Effectiveness of Control

Even a court that interprets section 6(a) in this fairly narrow fashion has some latitude, through interpretation and application of sections 3, 4, 5, and 14, to hold that the initial jurisdiction of another state's court was not substantially in conformity with the U.C.C.J.A.¹³⁵ A court would have even more latitude if it rejected this Article's interpretation of section 6(a), and held that under section 6(a) it can examine whether the foreign proceeding complied with sections other than 3, 4, 5, and 14.¹³⁶ The freedom that a court has in applying and interpreting section 6(a), therefore, is substantial.

133. See *infra* text accompanying notes 578, 630.

134. See *infra* text accompanying note 578.

135. See, e.g., *Williams v. Zacher*, 35 Or. App. 129, 136-40, 581 P.2d 91, 96-97 (1978). But see *S. KATZ, supra* note 59, at 20 (stating that the U.C.C.J.A. "assumes that all state courts take jurisdiction under requirements similar or identical to those of the Act" and that therefore section 6 in effect "assumes that the court with priority [in time] has properly taken jurisdiction"). See also *Lopez v. District Court*, 606 P.2d 853 (Colo. 1980) (en banc) (prohibiting lower court from exercising jurisdiction in case where Colorado petition was filed during pendency of case in California trial court); *In re Rector*, 39 Colo. App. 111, 565 P.2d 950 (1977) (affirming dismissal of Colorado petition filed during pendency of Kansas appeal).

136. See *Allison v. Superior Court*, 99 Cal. App. 3d 993, 160 Cal. Rptr. 309 (1979) (relying on perceived violations of sections 5 and 6 by Texas court in

3. *The Current, National Pattern of Initial Jurisdiction*

The flexibility built into the U.C.C.J.A.'s treatment of initial jurisdiction has resulted in some impairment of the U.C.C.J.A.'s goals of uniformity and comity. The several states that have not adopted the Act also prevent nationwide uniformity. The courts of the District of Columbia and Massachusetts, for example, can base some custody proceedings on personal jurisdiction over the contesting parents.¹³⁷ The law of the Virgin Islands goes still further. It has permitted a court to grant the initial award of a child's custody, despite the pendency of a custody proceeding in the state of the child's residence, on the basis that the forum had personal jurisdiction over the same parties in a divorce action that took place two and one-half years earlier.¹³⁸

There appears, then, to be considerable variation both among U.C.C.J.A. states and among nonenacting states concerning the circumstances that justify the assertion and exercise of jurisdiction to make initial custody decrees. Furthermore, whether or not a state has adopted the U.C.C.J.A., there are claims and exercises of such jurisdiction in very doubtful cases, sometimes even in the face of the concurrent exercise of jurisdiction by other states. It is therefore important to determine the limits that federal law places on initial custody jurisdiction. There appear to be only two sources of such federal law, the due process clause¹³⁹ and the Wallop Act.¹⁴⁰

C. DUE PROCESS LIMITS ON INITIAL JURISDICTION

Prior to the Wallop Act, federal law limited state court jurisdiction over initial determinations of child custody only in the area of personal jurisdiction over the defendants.

1. *May v. Anderson and Later Developments*

In *May v. Anderson*,¹⁴¹ the United States Supreme Court reversed an Ohio judgment recognizing and enforcing an initial custody decree of a Wisconsin court. Justice Burton, writing

holding that section 6 did not require the California court to defer to Texas proceeding).

137. See *Alves v. Alves*, 262 A.2d 111, 116-17 (D.C. 1970); *Green v. Green*, 351 Mass. 466, 471, 221 N.E.2d 857, 860 (1966).

138. *Cox v. Cox*, 8 V.I. 543, 457 F.2d 1190 (3d Cir. 1972).

139. U.S. CONST. amend. XIV, § 1.

140. See *supra* note 3 and accompanying text.

141. 345 U.S. 528 (1953).

for the Court, stated the question as "whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to . . . custody . . . without having jurisdiction over her *in personam*."¹⁴² At another point he wrote that the case presented the "narrow issue" of whether "in the absence of personal service" a custody decree has "any binding effect" on the parent not served.¹⁴³ Because of these phrases and other language¹⁴⁴ both in Justice Burton's opinion and in Justice Jackson's dissenting opinion,¹⁴⁵ some have read the case as establishing that a court violates a parent's due process rights if it awards custody without personal jurisdiction over the parent.¹⁴⁶ In other words, they suggest that *May* applies the *International Shoe Co. v. Washington*¹⁴⁷ standards of personal jurisdiction to child custody cases. Others, however, have interpreted *May* more narrowly.¹⁴⁸ In his concurring opinion,¹⁴⁹ Justice Frankfurter, one of only five Justices who joined in the Court's opinion, insisted that the Court was deciding only that the full faith and credit clause did not require recognition of the Wisconsin decree and stated that "[f]or Ohio to give respect to the Wisconsin decree would not offend the Due Process Clause."¹⁵⁰ Some aspects of Justice Burton's opinion also seem consistent with this narrower interpretation of the *May* holding.¹⁵¹

The susceptibility of *May* to at least these two interpretations, and the importance of both the full faith and credit question *May* answered and the due process question it may have

142. *Id.* at 533.

143. *Id.* at 532-33 (quoting *Halvey v. Halvey*, 330 U.S. 610, 615-16 (1947)).

144. *See, e.g.*, 345 U.S. at 533 ("Rights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody.")

145. *See id.* at 537 (Jackson, J., dissenting).

146. *See Hazard, May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379, 383-85 (1959).

147. 326 U.S. 310 (1945).

148. *See, e.g.*, U.C.C.J.A. § 13 Commissioners' Note, 9 U.L.A. 152 (1979); Bodenheimer, *supra* note 7, at 1232-33.

149. 345 U.S. at 535-36 (Frankfurter, J., concurring).

150. *Id.*

151. Justice Burton made no specific response to Justice Frankfurter's limiting interpretation of the holding, and referred to the due process clause only in explaining the prior history of the litigation. 345 U.S. at 530 n.2. Furthermore, he dismissed the contention that the children, although resident in Ohio, were technically domiciled in Wisconsin by saying that, even if true, that fact would "not give Wisconsin, *certainly as against Ohio*, the personal jurisdiction that it must have in order to deprive their mother of her personal right to their immediate possession." *Id.* at 534 (emphasis added and footnote omitted).

answered, led to an outpouring of professional commentary.¹⁵² No solid consensus emerged, however, on the existence or stringency of a due process requirement of personal jurisdiction in custody cases.¹⁵³

Promulgation of the U.C.C.J.A. in 1968, and the accelerating trend in the late 1970's toward its universal adoption, made the problem of personal jurisdiction and due process still more complex.¹⁵⁴ The Act's criteria that determine the existence and exercise of initial jurisdiction do not include any requirements for contacts with defendants claiming custody or visitation rights.¹⁵⁵ A Commissioners' Note explicitly stated that "[t]here is no requirement for technical personal jurisdiction" in child custody cases.¹⁵⁶

Faced with the uncertainty of whether *May* imposed a due process personal jurisdiction requirement in child custody cases, the Commissioners took a practical position. If they had tried to anticipate and codify in statutory form the specific defendant-forum contacts that courts might later require, they

152. See, e.g., Currie, *supra* note 41, at 112-14; Comment, *Full Faith and Credit to Child Custody Awards*, 5 KAN. L. REV. 77, 79-82 (1956). See generally Hazard, *supra* note 146.

153. See, e.g., authorities cited *supra* note 152.

154. The tendency of courts to allow increasingly attenuated contacts between defendants and forum states to satisfy personal jurisdiction requirements further complicates the problem of interpreting *May*. For discussion of this trend, see *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292-93 (1980); Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 662 (1959); *Developments in the Law, supra* note 114, at 918. In *International Shoe*, decided six years before *May*, the Supreme Court provided a new doctrinal basis and fresh impetus for states to assert jurisdiction over defendants in a broader range of circumstances. Since *May*, the Supreme Court has relaxed due process limits on state jurisdiction even further.

This trend makes it difficult to predict which initial custody decrees violate due process, if one assumes that *May* imposes such a standard. The parent's rather extensive contacts with the forum state in *May*, see 345 U.S. at 530, might have even satisfied due process requirements as they existed in 1953. They were held inadequate in *May*, however, because Wisconsin lacked a long-arm statute authorizing acquisition of personal jurisdiction through extraterritorial service of process. *Id.* at 530-31. Most states lacked such long-arm statutes as recently as the past decade. See Sampson, *Jurisdiction in Divorce and Conservatorship Suits*, 8 TEX. TECH L. REV. 159, 166, 200 n.126 (1976); Note, *Long-Arm Jurisdiction in Alimony and Custody Cases*, 73 COLUM. L. REV. 289, 311-12 (1973). Given suitable state legislation and today's relaxed constitutional standards, cases like *May*, and even cases involving fewer contacts between the defendant and the forum state, may not violate due process.

155. See U.C.C.J.A. §§ 3-8 (1968).

156. U.C.C.J.A. § 12 Commissioners' Note, 9 U.L.A. 150 (1979). On the other hand, when Congress imposed a requirement of interstate enforcement of custody decrees in the Wallop Act without making explicit reference to defendant-forum contacts, it did not commit itself to a particular legal justification for that decision. See S. REP. NO. 553, 96th Cong., 2d Sess. 1253-55 (1980).

would have foreclosed the possibility that the courts would hold that the Constitution required fewer or no contacts. If they had added a general requirement that courts exercise jurisdiction consistently with due process jurisdictional limits as they apply to child custody cases,¹⁵⁷ they would have failed to contribute anything to the clarity or stability of due process law. Moreover, enactment of such a provision seems unnecessary even as a demonstration of respect for whatever unknown constitutional limits may exist. After all, exercise of unwarranted personal jurisdiction is only one way a court might violate due process rights in a custody case,¹⁵⁸ and the U.C.C.J.A. does not have provisions that govern those violations. The practical alternative was, therefore, to create the desired state law limits on custody jurisdiction and wait for the courts to decide whether and how the Constitution imposes additional limits. If the Supreme Court eventually holds that *International Shoe* and its progeny do not apply to child custody cases,¹⁵⁹ the Commissioners and like-minded commentators will presumably be gratified.¹⁶⁰

157. Cf. TEX. FAM. CODE ANN. § 11.051 (Vernon Supp. 1981) (providing for the exercise of personal jurisdiction in suits affecting the parent-child relationship upon "any basis consistent with the constitutions of this state or the United States for the exercise of personal jurisdiction").

158. The court, for example, might take custody of a child from his or her family for religious reasons. See, e.g., *In re Hadeen*, 27 Wash. App. 566, 619 P.2d 374 (1980). It might also take custody for reasons that are just too weak to justify state interference with parental custody. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (dictum); *Stanley v. Illinois*, 405 U.S. 645, 657-58 (1972).

159. Some commentators have recently argued at length that the Supreme Court's treatment of due process limits on states' judicial jurisdiction is in some respects fundamentally misconceived and should be abandoned in favor of alternative approaches. See, e.g., Ratner, *Procedural Due Process and Jurisdiction to Adjudicate*, 75 NW. U.L. REV. 363 (1980); Redish, *Due Process, Federalism, and Personal Jurisdiction: A Theoretical Evaluation*, 75 NW. U.L. REV. 1112 (1981); Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical Interpretive Reexamination of the Full Faith and Credit and Due Process Clauses*, 14 CREIGHTON L. REV. 499 (pt. 1), 735 (pt. 2) (1981).

This Article, however, assumes that the Court will continue to apply and to elaborate upon the general approach it has supplied since *International Shoe*. Even critics of this approach concede that the Court has been relatively consistent in approving its most criticized features. See, e.g., Ratner, *supra*, at 366-68 & n.19; Redish, *supra*, at 1115-21. But see Whitten (pt. 2), *supra*, at 843 (arguing that, as applied, the Court's solicitude for states' interests serves defendants' interests instead). Furthermore, the Court has restated its view so recently and so forcefully that a prompt and major departure from that view is unlikely. See *Rush v. Savchuk*, 444 U.S. 320 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Kulko v. Superior Court*, 436 U.S. 84 (1978); *Shaffer v. Heitner*, 433 U.S. 186 (1977).

160. See, e.g., Bodenheimer & Neeley-Kvarme, *Jurisdiction Over Child Custody and Adoption After Shaffer and Kulko*, 12 U.C.D. L. REV. 229 (1979).

Although the Commissioners' approach is practical, it does raise two problems if one assumes that due process jurisdictional standards do apply to child custody cases. One can avoid both difficulties, however, by properly interpreting the U.C.C.J.A. The first problem arises because the U.C.C.J.A. allows states to assert jurisdiction even though such an assertion would violate due process. A court could therefore arguably strike down the entire statute as an unconstitutional exercise of jurisdiction. It would be more reasonable, however, to treat the U.C.C.J.A. as the equivalent of a long-arm statute claiming jurisdiction in every child custody case in which the due process clause allows it.¹⁶¹ This could also avoid the need of U.C.C.J.A. states, most of which lack other long-arm statutes applicable to child custody cases,¹⁶² to enact such statutes simply to reiterate the assertions of jurisdiction that the U.C.C.J.A. already makes.¹⁶³

The second problem is the possibility that no state may be able to satisfy the jurisdictional requirements of both the U.C.C.J.A. and due process in a particular case. A case may arise, for example, in which only one state, state *D*, has sufficient contacts with the mother to satisfy due process requirements. Suppose that this state has enacted the U.C.C.J.A. and

161. *Cf.* *Shaffer v. Heitner*, 433 U.S. 186, 213-17 (1977) (absent legislative assertion of state interest in securing jurisdiction of out-of-state defendants, sequestration of property insufficient); *id.* at 221 (Brennan, J., concurring in part and dissenting in part) (statutory authorization of state judicial power upon constitutionally permissible grounds is a necessary ingredient of properly asserted state court jurisdiction); *In re M.S.B.*, 611 S.W.2d 704, 706 (Tex. Civ. App. 1980) (jurisdiction established through "particularized rules governing adjudications of status"). See generally RESTATEMENT (SECOND) OF JUDGMENTS § 7 reporter's note at 59-60, comment c (Tent. Draft No. 5, 1978). Although some applications of the U.C.C.J.A. might violate due process, courts may treat the Act as an assertion of state authority up to the limits of due process. Compare *Yules v. General Motors Corp.*, 297 F. Supp. 674 (D. Mont. 1969) (the Montana long-arm statute claimed jurisdiction in a case in which due process would not permit its assertion) with *Ballard v. Rhodes Pharmacal Co.*, 263 F. Supp. 79 (D. Mont. 1967) (exercising jurisdiction under the identical statute, because the facts of the case satisfied due process requirements).

162. See *supra* note 154.

163. *But see* *Kulko v. Superior Court*, 436 U.S. 84, 98 (1978) (implying that due process may permit broader personal jurisdiction where a state has "attempted to assert [a] particularized interest . . . by, e.g., enacting a special jurisdictional statute" than might otherwise be asserted); *Shaffer v. Heitner*, 433 U.S. 186, 214 (1977) (same). One can read the pertinent language in these cases as general support for the proposition that a state might be able to assert broader personal jurisdiction in child custody cases if it enacted not only the U.C.C.J.A. rules of jurisdiction, but also specific rules detailing the contacts between a custody defendant and the enacting state that would be necessary for personal jurisdiction.

seems to be unable to meet its requirements for the existence of jurisdiction.¹⁶⁴ It meets neither the "home state" test nor the "significant connection" test of section 3, paragraphs (1) and (2).¹⁶⁵ There is also no abandonment, mistreatment, abuse, or neglect within the meaning of paragraph (3).¹⁶⁶ The only remaining provision which could give state *D* jurisdiction is paragraph (4), which is applicable if

(i) it appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (1), (2), or (3), or another state has declined to exercise jurisdiction on the ground that this State is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.¹⁶⁷

State *D* can easily satisfy the "best interest" requirement. If one of the parents wants to sue, it ordinarily will be in the best interest of the child that state *D* determine that child's custody, because it is best to decide the issue rather than leaving it unresolved, and state *D* is the only state that has jurisdiction in compliance with the Constitution. The other requirement of paragraph (4), however, appears impossible to meet if there is another state, state *E*, that is a "home state" or a "significant connection" state under paragraph (1) or (2). State *E* would have jurisdiction "in accordance with paragraph (1), (2), or (3)," even though its assertion of jurisdiction would violate due process. Given this scenario, no state will be able to hear the case; state *D*, the only state that satisfies due process, will not have jurisdiction under the U.C.C.J.A.

One conceivable but unappealing solution is for state *E* to go through a charade of actually declining to exercise its U.C.C.J.A. jurisdiction. It would do so on the grounds that it lacks jurisdiction consistent with the due process clause and that state *D*, which has personal jurisdiction, is therefore "the more appropriate forum." This procedure, however, is cumbersome. Moreover, if state *E* does not decline to exercise its jurisdiction, and if state *D* is impotent because of paragraph (4), there will be no state that can decide the case consistently with both state law and due process. The best resolution of this problem requires one to interpret paragraph (4)(i) so that state *E*, although it satisfies "prerequisites substantially in accordance with paragraphs (1), (2), or (3)," does not "have jurisdic-

164. As noted above, U.C.C.J.A. section 3 sets forth the requirements for the existence of jurisdiction. See *supra* note 96.

165. U.C.C.J.A. § 3(a)(1), (2) (1968).

166. *Id.* § 3(a)(3).

167. *Id.* § 3(a)(4).

tion under" them because it lacks personal jurisdiction.¹⁶⁸ This construction of the U.C.C.J.A. could conceivably be adopted by judicial interpretation in some states and by statute in the others, thereby breaking the impasse.

2. *Application of Current Doctrine to Custody Litigation*

The Supreme Court's recent decision in *Shaffer v. Heitner*¹⁶⁹ has further complicated the question of whether child custody cases must satisfy the due process requirements of *International Shoe*. In this 1977 decision, the Court announced that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."¹⁷⁰ The Court held that the standards that previously applied only to proceedings in personam would now also govern proceedings in rem and quasi in rem.¹⁷¹ *Shaffer's* extension of the *International Shoe* standards, therefore, seems to undermine the argument that the requirements for personal jurisdiction do not apply to child custody cases because these cases are proceedings in rem or for determinations of status.¹⁷²

The Court in *Shaffer* arguably left some room, however, to treat custody litigation as a special case under the due process clause. It adverted to at least three categories of cases in which lesser, or at least different, contacts between a defendant and a forum state might satisfy the jurisdictional standards of *International Shoe*. One category consisted of cases in which a plaintiff tries to collect a debt in one state that another state has already found to exist.¹⁷³ In a footnote to its opinion, the Court reserved judgment on a second category of cases by stating, "[w]e do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness."¹⁷⁴ Finally, the Court declined to consider "whether the presence of a defendant's property in a State is a sufficient basis for jurisdiction when no other forum is avail-

168. *See id.*

169. 433 U.S. 186 (1977).

170. *Id.* at 212.

171. *Id.* at 207-09. *See* *Rush v. Savchuk*, 444 U.S. 320 (1980).

172. The Commissioners advanced this argument. *See* U.C.C.J.A. § 12 Commissioners' Note, 9 U.L.A. 150 (1979).

173. 433 U.S. at 210-11 n.36. This Article describes the analogous situation in child custody cases—the mere enforcement of custody or visitation rights adjudicated elsewhere. *See infra* text accompanying notes 466-72.

174. 433 U.S. at 208 n.30.

able to the plaintiff."¹⁷⁵ These apparently open questions are relevant in deciding whether and how to apply due process jurisdictional requirements to child custody litigation.

a. The Indiscrimination of a Simple "Status" Exception

Neeley-Kvarme and the late Professor Bodenheimer have argued that "status adjudications based on specialized jurisdictional rules meet due process requirements of fairness without the need for minimal contacts of the defendant with the forum."¹⁷⁶ They suggested that this "status exception" applies not just to ordinary custody cases but also to proceedings for guardianship, neglect, termination of parental rights, and adoption.¹⁷⁷ In their view the "status exception" is applicable whenever there are "(1) a status adjudication, and (2) particularized jurisdictional rules applicable to the proceedings."¹⁷⁸

This analysis explaining both the "status exception" and its application to child custody cases is oversimplified. Although it may be appropriate to apply due process principles differently to child custody cases than to other kinds of litigation,¹⁷⁹ it would be incorrect to make an uncritical assumption that legal rules and principles governing other litigation are wholly use-

175. *Id.* at 211 n.37.

176. Bodenheimer & Neeley-Kvarme, *supra* note 160, at 240.

177. *Id.* at 240-48.

178. *Id.* at 240. Their argument relied in part on their interpretation of language in footnote 9 to the opinion for the Court in *Stanley v. Illinois*, 405 U.S. 645, 657 (1972). In *Stanley*, the Court said that giving certain unwed fathers a constitutional right to demand hearings on their fitness to have custody of their children created "no constitutional or procedural obstacle to foreclosing those unwed fathers who are not so inclined [to claim custodial rights]." *Id.* The Court noted that state law allowed not only personal service of process, but also service by certified mail and even, if personal or certified mail service was impossible or a father's identity was unknown, service by publication addressed to "All whom It may Concern." "Unwed fathers who do not promptly respond," the Court wrote, "cannot complain if their children are declared wards of the State." *Id.*

One should interpret this dictum, however, as dealing only with the constitutional requirement of notice. Read this way, *Stanley* is consistent with other precedents. See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). The *Stanley* Court does not expressly purport to deal also with the question of due process limits on territorial jurisdiction. There was no interstate element in the facts of the *Stanley* case, nor any reference to the special problems of interstate litigation. Thus, the Court probably was addressing only the fathers' right to "complain" of lack of notice, not their right to complain of overbroad assertions of territorial jurisdiction.

179. As Justice Frankfurter wrote in *May*, "children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a State's duty towards its children." 345 U.S. at 536 (Frankfurter, J., concurring).

less to serve the legitimate purposes of proceedings affecting the status of children.¹⁸⁰ Courts have made virtually all of the custody rulings that commentators have considered ultimately harmful to the children in the name of their best interests.¹⁸¹ Thus, it is not sufficient to assume that invocations of "best interests" in the U.C.C.J.A., in other jurisdictional rules, or in judicial opinions applying them justify a state's adjudication of a child's custody status under all circumstances.

It would also be surprising if, after penetrating the conceptual fog surrounding in rem and quasi in rem jurisdiction, the Supreme Court adopted the view of Bodenheimer and Neeley-Kvarme and made blanket use of the concept of status in applying due process jurisdictional limits.¹⁸² A close reading of

180. Bodenheimer & Neeley-Kvarme only began to examine whether minimum contacts are necessary in child custody cases. They merely noted that custody and other proceedings are "child centered" rather than "defendant centered," and called for a due process ruling that is "beneficial to children." Bodenheimer & Neeley-Kvarme, *supra* note 160, at 252.

181. Compare Halvey v. Halvey, 330 U.S. 610, 614-15 (1947) (New York court "empowered to modify the [Florida] decree in the interests of the child") with U.C.C.J.A. Commissioners' Prefatory Note, 9 U.L.A. 111-13 (1979) (courts have a "tendency to over-emphasize the need for fluidity and modifiability of custody decrees at the expense . . . of the child"); compare Sampsel v. Superior Court, 32 Cal. 2d 763, 777-80, 197 P.2d 739, 748-50 (1948) (existence of concurrent jurisdiction in two or more states serves interests of child) with S. KATZ, *supra* note 59, at 11-12 (existence of concurrent jurisdiction has contributed to child snatching and consequent harm to children).

182. When the court in its *Shaffer* footnote, 433 U.S. at 208 n.30, expressly left open the possibility that the rules governing jurisdiction in status adjudications might adequately comport with the standard of fairness, the only authority it cited was two pages of a 1959 law review article, Traynor, *supra* note 154, at 660-61. Justice Roger Traynor used those two pages to defend, on specific and practical grounds, the rule that the plaintiff's domicile has jurisdiction to dissolve the status of the plaintiff's marriage despite its lack of contacts with the other spouse. He also argued, however, that a court should have personal jurisdiction over the putative father of a child before it determines whether the status of paternity exists. He went on to say that cases concerning the parent-child relationship involve large interests of the state and momentous consequences for the parties, and that these considerations and fair play "would normally preclude jurisdiction over a non-resident defendant having no contact with the forum state." *Id.* at 661. "Nevertheless," Traynor continued on a page not cited in *Shaffer's* footnote 30,

the state where a child is present must be competent to regulate his custody whether his parent is present or not, and if the parent cannot be found or has failed to discharge his parental obligations, that state, given the best notice reasonably possible, should be free to promote the interest of the child by permitting his adoption.

Id. at 661-62.

It is, of course, unlikely that the Supreme Court meticulously cited pages as a subtle indication that creation of the divorce status requires no minimum contacts, and that creation or termination of the paternity status does require minimum contacts. Similarly, its failure to cite subsequent pages of the article does not indicate disapproval of Traynor's views on custody and adoption. In-

Shaffer and later cases suggests that the Court is not disposed toward making such broad generalizations. These cases alter the distinctions among proceedings in personam, in rem, and quasi in rem, and among various kinds of cases within each of these categories.¹⁸³ Instead of using the three categories of actions to displace the ultimate standards of *International Shoe*, the Court now uses the three categories to help indicate whether it is reasonable to give a state jurisdiction to affect the parties involved. In both quasi in rem and in rem proceedings, the presence of a res that is "the source of the underlying controversy" is "normally" a sound basis of jurisdiction.¹⁸⁴ If, however, this inference is invalid in a particular case, then due process bars the assertion of jurisdiction.¹⁸⁵ Thus, identifying a relationship as a status, a concept that a court should determine in rem, does not render the reasonableness standard of *International Shoe* irrelevant; it only supports an inference that jurisdiction is reasonable, leaving open the question whether it actually is reasonable considering the nature of the relationship and the circumstances under which that relationship is litigated.¹⁸⁶

stead, the Court likely cited Traynor to endorse his argument that minimum contacts are sometimes needed and sometimes not needed for a fair adjudication of status. The Court thus may have indicated that it would not exempt every "status" case from the requirement of defendant-forum contacts. Cf. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 423 n.67, 425-26 (1981) (suggesting that it might be desirable to recognize, as categories of jurisdiction, jurisdiction over status and jurisdiction by necessity, but that, in utilizing categories of jurisdiction other than personal jurisdiction, courts arguably must determine the reasonableness of a state's identification of the subject of litigation and attribution of legal situs to it).

183. See, e.g., *Kulko v. Superior Court*, 436 U.S. 84, 101 (1978) (distinguishing child support from commercial litigation in personam); *Shaffer v. Heitner*, 433 U.S. 186, 199 n.17, 207-09, 213 (1977) (distinguishing quasi in rem jurisdiction in which the cause of action relates to the attached property from quasi in rem jurisdiction in which the property is unrelated to the claim).

184. *Shaffer v. Heitner*, 433 U.S. at 207-08. See *Rush v. Savchuk*, 444 U.S. 320, 328 (1980) (stating that a defendant's ownership of property in a state "may suggest the presence of other ties") (quoting *Shaffer v. Heitner*, 433 U.S. at 209).

185. See *Shaffer v. Heitner*, 433 U.S. at 207-08.

186. Arguably, even after *Shaffer*, the standards that courts will use in determining whether jurisdiction is reasonable will vary depending on whether the action is in rem, quasi in rem on claims related to the property made the basis of jurisdiction, quasi in rem on claims not related to such property, or in personam. See, e.g., Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 71-79 (1978). Even if the minimum contacts standards vary, however, it does not necessarily follow that there can be actions in which no forum-defendant contacts are necessary, regardless of other circumstances. See *infra* notes 208-14 and accompanying text. Furthermore, in some states the

Since the answer to this question hinges upon the particular characteristics of a status, and because the several recognized statuses display different characteristics, the Court probably will not treat all statuses alike. The legal relationships involved in cases of child custody,¹⁸⁷ adoption,¹⁸⁸ divorce,¹⁸⁹ separation,¹⁹⁰ and annulment of marriage¹⁹¹ are considered statuses. The natures of those relationships and the direct and incidental consequences of their creation, alteration, and destruction are different for each status, and they vary from one state to another.¹⁹² Moreover, the rules governing judicial jurisdiction to create, to affect, or to destroy these statuses have varied substantially from one status to the other, from one time to another, and from one state to another.¹⁹³ It is appropriate, therefore, in determining whether jurisdiction is reasonable in the specific context of the status of custody, to consider its nature, the consequences of its adjudication, and the particular rules and circumstances upon which jurisdiction to adjudicate it is based.

U.C.C.J.A. permits a forum to exercise jurisdiction although the presence of the res is debatable, or the same or another related res is present elsewhere. *See, e.g., Allison v. Superior Court*, 99 Cal. App. 3d 993, 998-99, 160 Cal. Rptr. 309, 311-12 (1979); *Reeve v. Reeve*, 391 So. 2d 789, 791 (Fla. Dist. Ct. App. 1980). Thus, even if no forum-defendant contacts are necessary, an application of the U.C.C.J.A. might violate the jurisdictional requirement of a res, so there still would be a need for analysis of the forum's contact with the child. *See infra* text accompanying notes 215-94.

187. *See, e.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 79 (1971); Goodrich, *Custody of Children in Divorce Suits*, 7 CORNELL L.Q. 1, 2-3 (1921).

188. *See, e.g.,* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 78 (1971).

189. *See, e.g., Williams v. North Carolina*, 317 U.S. 287, 298 (1942); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 70-74 (1971).

190. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 75 (1971).

191. *See, e.g., id.* § 76.

192. An examination of grandparent visitation illustrates the variation from state to state in the consequences of adoption, *see In re Gardner*, 287 N.W.2d 555 (Iowa 1980) (disallowing grandparent visitation and collecting decisions from other states applying various rules on the subject), and custody, *compare Sparks v. Wigglesworth*, 5 Fam. L. Rep. (BNA) 3173 (Ky. App. 1979), *aff'd*, 598 S.W.2d 763 (Ky. 1980) (unpublished opinion) (grandparent visitation allowed) *with West v. King*, 263 S.E.2d 386 (Va. 1980) (grandparent visitation disallowed). *See also* Annot., 90 A.L.R.3d 222 (1979) (discussing grandparent visitation rights).

193. For example, the traditional bases of custody jurisdiction have varied substantially over time and from state to state. There still is considerable variation among states in the grounds on which jurisdiction is assumed and exercised in custody cases. *See supra* text accompanying notes 35-54, 60-61, 80, 135-38; *infra* text accompanying notes 450-76, 579-83. There has also been great variation among the states concerning the bases for jurisdiction in annulment and adoption proceedings. *See Developments in the Law, supra* note 114, at 976-79.

b. The Divorce Analogy

It is well settled that due process does not require forum-defendant contacts in proceedings determining a person's divorce status.¹⁹⁴ Analysis of the reasons underlying this treatment of divorce jurisdiction sheds light on the likely future treatment of child custody jurisdiction.

Courts typically impose only one limitation on jurisdiction to dissolve the marriage status. State¹⁹⁵ and arguably federal constitutional law¹⁹⁶ require that the forum state be the domicile of either party. This requirement, however, is often satisfied very easily.¹⁹⁷ It scarcely seems adequate to serve either of the functions that due process limits on territorial jurisdiction perform—protection of defendants from unreasonable demands to litigate in a distant or inconvenient forum and preservation of territorial limits on the authority of states within the federal system.¹⁹⁸

If one considers the nature of the status of divorce and the legal consequences of its *ex parte* adjudication, however, it is probable that the Supreme Court will continue to allow the domicile of the plaintiff to be an adequate substitute for defendant-forum contacts. The only legal consequence of a divorce decree is the dissolution of the parties' marriage, making them free to remarry; it does not affect claims to property, support,¹⁹⁹ or child custody.²⁰⁰ Commentators have observed that the plaintiff and the plaintiff's domicile have a much greater interest in obtaining the divorce than the defendant and the defendant's domicile have in preventing it.²⁰¹ In its formulations of due process limits on territorial jurisdiction, the Court has

194. See *Williams v. North Carolina*, 317 U.S. 287, 298-99 (1942).

195. See DEL. CODE ANN. tit. 13, § 1504(a) (Supp. 1980); ILL. ANN. STAT. ch. 40, § 401(1) (Smith-Hurd 1980); MASS. GEN. LAWS ANN. ch. 208, § 4 (West Supp. 1981); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 70 comment d, § 71 (1971).

196. See *Alton v. Alton*, 207 F.2d 667, 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954). See generally Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501 (1980); Note, *Domicile as a Constitutional Requirement for Divorce Jurisdiction*, 44 IOWA L. REV. 765 (1959).

197. See Garfield, *supra* note 196, at 504.

198. See *Rush v. Savchuk*, 444 U.S. 320, 327-33 (1980); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980); *Kulko v. Superior Court*, 436 U.S. 84, 91-101 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 203-12 (1977).

199. *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418-19 (1957).

200. *May v. Anderson*, 345 U.S. 528, 534 (1953). *But see supra* notes 141-52 and accompanying text.

201. See, e.g., H. CLARK, *LAW OF DOMESTIC RELATIONS* 316-17 (1968); Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26, 29 (1966).

usually weighed such respective interests.²⁰² In *World-Wide Volkswagen Corp. v. Woodson*,²⁰³ for example, the Court recently observed that, although the fairness of an exercise of personal jurisdiction primarily depends upon the burden it places on the defendant, that burden

will in an appropriate case be considered in the light of other relevant factors, including the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff's power to choose the forum, the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.²⁰⁴

The Court seems to have adopted as a fundamental substantive social policy the view that an unwilling spouse should not be trapped in a broken marriage, despite the clear evidence that not every state shares its commitment to this policy.²⁰⁵ Given this policy, the requirement that a plaintiff seeking divorce be domiciled in the forum state arguably satisfies the constitutional standards. A divorce plaintiff's decision either to reside permanently in a state other than the defendant's, or to undergo the expense and inconvenience of a temporary move to one of the "quickie" divorce states, is a strong indication that the marriage is already destroyed. The interest of such plaintiffs in obtaining divorces and escaping their marriages is great. The need to protect this interest is even greater if the state in which the defendant is domiciled would withhold the divorce,²⁰⁶ a possibility that historically was fairly strong.²⁰⁷

This rationale underlying the Supreme Court's decision to allow the domicile of the plaintiff to substitute for defendant-forum contacts is not entirely persuasive. Although the disso-

202. See, e.g., *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978); *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1957). But cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 300 (1980) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)) (forbidding personal jurisdiction where there are no defendant-forum "contacts, ties, or relations"). It is not entirely clear, however, that the Court in *World-Wide Volkswagen* meant to exclude consideration of the respective interests.

203. 444 U.S. 286 (1980).

204. *Id.* at 292 (citations omitted).

205. See, e.g., ILL. ANN. STAT. ch. 40, § 401(2) (Smith-Hurd 1980); S.D. COMP. LAWS ANN. § 25-4-2 (1976).

206. Even if the forum state's interest in hearing the case is weak, it would be the only forum interested in what the plaintiff and, therefore, the Supreme Court consider necessary.

207. Many states have historically been very reluctant to grant divorces. Today, however, most states have more relaxed standards. See *infra* notes 212-13 and accompanying text.

lution of a marriage theoretically changes only the status itself, it has practical significance for the defendant spouse and for children of the marriage whose interest the defendant might in fact represent by resisting the divorce.²⁰⁸ For example, the spouse and children may value the marriage status itself.²⁰⁹ Moreover, the prospect of a divorce and its occurrence typically make reconciliation less likely.²¹⁰ The adjudication of "mere" status also may eventually affect the defendant spouse's property rights.²¹¹ In addition, the necessity of offering the plaintiff a forum that will grant a divorce has decreased, since many states have recently expanded their grounds for divorce.²¹² The remaining variations among the states in the grounds and procedures for divorce²¹³ merely cast doubt upon the Court's assertion that there is a fundamental social policy to facilitate divorces between unhappy spouses. Finally, the Supreme Court itself may consider reversing present doctrine and requiring that the defendant have at least some contacts with the forum state.²¹⁴ Although these arguments weaken the contention that even after *Shaffer* divorce is a status that a state can create solely because it is the domicile of the plaintiff, that practice will probably continue unless the Supreme Court clearly decides differently.

c. Relevant Characteristics of Custody Adjudication

Although the criteria governing jurisdiction to make custody decrees vary considerably among the states,²¹⁵ they generally impose more substantial restrictions on jurisdiction than

208. See *infra* notes 225-28 and accompanying text.

209. See Drinan, *What Are the Rights of an Involuntary Divorcee?*, 53 Ky. L.J. 209, 214 (1965).

210. See Currie, *supra* note 201, at 29 n.20.

211. See, e.g., *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81, 84-85 (1965).

212. See Garfield, *supra* note 196, at 503, 522-24. When the Court first held that due process does not require defendant contacts in a divorce case, *Williams v. North Carolina*, 317 U.S. 287 (1942), a number of states granted divorces only on proof of misconduct characterized by criminality and social stigma. See, e.g., *Williams v. Williams*, 351 Mich. 210, 213, 88 N.W.2d 483, 484 (1958); *Molloy v. Molloy*, 46 Wis. 2d 682, 685, 176 N.W.2d 292, 295 (1970). See generally Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966).

213. See Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229 (1981).

214. See *Hanson v. Denckla*, 357 U.S. 235, 251 (1958); *supra* note 202. See generally Redish, *supra* note 159, at 117-20; Note, *Minimum Contacts As Applied to Products Liability—World-Wide Volkswagen v. Woodson*, 29 DE PAUL L. REV. 1159, 1164-65, 1172 (1980); Note, *Specific Jurisdiction: Can the Fourth Circuit Approach Survive Woodson?*, 32 S. CAL. L. REV. 379, 391, 394 (1980).

215. See *supra* text accompanying notes 80, 135-38.

the domicile requirement imposes in divorce cases. Yet, most of those restrictions refer not to the relationship between the forum and the defendant but to the forum's contacts with the child.²¹⁶ There is a genuine and long-standing national consensus that legal rules applicable in custody cases should serve the interests of the children more than the interests of the parents.²¹⁷ This Article takes no exception to that principle. This lack of emphasis on the defendant's contacts with the forum state may nevertheless violate due process. The rules of jurisdiction governing child custody cases are "particularized,"²¹⁸ but their compliance with due process depends upon whether the special nature of the status that is involved justifies the rules' lack of defendant contacts requirements. The momentous consequences of a custody determination for both the child and the parents seem to indicate that the basis of a state's jurisdiction should ordinarily include significant forum-defendant contacts.

The Supreme Court has recognized that the interests of parents in having custody of their children are legitimate and substantial.²¹⁹ In custody decrees courts may, for example, give defendants custody subject to restrictions giving the plain-

216. See, e.g., *Perry v. Ponder*, 604 S.W.2d 306 (Tex. Civ. App. 1980); TEX. FAM. CODE ANN. §§ 11.045, 11.051 (Vernon Supp. 1980); U.C.C.J.A. § 3 (1968). In several states a parent who takes his or her child from a distant state, where the child had lived for years, could, after six months' residence, commence in the second state an initial action for custody and for a total denial of visitation to the other parent, who may never have been in the second state. See U.C.C.J.A. §§ 2(5), 3(a)(1)(i) (1968); cf. *In re Leonard*, 122 Cal. App. 3d 443, 175 Cal. Rptr. 903 (1981) (home state has jurisdiction to render custody decree binding a parent over whom state lacks personal jurisdiction); *Perry v. Ponder*, 604 S.W.2d 306 (Tex. Civ. App. 1980) (residence of mother and child in Texas for eight months may give Texas court jurisdiction to render custody decree binding father who lacks minimum contacts with Texas). The Wallop Act does not eliminate this possibility. See *infra* text accompanying notes 295-302.

217. See Foster, *Adoption and Child Custody: Best Interests of the Child?*, 22 BUFFALO L. REV. 1 (1972); Foster & Freed, *Child Custody*, 29 N.Y.U. L. REV. 423 (pt. 1), 615 (pt. 2), 425 (1964); Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 227-28, 230-49 (1975); Note, *Legalized Kidnapping of Children by Their Parents*, 80 DICK. L. REV. 305, 318 (1975); Comment, *Custody of Children: Best Interests of Child vs. Rights of Parents*, 33 CALIF. L. REV. 306 (1945). This consensus prevails despite some interstate disagreement on which substantive custody standards best serve children's interests. See Freed & Foster, *supra* note 213, at 233-37, 262-67. States whose substantive rules favor parental custody, even if custody in nonparents best serves the interests of the children, typically justify such rules at least partly on a theory that they serve the children's interests more surely than ad hoc comparisons between particular parents and other claimants. See, e.g., *Frederick v. Frederick*, 617 S.W.2d 629 (Mo. App. 1981).

218. *Shaffer v. Heitner*, 433 U.S. at 208 n.30.

219. *Stanley v. Illinois*, 405 U.S. 645, 652 (1971).

tiffs periodic possession of the children and a role in making decisions concerning them.²²⁰ The defendants may, on the other hand, be given no right to see the children nor to participate in their upbringing at all.²²¹ Unlike a decree creating the status of divorce, which primarily serves to confirm in law the already accomplished demise of a relationship, and permits the parties to the former marital relationship to establish new ones, a decree creating or altering the status of custody commonly expands or contracts the existing relationship between the child and the defendant. Thus, it cannot be said that in custody cases, as in divorce cases, the plaintiffs' interests in obtaining the relief they request are as a rule greater than the other interests that the decrees affect. The courts have long recognized the strong parental interests in custody cases and have consequently created a due process requirement that parents receive notice and opportunity to be heard in custody proceedings, despite the priority given by custody law to the interests of children.²²²

The child too has a significant interest in seeing that the defendant has contacts with the forum state. It is obvious that an unwise custody decree can adversely affect the development of the involved child.²²³ Unlike a divorce decree, which terminates the defendant's legal ties only with a plaintiff who has rejected the relationship and who is considered capable of making a responsible decision to do so, a custody decree may reduce or cut off the defendant's relationship to a child who may want or need the relationship and who may be too young to assess his or her own interests. To avoid this harm, defendant spouses must be able to participate fully in the custody proceeding. The judicial systems of all the states depend on parents to promote the children's best interests in custody litigation. This is most obvious in states in which children may not be parties,²²⁴ may not be represented by counsel,²²⁵ and

220. See, e.g., *Van Nortwick v. Van Nortwick*, 87 Ill. App. 2d 55, 58, 230 N.E.2d 391, 392-93 (1967); *Mirsky v. Mirsky*, 69 Ill. App. 2d 382, 386-87, 217 N.E.2d 467, 469-70 (1966).

221. See, e.g., *L.L.T. v. P.A.T.*, 585 S.W.2d 157 (Mo. App. 1979).

222. See *In re Donovan R.*, 5 Fam. L. Rep. (BNA) 2845, 2846 (Cal. App. 1979) (holding notice of custody proceeding given to parent by publication violative of due process, although "in modifying a custody decree the court is fundamentally concerned with the child's welfare"); *Parker v. Parker*, 142 Colo. 416, 418, 350 P.2d 1067, 1069 (1960); U.C.C.J.A. §§ 4, 5 (1968); *id.* Commissioners' Notes, 9 U.L.A. 130-32 (1979).

223. An unwise decision can also have serious consequences for the communities in which the child will live during his or her life.

224. See, e.g., *Leigh v. Aiken*, 54 Ala. App. 620, 625, 311 So. 2d 444, 448 (1975).

225. See *Robin v. Robin*, 45 Ill. App. 3d 365, 373-74, 359 N.E.2d 809, 815 (1977).

can be heard only through one of their parents or either parent's attorney.²²⁶ It is also true in states in which children possess substantial procedural rights.²²⁷ Even there, the defendant can contribute important information and make arguments bearing on the interests of the child that the plaintiff, the child's guardian *ad litem*, or the child's attorney fail to make.²²⁸

If the burdens on defendants are unreasonable because of the minimal contacts that they have with the forum, they may be unable to make as effective a defense as they could make in another forum.²²⁹ Since a reliable determination of the interests of the children as well as of the interests of the defendants in custody cases substantially depends upon the ability of defendants to litigate, there should be no cavalier assumption that the focus of custody litigation on the interests of children justifies utter disregard of the contacts that a defendant has with the forum. On the contrary, this very solicitude for children's interests in custody litigation suggests the need for due process standards guaranteeing that defendants have reasonable opportunities to participate. Commentators have justly criticized²³⁰ the majority opinion in *May* for its virtual silence concerning children's interests coupled with its exaltation of parents' interests.²³¹ Those who consider children's interests important should hesitate, however, to conclude that due process allows *ex parte* determination of those interests whenever a state finds that its own law allows such a determination.

See generally Note, *Lawying for the Child: Principles of Representation in Custody and Visitation Disputes Arising from Divorce*, 87 YALE L.J. 1126 (1978).

226. *See, e.g.*, *Rathke v. Peebles*, 31 Ill. App. 3d 711, 714, 334 N.E.2d 362, 365 (1975); *Hugo v. Hugo*, 430 A.2d 1183, 1186 (Pa. Super. 1981). *See generally* Freed & Foster, *supra* note 213, at 262-63.

227. *See* Note, *supra* note 225, at 1134-38.

228. *See* *Berlin v. Berlin*, 428 A.2d 1113 (Vt. 1981) (refusing to review propriety of trial court's failure to appoint counsel for children in suit for divorce and custody on the ground that neither parent had requested such appointment); Note, *A Child's Due Process Right to Counsel in Divorce Custody Proceedings*, 27 HASTINGS L.J. 917, 924-27 (1976); Dembitz, Book Review, 83 YALE L.J. 1304, 1312 (1974).

229. *See* Whitten, *supra* note 159, at 837; *Developments in the Law, supra* note 114, at 924, 931.

230. *See, e.g.*, Bodenheimer & Neeley-Kvarme, *supra* note 160, at 249.

231. The Court said a parent's rights were "far more precious . . . than property rights." *May v. Anderson*, 345 U.S. at 533.

d. Constitutional Recognition of Affected Individual and Institutional Interests

Although due process seems ordinarily to require that defendants in custody cases have some contacts with the forum state, the nature and consequences of custody adjudication and the special federal and state rules for jurisdiction in custody cases warrant broader due process standards than those that the Supreme Court has imposed, for example, in child support cases²³² or in commercial litigation.²³³ The Court has identified four interests belonging to states, individuals, and the interstate judicial system that will affect the strictness of the due process standards that it applies.²³⁴ In many custody cases, under the states' existing rules of jurisdiction, these interests are strong enough to justify relatively broad jurisdiction over nonresident defendants.

In *World-Wide Volkswagen*, the Supreme Court recognized the importance of a state's "interest in adjudicating the dispute."²³⁵ Custody litigation heavily implicates this interest; in such cases a state has dual concerns—the peaceful resolution of the dispute between the contending adults and the advancement or protection of the child's interests.²³⁶ The former concern arises in all litigation. The latter concern, though, is particularly affected by custody adjudications.²³⁷

The strength of a state's interest in protecting the child varies from case to case, becoming stronger as the connection between the state and the child becomes closer. Jurisdiction under the U.C.C.J.A. based on the forum state being the "home state,"²³⁸ or both having a "significant connection" with the child and the parents and possessing substantial evidence,²³⁹ requires some connection between the child and the forum state. The same is true for jurisdiction based on domicile or

232. See *Kulko v. Superior Court*, 436 U.S. 84, 91-98 (1978).

233. See, e.g., *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

234. See *infra* text accompanying notes 235-59.

235. 444 U.S. at 292.

236. Mnookin, *supra* note 217, at 229, 232, 238, 242, 244-45, 265.

237. *Id.* At least in some contexts, the appropriateness of recognizing the jurisdiction of a particular state may depend upon its approach to questions of choice of law. See Silberman, *supra* note 186, at 79-99. States almost invariably apply the law of the forum in custody cases. 1 A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW 122 (1967). As long as this practice prevails, the law should generally limit custody jurisdiction to states having substantial interests not only in providing a forum, but also in applying local law.

238. See U.C.C.J.A. § 2(5) (1968).

239. See *id.* § 3(a)(1), (2).

presence of the child in a non-U.C.C.J.A. state.²⁴⁰ The nature, extent, and currentness of the connections vary, of course, among these jurisdictional bases.²⁴¹ Nevertheless, in each instance some such connection is required.

Another variable affecting the strength of the state's interest is the amount of difference that the custody determination will make to the child. If the child will receive nearly the same benefits regardless of which parent receives custody, the interest of a state in seeing that its view prevails is fairly weak.²⁴² The strength and legitimacy of the state's interest in protecting the interests of the child also largely depend upon the forum's ability to obtain fairly the necessary evidence and upon the inability of another forum to perform that function equally as well or better.²⁴³ The jurisdictional criteria of the U.C.C.J.A. provide better assurance than either the technical concept of domicile or the mere requirement of physical presence that the state best equipped to decide the custody of a child will do so.²⁴⁴ All these rules, however, guarantee that the forum state has some ability to gather relevant evidence.

In evaluating the strength of a state's interest, one should also examine whether other forums have jurisdiction to hear the case. The Supreme Court's refusal in *Shaffer* to consider whether the presence of a defendant's property is a sufficient basis for jurisdiction if no other forum is available to the plaintiff²⁴⁵ may suggest that the absence of an alternative forum heightens a state's interest in deciding a case. This may be particularly true in child custody cases because of the dual and special nature of the state's interest in such litigation. If the forum state is the only state that has jurisdiction to determine custody, it is the only state that can evaluate the interests of the child.

240. See, e.g., *Gil v. Servizio*, 375 Mass. 186, 191, 375 N.E.2d 716, 720 (1978).

241. The forum-child connections are especially likely to be insubstantial if jurisdiction is based on presence of the child.

242. See *Mnookin*, *supra* note 217, at 232 (implying that in a divorce custody case unless one of the parties would endanger the child the decision of the court performs no function of child-protection).

243. Cf. *Kulko v. Superior Court*, 436 U.S. 84, 98-100 (1978) (treating the availability of proceedings under the Revised Uniform Reciprocal Enforcement of Support Act (1968) as undercutting a state's interest in providing a forum for child-support litigation); *Cornelison v. Chaney*, 16 Cal. 3d 143, 150-51, 545 P.2d 264, 268, 127 Cal. Rptr. 352, 356 (1976) (treating the availability of evidence on damages in a motor vehicle accident case as supporting state's interest in obtaining personal jurisdiction over nonresident defendant).

244. See *Bodenheimer*, *supra* note 7, at 1221-25.

245. *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977).

Of course, some states may lack any substantial connection with a child, thus weakening their interest in adjudicating the case. A non-U.C.C.J.A. state, for example, may exercise personal jurisdiction over two parents to decide the custody of a child even though the child has no contacts with the forum state.²⁴⁶ It may also exercise continuing jurisdiction to change the custody of a child long after all connection between the child and forum state was broken.²⁴⁷ If a state chooses not to require child-forum contacts, it may have an interest in settling the parents' dispute, but it cannot also claim the weighty state interest in protecting the welfare of the child.

In addition to a state's interest, the Supreme Court will consider in assessing the reasonableness of state jurisdiction "the plaintiff's interest in obtaining convenient and effective relief, . . . at least when that interest is not adequately protected by the plaintiff's power to choose the forum."²⁴⁸ Like the defendant's interests in the litigation, the plaintiff's interests encompass not only his or her personal interests, but also the interests of the child; both parents present arguments to assist the court in determining what is best for the child.²⁴⁹ The plaintiff's interests, therefore, arguably are weightier than the interests of plaintiffs who sue only for their own benefit in cases in which the courts do not play a paternalistic role. Indeed, in many custody cases the interests of plaintiffs appear to justify a departure from the policy discouraging litigation to change the status quo and, thus, favoring the convenience of defendants more than that of plaintiffs. In initial custody suits, the absence of either parent will impair the accuracy of a judicial determination of the child's interests. Because both plaintiff and defendant likely represent the child, courts should not necessarily favor defendant's convenience.²⁵⁰

Plaintiffs must do more, however, than just demonstrate their interest for the Supreme Court to consider it. They must also show that the forum state is the only state that can supply them with convenient and effective relief.²⁵¹ If, for example, a

246. See cases cited *supra* notes 137-38.

247. See, e.g., *Dillon v. Dillon*, 219 S.C. 255, 256-60, 64 S.E.2d 649, 649-50 (1951); *State ex rel. Ravitz v. Fox*, 273 S.E.2d 370, 372-73 (W. Va. 1980).

248. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292.

249. See *supra* text accompanying notes 219-28.

250. There is a public interest in seeing a custody dispute resolved consistently with the child's interests. See generally Ratner, *supra* note 159, at 367; Von Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1127-28, 1166-77 (1966).

251. See *supra* note 243.

father and his child have lived in a state long enough to develop extensive contacts with that state and to sever most of the child's contacts with the mother's state, the father would find it much more convenient to litigate in his state than in the mother's state, especially if the mother's state contains little evidence. Furthermore, the relief might be more effective if granted by the father's state; indeed, the U.C.C.J.A. and the Wallop Act may, in this example, only require enforcement of a decree made in the father's state.²⁵² The father's power to choose a forum thus does not adequately protect his interests, because the U.C.C.J.A. and the Wallop Act often permit only one forum to render a custody decree, or at least to render one that other states must enforce.²⁵³

If one assumes, however, that the mother's state has extensive contacts with both parents and the child, contains a great deal of evidence about the child, and under its law has jurisdiction to decide the custody case, the father might find that litigation in his home state is just as burdensome as litigation in the mother's state. Regardless of the site of the litigation, the father will suffer the inconvenience and expense that arises from the need for pretrial studies, depositions, and other proceedings that will occur in each of the two states.²⁵⁴ This situation might also lead to a decree in the mother's state that would be entitled to interstate enforcement and thereby just as effective as a decree from the father's state.²⁵⁵ These hypotheticals illustrate that the plaintiff's interest in obtaining convenient and ef-

252. See *infra* notes 630-46 and accompanying text. This argument may appear to be circular, since in contending that a decree does not violate due process, the argument uses a line of reasoning that assumes the decree is enforceable. That is, it assumes the decree does not violate due process. See *Griffin v. Griffin*, 327 U.S. 220, 232 (1946). Nevertheless, there are cases in which the U.C.C.J.A. and the Wallop Act, see *infra* text accompanying notes 550-600, 619-46, and the full faith and credit clause and implementing act, see *infra* text accompanying notes 603-18, might not give effect to a decree of the mother's state. One can still argue, therefore, that if the constitutional limits on personal jurisdiction permit the father's state to enter a decree, the decree will be more "effective" than a decree of the alternate forum. See *Kulko v. Superior Court*, 436 U.S. 84, 92 (1978); *Shaffer v. Heitner*, 433 U.S. 186, 211 n.37 (1977).

253. See *supra* notes 68-136 and accompanying text; *infra* notes 295-302, 345-428, 573-83, 619-46 and accompanying text; cf. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (noting that a plaintiff's interest in obtaining relief becomes important when the plaintiff has insufficient power to select a forum).

254. See U.C.C.J.A. §§ 18-20 (1968). Even if the father would bear less and the mother would bear more of these costs if the litigation were in his state, the ability of the courts under the U.C.C.J.A. to apportion these costs between the parties can negate this advantage. *Id.* §§ 19, 20.

255. See *supra* text accompanying note 168.

fective relief sometimes but not always justifies a state's broad exercise of jurisdiction over nonresident defendants.

The two final factors supporting the use of less rigorous due process standards for child custody are "the interstate judicial system's interest in obtaining the most efficient resolution of controversies"²⁵⁶ and "the shared interest of the several States in furthering fundamental substantive social policies."²⁵⁷ In custody litigation, these interests are interdependent and apply with very special force. The insistence that courts determining custody attach primary importance to the best interests of the children is one of the most uniformly expressed social policies in state law.²⁵⁸ Practically all states also recognize that the forum that can most easily determine the best interests of children will have a connection with and interest in the child and will have ready access to the relevant evidence.²⁵⁹ Most states even agree on the basic aspects of the U.C.C.J.A. and the Wallop Act which they use to implement the shared social policies. The states have thus expressed their shared interest in seeking the best interests of the children in custody cases by not placing unduly rigid limits on jurisdiction over defendants and by adopting jurisdictional criteria that promote efficiency and avoid interstate conflict in the resolution of custody disputes.

These two interests, unlike the interests of a particular state or the interests of a particular plaintiff, justify a state's exercise of jurisdiction over the defendant if the state satisfies the U.C.C.J.A. and Wallop Act standards, even though another state has substantial contacts with the child and jurisdiction under its own law. An application of specific statutory rules would better serve the social policy promoting the efficient operation of the combined federal-state custody scheme than would case-by-case assessments of the relative interests of particular plaintiffs and particular states.

e. Litigation Involving Multiple Contestants

Although these four interests may often justify relatively broad jurisdiction in custody disputes between two parties,

256. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 292.

257. *Id.*

258. See authorities cited *supra* note 217.

259. See Bates & Holmes, *The Uniform Child Custody Jurisdiction Act: Progress and Pitfalls*, 17 GA. ST. B.J. 72, 74 (1980); Ratner, *supra* note 37, at 809; Rheinstejn, *Jurisdiction in Matters of Child Custody*, 26 CONN. B.J. 48, 65 (1952); *supra* text accompanying notes 63-66.

they support custody adjudication still more strongly in disputes among more than two parties, even if the decree will bind absent contestants. In a two-party case, the due process clause very seldom prevents the rendering of a custody decree that binds both parties; state law permitting, a willing and able plaintiff can make the sacrifice of suing in a state having contacts with the other party. If, however, three or more parties contest custody or visitation of a child, it is more likely that one or more contestants will be unwilling or unable to litigate away from home. A too rigorous application of the due process clause to such cases could mean that no single decree would bind all the contestants even if the plaintiff were willing and able to litigate away from home.²⁶⁰

The Supreme Court has considered various anomalies that can result from limits on territorial jurisdiction in multiparty cases. In *Baker v. Baker, Eccles & Co.*,²⁶¹ for example, it was impossible to bring all possible distributees of a decedent's estate before a single court having jurisdiction over the estate. This produced inconsistent decisions in various states and interfered with "the ideal distribution of the entire personal estate as a unit."²⁶² The court considered this a mere "inconvenience" and a "necessary incident" of due process. The situation neither justified relaxation of due process limits on personal jurisdiction nor, presumably, denied due process of law to distributees who received less from the estate under one state's decision than they would have received under the other state's decision.²⁶³ On the other hand, in *Western Union Telegraph Co. v. Pennsylvania*²⁶⁴ one state attempted to escheat a fund in a proceeding not binding on another state that was also trying to escheat part of the same fund. The court held that the

260. Such cases can take various forms. For example, the parties in a visitation case may consist of the widowed mother of a child and the divorced parents of the child's deceased father. If the mother and grandparents live in three different states and lack contacts with each other's states, and if only the mother is willing and able in effect to waive her due process right by suing away from home, a strict requirement of minimum contacts would not permit one custody decree to bind all three adults. In another such case a child's foster parents might be suing both the father and the mother for custody in two states. Again, if a rigid test of due process gives each state jurisdiction over only one defendant but not the other, one decree cannot bind both defendants. In yet another case a state might itself seek custody of a child whose father or mother lives in a different state and lacks contacts with the state of the child's residence.

261. 242 U.S. 394 (1917).

262. *Id.* at 405.

263. *Id.* at 404-05.

264. 368 U.S. 71 (1961).

first escheat violated due process.²⁶⁵

Custody contests conducted in two states can produce either kind of anomaly if neither state can bind every party. Suppose, for example, that a child's paternal grandparents are divorced and live in two different states. The grandmother lives in state *A* and the grandfather in state *B*; each grandparent lacks contacts with the other's state. The child's widowed mother, who lives in *B*, may sue the grandmother for custody in *A*, where the child lived with his father until the father's death. Suppose that the mother wins custody, subject to the grandmother's right to visitation in July of each year. If the grandfather later sues in *B* for visitation, the *B* court may make factual findings that are inconsistent with those made by the *A* court, or the *B* court may give the grandfather visitation rights for each August. Like the distributee of the estate in *Baker*, the mother suffers the inconvenience and expense of duplicative litigation and loses certain rights she won in one state because of the judgment of another state. The limits on state court jurisdiction to bind litigants thus interferes with "the ideal distribution of the entire"²⁶⁶ set of custodial rights. If the court is concerned with the welfare of children, it might object more to inconvenience and interference with "ideal" dispositions in custody cases than to similar interference in estate litigation. The court, however, might strictly adhere to *Baker* and deem this anomaly in custody litigation a mere "necessary incident" of territorial limits on judicial jurisdiction.

Assume a second hypothetical in which the mother loses custody contests in both states *A* and *B*. The *A* court orders her to send the child to the grandmother in state *A* and the *B* court orders her to deliver the child to the grandfather in state *B*.²⁶⁷ If this occurs, the mother faces more than inconvenience and inconsistent findings and more than the loss in one forum of what she gained in another. She must face even more than the double liability that violated due process in *Western Union*. She is literally unable to satisfy both judgments and conceivably could face punishment for contempt of court or even criminal prosecution.²⁶⁸

265. *Id.* at 75.

266. *Baker v. Baker, Eccles & Co.*, 242 U.S. at 405.

267. Enactment of the Wallop Act and the near ubiquity of the U.C.C.J.A. make this unlikely, but it remains possible. See *infra* notes 573-83, 619-21, 629-46 and accompanying text.

268. Cf. *In re Walker*, 228 Cal. App. 2d 217, 221, 39 Cal. Rptr. 243, 245 (1964) (conflicting judgments left mother open to criminal charge in Texas).

The Court's solution in *Western Union* will not work in child custody cases. In *Western Union*, the Court left the fund in the possession of the defendant until the states brought an original action in the Supreme Court to determine their respective interests.²⁶⁹ No similar resolution would be possible in many custody cases, because if due process prohibits jurisdiction over some of the parties, no single plaintiff could bring all the claimants before a single court. If the contestants prefer self-help to inconvenient litigation, there may be no attainable judicial solution. For example, the grandparents, each having won custody in their own state, may decline to sue to resolve their conflicting rights and may resort instead to interstate child-snatching. Leaving a child exposed to such conduct until the interested adults choose to waive due process is less satisfactory than leaving funds in the hands of a stakeholder until one state chooses to sue others in the Supreme Court. The Court therefore should be reluctant to hold, by analogy to *Western Union*, that a custody decree binding some but not all of the claimants violates the due process rights of each party bound. Neither, however, should the Court readily decide that due process prevents joinder of all claimants in a single custody proceeding. Such a holding could result in inconvenience, waste, inconsistency, harmful self-help, and the issuance by different states of mutually contradictory custody orders with which a party would be unable to comply.²⁷⁰ Instead, the Court should treat some custody cases involving multiple parties differently than cases involving only two contestants. In considering the requirement of the due process clause in the former cases, it should give great weight to the individual, state, and national interests tending to support the broad power of a state court to bind nonresident defendants.²⁷¹

f. The Territorial Imperative

The Supreme Court indicated, however, that some of these individual, state, and national interests may be relevant only in evaluating fairness to defendants, and not in deciding whether

269. 368 U.S. at 77 (1961).

270. *Cf. Cornelison v. Chaney*, 16 Cal. 3d 143, 150-51, 545 P.2d 264, 268, 127 Cal. Rptr. 352, 356 (1976) (dictum) ("avoidance of a multiplicity of suits and conflicting adjudications" should help to justify jurisdiction over nonresidents).

271. *See Perry v. Ponder*, 604 S.W.2d 306, 316 (Tex. Civ. App. 1980); *cf. Mul-lane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 311-13 (1950) (considering state interest in closing trusts as rationale for permitting jurisdiction over trust claimants).

an exercise of jurisdiction exceeds the limits that a state's status within the federal system imposes on that state.²⁷² Even if the exercise of jurisdiction over defendants serves their convenience as well as the plaintiff's and effects a strong interest of the forum state, it can deny due process by violating "principles of interstate federalism."²⁷³

The Court has not been consistent in emphasizing this branch of due process analysis²⁷⁴ and has not yet specifically defined its contours. The Court in *World-Wide Volkswagen v. Woodson* did, however, reiterate and claim to apply the *International Shoe* dictum that due process excludes jurisdiction over a defendant who has "no contacts, ties, or relations"²⁷⁵ with the forum state. Furthermore, in *Kulko v. Superior Court*,²⁷⁶ the one recent case in which the Court has applied "minimum contacts" analysis to litigation concerning domestic relations, the Court emphasized that the unilateral activity of someone other than the defendant cannot create the necessary contacts; they invariably must result from the defendant's purposeful conduct as the defendant seeks the benefits and protections of the laws of the forum state.²⁷⁷

Current state law and the Wallop Act ensure that few cases will arise in which courts of states having literally no relations with the defendants adjudicate custody. Jurisdiction usually results from a substantial period of the child's residence,²⁷⁸ while an adult's attempts to exercise rights of custody or visitation usually bring the adult to the residence of the child. Adjudications by states lacking contacts with defendants are, nevertheless, still possible.²⁷⁹ If there are no contacts, the

272. See, e.g., *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980); *Hanson v. Denckla*, 357 U.S. 235, 251-53 (1958).

273. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 293.

274. See, e.g., *Rush v. Savchuk*, 444 U.S. 320, 327-33 (1980); *Shaffer v. Heitner*, 433 U.S. 186, 207-12 (1977).

275. 444 U.S. at 294 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

276. 436 U.S. 84 (1978).

277. *Id.* at 93-94 (holding personal jurisdiction lacking over defendant in child support action).

278. See *supra* notes 70-71, 216-18 and accompanying text.

279. See, e.g., *Perry v. Ponder*, 604 S.W.2d 306, 313 (Tex. Civ. App. 1980). For example, a father may have lived in a different state from the mother and child since the child's birth. Because the child never lived in his state, both the U.C.C.J.A. and the Wallop Act prevent the father from bringing a custody proceeding in his state that, under the U.C.C.J.A. or the Wallop Act, would have precluded the mother from suing in her state. In another case, a father may once have lived with his child but has since separated from his wife. If both move to different states, the father alone and the mother and child together, the

Supreme Court apparently might conclude that principles of interstate federalism bar custody adjudication by a court of the plaintiff's state whether or not litigation in that state would be convenient and effective for the plaintiff, serve the interests of the new state, or provide an efficient determination of the best interests of the child.

Paradoxically, widespread enactment of the U.C.C.J.A., a statute that assumes that there is no due process requirement of territorial jurisdiction over custody defendants,²⁸⁰ undercuts the arguments for relaxation of that requirement. It does so by ameliorating the burdens of plaintiffs who are forced to litigate outside their home state. Certain sections of the Act encourage states to make evidence located in their state available in another state and to minimize and to allocate the inconvenience and cost of litigation in any particular forum.²⁸¹ Although courts have made varied use of these and other U.C.C.J.A. tools of interstate cooperation,²⁸² these sections weaken the argument that it is necessary for effective custody litigation to permit assertions of jurisdiction over defendants that violate principles of federalism or that sacrifice the principle of fairness to defendants.²⁸³ Indeed, the Court relied on the availability of a similar uniform statute when it refused to relax due process requirements for jurisdiction in a child support action.²⁸⁴ Given the Court's commitment to its approach to due process limits on territorial jurisdiction, the burden seems to be on those attempting to justify a categorical exception to that

father's new state cannot exercise jurisdiction and bar the mother's state from exercising jurisdiction. In still another case, a father, whose wife may have suddenly left the family home with the child and hidden in another state, may have failed to promptly commence custody proceedings and thereby under the Wallop Act failed to prevent the mother's and child's new state from exercising jurisdiction. In each of these three cases, even if the father had no personal contact whatever with the new state of the mother and child, state and federal statutes would leave the courts of the mother's state free to decide custody of the child. *See supra* text accompanying notes 216-18; *infra* text accompanying notes 302-03, 573-75, 579-83, 620-29.

280. *See supra* text accompanying notes 155-56.

281. *See* U.C.C.J.A. §§ 18-20 (1968).

282. *Compare* Green v. Green, 87 Mich. App. 706, 709-15, 276 N.W.2d 472, 473-76 (1978) (decision by two judges of different states through telephone conversation concerning which court should hear child custody case) *with* Loper v. Superior Court, 126 Ariz. 14, 612 P.2d 65 (Ct. App. 1980) (vacating denial of parent's motion for finding of inconvenient forum, on grounds that lower court should have first consulted and cooperated with Alaska court).

283. These U.C.C.J.A. provisions can also ameliorate the burdens on the defendant, so their availability also arguably favors requiring the defendant to litigate the custody issue in the plaintiff's state. *See supra* note 254.

284. *Kulko v. Superior Court*, 436 U.S. at 98-99.

approach. These U.C.C.J.A. provisions make that burden harder to carry.

g. Likely Invalidation of Some U.C.C.J.A. Applications

The preceding analysis suggests that there are two reasons why the Supreme Court will likely hold that some extreme applications of the U.C.C.J.A. deprive defendants of due process. First, the Court's minimum contacts test of reasonableness is "not susceptible of mechanical application"²⁸⁵ but requires courts to weigh the facts of each case.²⁸⁶ Not only do the contacts between custody defendants and forum states vary substantially from one case to another, but also two of the four interests that the Court will use to evaluate the reasonableness of burdening defendants vary from case to case and may not be involved at all in some cases.²⁸⁷

Second, the Court often voices a concern for territorial limits on state authority.²⁸⁸ This concern appears to be separate from considerations of convenience and interests of particular parties and states and seems to require that defendants have some purposeful contacts with the forum. Since it is possible under state and federal statutory law for a forum state to exercise jurisdiction over the custody of a child even if one parent has no intentional contacts with the state and another state would be a satisfactory forum,²⁸⁹ there will probably be a few cases in which the due process clause, as an instrument of federalism, will bar the exercise of jurisdiction otherwise proper under federal and state law.

Using the due process clause to invalidate exercises of jurisdiction under the U.C.C.J.A. in which there are insufficient forum-defendant contacts may be an improvement, not a blight, upon the current statutory law of custody jurisdiction. The minimum contacts standard enhances the likelihood that each adult who claims to speak for the child's interests has an adequate opportunity to do so.²⁹⁰ That opportunity in turn maximizes the information available to a forum when deciding whether or not to defer to another forum also having jurisdiction. Yet, courts should be reasonably flexible in applying the

285. *Id.* at 92 (citing *Hanson v. Denckla*, 357 U.S. 235, 246 (1958)).

286. *Id.*

287. *See supra* text accompanying notes 235-55.

288. *See supra* text accompanying notes 272-84.

289. *See, e.g., In re Leonard*, 122 Cal. App. 3d 443, 175 Cal. Rptr. 903 (1981); *Perry v. Ponder*, 604 S.W.2d 306, 313-14 (Tex. Civ. App. 1980).

290. *See supra* text accompanying notes 223-28, 249.

International Shoe requirement to custody litigation. Cases in which there are strong individual and state interests in having litigation occur in a particular forum should be allowed to remain in that forum, even though there will be some sacrifice of defendants' interests. The clearest example of such a case is an abandonment or neglect proceeding in which the location or even the identities of a child's parents are unknown. Due process should only limit the consequences of this proceeding on a parent who may eventually appear; it should not limit the authority of the state to take immediate protective action. The requirements of due process should also be flexible in cases involving either multiple parties²⁹¹ or the absence of a suitable forum having contacts with both of the parties.²⁹² In such cases, the relevant individual and state interests may justify proceedings binding each contestant despite the absence of contacts that due process would otherwise require.

Using the due process standards of *International Shoe* is far wiser than adopting other alternative due process standards. It would be inappropriate, for example, for the Court to equate due process with the detailed statutory scheme of the U.C.C.J.A. Since the Act is receiving disparate and parochial interpretations and applications,²⁹³ this alternative would likely be ineffective as well. If the Court instead held that due process requires a forum state to have a connection with the child, but defined this connection in terms other than those of the U.C.C.J.A., the Court probably would interfere with the operation of the federal and state statutory scheme as much or more than it would if it merely applied the general principles of *International Shoe* and its progeny.²⁹⁴ Thus, sensible application of the standards of *International Shoe* seems likely to provide the best constitutional control on custody jurisdiction.

A flexible interpretation of the due process standards of *International Shoe* neither abdicates to unfettered state law, nor

291. See *supra* text accompanying notes 260-71.

292. See *supra* text accompanying note 245.

293. See *supra* text accompanying notes 80, 135-38.

294. The federal and state acts probably recognize jurisdiction more often in cases in which the child is not currently a resident or domiciled in the forum state than in cases in which the forum state lacks both contacts with the defendant and justification for not requiring such contacts.

In any event, it would be unwise for the Court to define this connection between the child and the state in terms of the child's domicile or residence. A parent can easily manipulate the location of a child's domicile or residence. Moreover, these criteria are inadequate to serve any of the purposes of selection among possible forums. See *supra* notes 42-47 and accompanying text.

invariably requires forum-defendant contacts, nor indiscriminately dispenses with them. Instead, it reflects the general standards of fairness and reasonableness in the special context of custody litigation. In applying the due process clause to custody cases, courts should not only respect the individual and institutional interests that the Supreme Court has recognized as relevant, but also give some deference to the specific federal and state statutory scheme adopted to advance those interests. If courts do so, they will sustain custody jurisdiction exercised consistently with the U.C.C.J.A. and the Wallop Act in all but extreme cases in which courts adjudicate the rights of defendants lacking significant contacts with the forum without real justification.

D. THE NEW FEDERAL STATUTE

Certain commentators suggest that the Wallop Act,²⁹⁵ also known as the Parental Kidnaping Prevention Act or P.K.P.A., codified as section 1738A of title 28 of the United States Code,²⁹⁶ drastically alters federal and state law on initial custody jurisdiction.²⁹⁷ Professor Henry Foster and Dr. Doris Freed have written that, unlike the U.C.C.J.A. with its "alternative bases for custody jurisdiction,"²⁹⁸ the "PKPA, in effect, confers *exclusive* and *continuing* child-custody jurisdiction on the home state."²⁹⁹ Richard Crouch has similarly contended that the new

295. Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, § 6, 94 Stat. 3568.

296. 28 U.S.C.A. § 1738A (West Supp. 1980).

297. See Foster & Freed, *Child-Custody Decrees—Jurisdiction*, N.Y.L.J., Apr. 24, 1981, at 1, col. 1.

298. *Id.* at 2, col. 1; U.C.C.J.A. § 3 (1968).

299. Foster & Freed, *supra* note 297, at 2, col. 1; 28 U.S.C.A. § 1738A(c)(2)(B) (West Supp. 1980). They have also stated that the Wallop Act renders significant connection jurisdiction "superfluous" and suggested that "for all practical purposes" it has been "eliminated." *Id.* at 2, cols. 1-2. They asserted that the Wallop Act treated significant connection jurisdiction in this manner because the measure was "prepared and passed in a hurry" and contended that the result surprised "concerned scholars." *Id.*

In fact, however, a recommendation that Congress make initial jurisdiction of a home state exclusive of initial significant connection jurisdiction for the purposes of the Wallop Act was presented in a Senate subcommittee hearing on the legislation as early as April, 1979. See *Parental Kidnaping, 1979: Hearing Before the Subcomm. on Child and Human Development of the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 51-52 (1979) (statement of Professor Brigitte M. Bodenheimer) [hereinafter cited as *1979 Senate Hearing*]. Nine months later, when Professor Foster and Dr. Freed submitted statements on the bill to the same subcommittee, neither of them commented on this recommendation. See *1980 Senate Hearing, supra* note 4, at 52-58 (testimony and statement of Dr. Doris Freed), Addendum at 218-33 (statement of Professor Henry Foster). Later, in a Senate hearing in January, 1980,

Act "makes express and exclusive the priority of home state jurisdiction over the other jurisdictions" and that it is therefore in conflict with U.C.C.J.A. decisions that "have found and exercised significant-connection jurisdiction despite there being a home state elsewhere."³⁰⁰

These interpretations of the Wallop Act are inaccurate. Section 1738A, correctly interpreted, does not "confer" jurisdiction. The federal provision detailing the relationship between the "home state" and "significant connection" bases of jurisdiction³⁰¹ is not a grant or denial of initial jurisdiction; it is only a criterion for applying the new federal statutory duties governing the enforcement and modification of foreign decrees and the treatment of concurrent proceedings.³⁰² Only two of the Wallop Act's provisions limit the authority of a state court to make the initial award of a child's custody. One provision requires that courts give contestants notice and opportunity to be heard before it makes a custody determination.³⁰³ The other provision forbids a state court under certain circumstances from exercising custody jurisdiction during the pendency of a proceeding in another state.³⁰⁴ The Wallop Act has no other controls circumscribing the authority of a state court to conduct proceedings for, and to make, an initial custody decree.³⁰⁵

the recommendation received the endorsement of the author of this Article, who suggested language to implement the recommendation which the Senate subcommittee thereafter adopted. *Id.* at 145 n.16, Addendum at 270 (statement and further submission of Russell M. Coombs). In June 1980, Dr. Freed again testified on the legislation and again did not comment upon the recommendation in question. *Parental Kidnaping: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 99-107 (1980). Two months later the Senate passed a version of the Wallop proposal, including this subordination of significant connection to home state jurisdiction, and on that occasion Senator Wallop explained the reasons for the amendment. 126 CONG. REC. S11,483-86, S11,489 (daily ed. Aug. 25, 1980). Then in September 1980, three months before enactment of the Wallop Act, the House-Senate conference committee approved the proposed legislation in a form which included the language under discussion. H.R. REP. NO. 1401, 96th Cong., 2d Sess. 18 (1980). The statutory subordination of significant connection jurisdiction does not, therefore, seem to have been a result of haste nor a cause for surprise to concerned scholars.

300. R. CROUCH, *supra* note 70, at 91.

301. 28 U.S.C.A. § 1738A(c)(2)(B)(i) (West Supp. 1980).

302. This provision is analyzed in connection with the discussion of these duties below. *See infra* text accompanying notes 380-90, 631-32.

303. 28 U.S.C.A. § 1738A(e) (West Supp. 1980).

304. *Id.* at § 1738A(g).

305. *See* H.R. REP. NO. 1396, 96th Cong., 2d Sess. 639 (1980); S. REP. NO. 553, 96th Cong., 2d Sess. 1254 (1980). In the first draft of § 1738A and in several subsequent revisions, subsection (c) did provide that a state "has jurisdiction . . . if and only if" it meets the criteria of § 1738A(c)(1) and (2). Typed drafts of amendment to S. 1437, 95th Cong., 2d Sess. (Nov. 15, 1977) (on file with the *Min-*

1. *Notice and Opportunity to be Heard*

Section 1738A(e) provides that "[b]efore a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child."³⁰⁶ This provision should have little practical impact on most initial custody proceedings, but in occasional cases it may give rise to difficult and crucial legal issues.

Subsection (e) does not specify the methods to use in attempting notification, the circumstances under which actual notice is sufficient, the circumstances under which unsuccessful attempts are sufficient, the period of time a person has to prepare for a hearing, or the extent of participation in the proceedings that courts must afford to particular classes of persons. It answers these questions by referring to the constitutional standard of reasonableness.³⁰⁷ Instead of describing what notice and opportunity to be heard means, subsection (e) specifies the classes of persons that must receive notice and opportunity to be heard, even if state law³⁰⁸ and federal constitutional law³⁰⁹ offer them no protection.³¹⁰ The two principal problems

nesota Law Review). The language of the Act was changed, however, because of information discovered by this author during negotiations with Senator Wallop's staff over the possibility of Senator Wallop accepting the draft as a substitute for a solely criminal provision on "child-snatching" that he had earlier persuaded the Senate Judiciary Committee to insert in the Criminal Code bill, S. 1437, 95th Cong., 2d Sess. (Nov. 15, 1977). It was learned by this author that Senator Culver of Iowa might oppose the substitute draft on the ground that it unduly interfered with state power. The draft then was revised to make the standards in section 1738A(c)(1) and (2) mere conditions on the proposed duties governing interstate enforcement, nonmodification, and concurrent proceedings rather than criteria for the existence or nonexistence of jurisdiction. When Senator Wallop agreed to accept the draft it incorporated that revision.

306. 28 U.S.C.A. § 1738A(e) (West Supp. 1980).

307. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950).

308. *See, e.g.*, *Clements v. Barber*, 49 Ala. App. 266, 272-73, 270 So. 2d 815, 820 (Civ. App. 1972) (notice of custody proceeding to "boarding home parents" in physical possession of child not required); *Hawkins v. Hawkins*, 77 Ill. App. 3d 873, 876, 396 N.E.2d 668, 670 (1979) (father not required to give notice of custody proceedings to mother's grandparents or child's maternal grandparents when neither set of grandparents were members of class for which statute requires notice).

309. *See, e.g.*, *Kyees v. County Dep't of Pub. Welfare of Tippecanoe County*, 600 F.2d 693, 698-99 (7th Cir. 1979) (holding foster parents in possession of child lack liberty interest requiring due process in removal of child).

310. In describing which persons should receive notice both inside and outside the forum state, the Wallop Act generally follows U.C.C.J.A. section 4, which establishes notice requirements only for persons inside the forum state. U.C.C.J.A. § 4 (1968). The Commissioners' Note to section 4 states that its pro-

that one faces in interpreting subsection (e), therefore, relate to the language it uses to describe which persons it covers. The reference to termination of parental rights creates one problem, while the use of the term "contestants" creates the other.

a. Notice and Hearing for a Parent Attacking Prior Termination of Parental Rights

Subsection (e) requires that notice and opportunity to be heard be given to "any parent whose parental rights have not been previously terminated."³¹¹ This requirement may present rather complex issues of law if parents, denied notice and opportunity to be heard on the ground that their rights had been terminated, argue that they should have been given notice and opportunity to be heard because the termination of their parental rights was invalid. Parents might claim, for example, that they were given inadequate notice and opportunity to be heard in the termination proceeding,³¹² that the terminating court lacked jurisdiction over the parent,³¹³ over the child,³¹⁴ or over the subject matter;³¹⁵ that failure to appoint counsel to represent the parent³¹⁶ or to allow the parent to confront and cross-examine adverse witnesses³¹⁷ denied him or her due process; or that the substantive standard on which the court based termination was constitutionally inadequate on its face or as applied to the parent.³¹⁸ Some of these claims have at least

vision of notice and opportunity to be heard is a due process requirement. U.C.C.J.A. § 4 Commissioners' Note, 9 U.L.A. 130 (1979). It is doubtful, however, that mere physical custody of a child, which section 2(8) defines as "actual possession and control," U.C.C.J.A. § 2(8) (1968), and which, therefore, even a wrongdoer unrelated to the child could achieve, is a sufficient predicate for this due process right. See *Kyees v. County Dep't of Pub. Welfare of Tippecanoe County*, 600 F.2d 693, 698-99 (7th Cir. 1979).

311. 28 U.S.C.A. § 1738A(e) (West Supp. 1980).

312. See *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965) (holding that adoption without notice to parent whose parental rights the adoption terminated violated due process); *Tammie v. Rodriguez*, 570 P.2d 332, 334-35 (Okla. 1977) (vacating termination of rights of mother not given notice required by statute).

313. See *In re One Minor Child*, 411 A.2d 951, 952-53 (Del. 1980).

314. See *Huff v. Moore*, 144 Ga. App. 668, 668, 242 S.E.2d 329, 329 (1978).

315. See *In re Marriage of Carrico*, 284 N.W.2d 251, 255 (Iowa 1979).

316. See *Lassiter v. Department of Social Servs. of Durham County*, 452 U.S. 18, 24 (1981).

317. Cf. *In re Jones*, 429 A.2d 671, 673 (Pa. Super. 1981) (holding confrontation and cross-examination of adverse witnesses required by due process in dispositional hearing in child-custody case).

318. See *Alsager v. District Court*, 406 F. Supp. 10, 17-21 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976); *In re J.L.W.*, 102 Wis. 2d 118, 132-40, 306 N.W.2d 46, 53-57 (1981).

tenable bases in federal constitutional law,³¹⁹ state law,³²⁰ or both federal and state law.³²¹

In deciding how to apply the Wallop Act in the face of such an attack, a court must decide not only whether the termination had indeed been defective, but also whether principles of *res judicata* or full faith and credit prevent collateral attack on the termination.³²² If the court decides that these principles permit collateral attack, it then must also consider whether it should construe section 1738A(e) to bar such an attack and whether the Constitution allows that construction.³²³ The Wallop Act and its legislative history are silent on these questions, and resolving them is beyond the scope of this Article. One should nevertheless note that if subsection (e) requires that persons who launch these attacks be given notice and opportunity to be heard, and if state law fails to require notice and opportunity to be heard in such cases,³²⁴ then subsection (e) restricts the power to make initial custody decisions.

b. Notice and Hearing for a Person Claiming Custody or Visitation

A contestant must be given notice and opportunity to be heard under subsection (e). Subsection (b) defines "contestant" as a person who "claims a right to custody or visitation" of the child.³²⁵ In interpreting subsection (e), therefore, one must decide whether the contestant's claim has to be cognizable under state or federal law and, if it must, which state's law in the absence of federal law determines whether it is cognizable.

The answer to the first question is clear—the claim must be cognizable for subsection (e) to apply. Congress could not have intended to allow total strangers to a child a right of notice simply by their making a claim that all law would deny

319. *See, e.g.*, *Armstrong v. Manzo*, 380 U.S. 545, 550 (1965); *Alsager v. District Court*, 406 F. Supp. 10, 17-21 (S.D. Iowa 1975), *aff'd*, 545 F.2d 1137 (8th Cir. 1976).

320. *See, e.g.*, *Huff v. Moore*, 144 Ga. App. 668, 668-69, 242 S.E.2d 329, 329-30 (1978). *Cf. Davey v. Evans*, 156 Ga. App. 698, 700, 275 S.E.2d 769, 771 (1980) (residence or domicile of the child is not a jurisdictional prerequisite to adoption).

321. *See, e.g.*, *In re One Minor Child*, 411 A.2d 951, 952-53 (Del. 1980); *In re J.L.W.*, 102 Wis.2d 118, 130-40, 306 N.W.2d 46, 52-57 (1981).

322. *See generally infra* text accompanying notes 510-50, 584-619, 753-99.

323. *See In re Riggs*, 612 S.W.2d 461, 465-69 (Tenn. 1980), *cert. denied*, 450 U.S. 921 (1981).

324. *Cf. People ex rel T.A.F.*, 624 P.2d 349, 351 (Colo. App. 1980) (members of extended family lacked standing to challenge order terminating parental rights).

325. 28 U.S.C.A. § 1738A(b)(2) (West Supp. 1980).

them standing to assert. Subsection (e) must exist to protect only those whose claims the courts would hear, because they are the only ones whose claims will affect the proceedings. There is, however, little authority explicitly supporting this position. The legislative history of the Wallop Act does not provide any guidance on the issue.³²⁶ The Commissioners' Notes commenting on similar language in several sections of the U.C.C.J.A.³²⁷ also do not adequately resolve the question.³²⁸ One court has, however, interpreted the similar provision of U.C.C.J.A. section 10, which requires a court when it learns of people who claim custody or visitation rights to order that they be notified and joined as parties. Almost a year before enactment of the Wallop Act, the Supreme Court of Missouri held that section 10 was inapplicable to foster parents on the ground that under other Missouri law they lacked standing.³²⁹ Although there is no indication in the legislative history of the Wallop Act that Congress was aware of this precedent, there is also no indication that Congress intended, any more than the Commissioners did, to require notice to persons lacking standing or substantive custody rights.³³⁰

If the claim of the contestant must be cognizable, the court must decide which state's law controls the question of standing to claim custody or visitation rights.³³¹ Since this choice will affect the operation of section 1738A not only in initial custody cases, but also in cases involving enforcement and modification of custody orders, this Article defers full discussion of its proper resolution until after an examination of the manner in which the Wallop Act generally treats enforcement and modifi-

326. See, e.g., H.R. REP. NO. 1401, 96th Cong., 2d Sess. 41-43 (1980); S. REP. NO. 553, 96th Cong., 2d Sess. 1253-55 (1980).

327. Compare 28 U.S.C.A. § 1738A(b)(2), (e) (West Supp. 1980) with U.C.C.J.A. §§ 2(1), 4, 10 (1968).

328. See U.C.C.J.A. §§ 2(1), 4, 10 Commissioners' Notes, 9 U.L.A. 120, 130, 147 (1979).

329. *In re Trapp*, 593 S.W.2d 193, 205 (Mo. 1980). In the Missouri version of the U.C.C.J.A., joinder and notice under section 10 are discretionary, not mandatory as in the U.C.C.J.A. *Id.* at 205 n.11.

330. See, e.g., *supra* note 326.

331. Standing to hear the claim would usually depend on state law, but not always. Even if state law denies a person, such as the father of an illegitimate child, any substantive right to custody or visitation and any standing to request it, if the Constitution gives him such a substantive right, then due process entitles him to notice and a hearing. See generally *Stanley v. Illinois*, 405 U.S. 645 (1972). In such a case, federal constitutional law surely requires the state court to respect the claim. Since the person can make the federal claim in the state court, it is a claim within the section 1738A definition of a "contestant" and supports application of the statutory requirement of notice and opportunity to be heard.

cation.³³² It is sufficient to state this Article's conclusion that subsection (e) probably requires the claim to be cognizable under the law of the forum state. If this interpretation is correct, then the Wallop Act's requirement of notice and opportunity to be heard in initial custody cases is in this respect no broader than the notice and hearing requirements of the Constitution³³³ and of state law.³³⁴

c. Other Legal Issues

The legal issues that subsection (e) creates do not all concern the question of who is entitled to notice and opportunity to be heard. There is also a question whether violation of subsection (e)'s notice and hearing requirement invalidates a decree within the rendering state and disqualifies it for the recognition or enforcement that other states might give it under state law or federal constitutional law. The intrastate effect of a state's violation of the Wallop Act's provisions seems clear under the language of subsection (e) and under the remainder of section 1738A.³³⁵ A custody determination made without the required notice and opportunity to be heard violates federal law, because subsection (e) mandates these requirements "before a child custody determination is made."³³⁶ The Wallop Act does not say, however, when and how the courts of that state on direct or collateral review of the proceed-

332. See *infra* text accompanying notes 872-78.

333. See, e.g., *Kyees v. County Dep't of Pub. Welfare of Tippecanoe County*, 600 F.2d 693 (7th Cir. 1979).

334. Compare *In re Trapp*, 593 S.W.2d 193, 205 (Mo. 1980) (foster parents in possession of child have no right under state law to intervene in custody proceeding) with *People ex rel. M.D.C.M. v. Sanchez*, 522 P.2d 1234 (Colo. App. 1974) (state statute requires that foster parents be entitled to intervene in a dispositional hearing). Another feature of subsection (e) that may in some states impose new restrictions on the exercise of initial jurisdiction is the requirement that notice and opportunity to be heard be given to any person who has physical possession and control of a child. This requirement applies regardless of the possessor's relationship to the child or the possessor's standing to seek custody or visitation rights. See 28 U.S.C.A. § 1738A(b)(7), (e) (West Supp. 1980); cf. U.C.C.J.A. §§ 2(8), 4 (1968) (identical U.C.C.J.A. requirement).

335. See *infra* text accompanying notes 647-726, 749-51. The only interstate sanction that the Wallop Act imposes if a state proceeding violates one of its requirements is found in section 1738A(a) and (g). This section states that such proceedings are not entitled to the respect that other states must normally give to foreign proceedings under sections 1738A(a) and (g), see *infra* text accompanying notes 343-440, 620-47, because they are not conducted "consistently with the provisions of this section." 28 U.S.C.A. § 1738A(a), (g) (West Supp. 1980). See *Virginia E.E. v. Alberto S.P.*, 440 N.Y.S.2d 979, 984 (Fam. Ct. 1981).

336. 28 U.S.C.A. § 1738A(e) (West Supp. 1980).

ings can correct the error of federal law. It thereby leaves such questions to the law of the rendering state.³³⁷

Another legal issue under the Wallop Act is whether the Act preempts state law provisions governing notice and opportunity to be heard. Subsection (e) does not prohibit giving notice and opportunity to be heard to persons whom it does not protect but who are entitled to those procedural protections under the due process clause or under state law. Neither does it expressly forbid giving notice and opportunity to be heard in a manner that is more than reasonable.³³⁸ This Article discusses whether the Wallop Act has occupied the field or otherwise invalidated various state law requirements below, and reaches the conclusion that the Act preempts state law only if courts find it literally impossible to comply with both federal and state law.³³⁹ In subsection (e), as elsewhere,³⁴⁰ the Wallop Act merely imposes an express federal statutory requirement and does not prohibit the application of requirements derived from other sources of law.

If courts interpret subsection (e) as suggested, it will preclude the jurisdiction of state courts over initial custody proceedings in only a few instances.³⁴¹ The Wallop Act's expansion of notice and hearing requirements should, therefore, have only a minor impact on the practices of state courts.

2. *Concurrent Exercise of Jurisdiction*

Section 1738A(g), a more significant limitation on initial jurisdiction than subsection (e), controls simultaneous proceedings in two states. Subsection (g) provides that

a court of a State shall not exercise jurisdiction in any proceeding for a custody determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.³⁴²

This provision limits initial jurisdiction in non-U.C.C.J.A. states

337. See generally Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 508 (1954).

338. The law of some U.C.C.J.A. states requires giving notice and opportunity to be heard in a manner that is arguably more than reasonable. See, e.g., GA. CODE ANN. § 74-506(b) (1981). The law of some non-U.C.C.J.A. states also requires this extra effort. See, e.g., TEX. FAM. CODE ANN. § 14.08(b) (Vernon Supp. 1981).

339. See *infra* text accompanying notes 647-726.

340. See U.S.C.A. § 1738A(a), (g) (West Supp. 1980).

341. Cf. *supra* note 96 (discussing the U.C.C.J.A. sections governing the existence and exercise of jurisdiction).

342. 28 U.S.C.A. § 1738A(g) (West Supp. 1980).

that do not require deference to a sister state in which an initial case was first filed.³⁴³ Subsection (g) should also have a substantial effect in U.C.C.J.A. states because of two differences between it and U.C.C.J.A. section 6.³⁴⁴ First, the scope of the federal duty not to exercise jurisdiction is different from the scope of the U.C.C.J.A. duty not to exercise jurisdiction. Second, the applicability of the federal duty depends not on forum law but on federal law and the law of the other state. Because of these differences, subsection (g) will prohibit the exercise of jurisdiction in some cases in which state law permits it. Moreover, the Supreme Court will be able to correct erroneous interpretations or applications of this federal duty.³⁴⁵

a. Scope of Statutory Duties

There are four significant differences between the breadth of the Wallop Act's duty not to conduct concurrent proceedings and the similar duty under U.C.C.J.A. section 6.³⁴⁶

(1) *Conformity with the Statutes*

In one respect the Wallop Act is less strict than the U.C.C.J.A. in prohibiting the exercise of concurrent jurisdiction. Section 1738A(g) prevents a forum from exercising jurisdiction only if the state in which a proceeding was already pending "is exercising jurisdiction consistently with the provisions of this section to make a custody determination."³⁴⁷ If the pending proceeding does not satisfy this fairly rigorous test, then the new forum can act. In contrast, the U.C.C.J.A. more broadly commands deference to a pending proceeding. U.C.C.J.A. section 6(a) forbids the exercise of jurisdiction even if the first forum is exercising jurisdiction only "substantially" in conformity with the U.C.C.J.A.³⁴⁸ Furthermore, section 6(c) requires a stay of the new forum's proceeding, at least tempora-

343. See *supra* text accompanying note 138.

344. U.C.C.J.A. § 6 (1968). See *supra* text accompanying note 82.

345. See *infra* text accompanying notes 409-11.

346. U.S.C.A. § 1738A(g) (West Supp. 1980) forbids the exercise of jurisdiction "in any proceeding for a custody determination," while U.C.C.J.A. § 6(a) (1968) forbids the exercise of jurisdiction "under this Act." The federal language perhaps makes it clearer than does the U.C.C.J.A. language that the prohibition is applicable only when both states' proceedings are aimed at the making or modifying of a custody determination, not also when the proceeding of one state or the other is one for mere enforcement of a decree, but this seems clear enough under both acts. See *infra* text accompanying note 452.

347. 28 U.S.C.A. § 1738A(g) (West Supp. 1980).

348. *Paltrow v. Paltrow*, 37 Md. App. 191, 200, 376 A.2d 1134, 1140 (1977), *aff'd on other grounds*, 283 Md. 291, 388 A.2d 547 (1978).

rily, if it learns of a prior proceeding in another state, whether or not the other state's exercise of jurisdiction conforms substantially to the U.C.C.J.A. or to any other standards. The Commissioners' Note accompanying section 6 also suggests that it may sometimes be appropriate for a state to defer to another state in which a proceeding was commenced earlier and is still pending even if the jurisdictional basis for the pending proceeding does not substantially conform to the U.C.C.J.A.³⁴⁹ Finally, section 6(b) requires a court to consult a registry of interstate cases before hearing a custody case. If the court believes that a proceeding is pending elsewhere, it must direct an inquiry to the other state whether or not it believes the proceeding is consistent with the U.C.C.J.A. These U.C.C.J.A. provisions may preclude or delay an exercise of jurisdiction that the federal provision does not restrict.

(2) *Criteria for the Race to the Courthouse*

Differences between the "first-in-time" rule found in the Wallop Act and the parallel rule in the U.C.C.J.A. can lead to contrary decisions regarding which proceeding won the race to the courthouse. The section 1738A(g) prohibition on concurrent proceedings applies if the proceeding in the forum state, state *B*, was "commenced during the pendency" of a proceeding in another state, state *A*.³⁵⁰ U.C.C.J.A. section 6(a), on the other hand, applies if a proceeding was "pending" in state *A* "at the time of filing the petition."³⁵¹ Courts should construe subsection (g) to allow each state's law to determine when a proceeding in that state is commenced or begins its pendency,³⁵² whether it is upon filing of a pleading,³⁵³ delivery of process to

349. Some courts have treated the pendency of foreign proceedings as a reason not to exercise jurisdiction even where section 6(a) has not dictated that result, *see, e.g.*, *Bosse v. Superior Court*, 89 Cal. App. 3d 440, 445, 152 Cal. Rptr. 665, 668 (1979) (relying on section 7, not section 6), but such deference is discretionary with the second forum. *See Allison v. Superior Court*, 99 Cal. App. 3d 993, 1001, 160 Cal. Rptr. 309, 313 (1979). There have been cases of this kind in which the second forum has declined to stay or to dismiss its proceeding. *See, e.g.*, *Sharp v. Aarons*, 101 Misc. 2d 323, 325, 420 N.Y.S.2d 1013, 1014 (Fam. Ct. 1979); *Williams v. Zacher*, 35 Or. App. 129, 139-40, 581 P.2d 91, 97 (1978).

350. *See supra* text accompanying note 342.

351. *See supra* text accompanying notes 82-90.

352. *See, e.g.*, *Lopez v. District Court*, 606 P.2d 853, 855 (Colo. 1980) (en banc) (applying California law to determine whether a California proceeding was pending when the Colorado petition was filed); *Potter v. Potter*, 104 Misc.2d 930, 430 N.Y.S.2d 201, 204 (Fam. Ct. 1980) (applying Wisconsin law to determine whether Wisconsin proceeding preceded New York one).

353. *See, e.g.*, *Lopez v. District Court*, 606 P.2d 853 (Colo. 1980) (en banc).

an officer for service,³⁵⁴ or service of process.³⁵⁵ This interpretation is consonant with the general approach of the Wallop Act, which consistently allows each state to determine whether its interests in a proceeding are strong enough to deserve and to receive interstate respect.³⁵⁶ One can interpret U.C.C.J.A. section 6(a) as also making state *A*'s law dispositive of whether a proceeding in *A* is pending. There is, however, little authority expressly supporting this interpretation,³⁵⁷ and, in any event, each state is free to interpret its U.C.C.J.A. differently. Thus, there may be a difference in a particular case between federal and state law regarding when the pendency of the proceeding in state *A* began. It is even more likely that there will be a difference between the time when the petition in state *B* was filed under U.C.C.J.A. section 6(a) and the time when the proceeding in state *B* was commenced under section 1738A(g). Either difference may lead the U.C.C.J.A. to declare that one party has won the race to the courthouse, while the Wallop Act declares that the other party won the race. This, in turn, may lead to differing applications of the federal and state prohibitions against concurrent exercise of jurisdiction.

(3) *Differences in Jurisdictional Criteria Incorporated by Reference*

The third difference, or more precisely, set of differences between section 1738A and the U.C.C.J.A. has the most significant effect on the scope of their prohibitions against concurrent exercise of initial jurisdiction. It is found in the jurisdictional criteria that section 1738A(g) and its U.C.C.J.A. analogue incorporate by reference.³⁵⁸

354. See, e.g., *Orlando v. Alamo*, 646 F.2d 1288, 1290 (8th Cir. 1981).

355. See, e.g., *Potter v. Potter*, 104 Misc.2d 930, 430 N.Y.S.2d 201, 204 (Fam. Ct. 1980).

356. See 28 U.S.C.A. § 1738A(c)(1), (d) (West Supp. 1980).

357. An Arizona court has indicated without discussion that U.C.C.J.A. section 6 precluded an Alaska court from exercising its jurisdiction in a case in which filing and service of process in the Alaska suit occurred after the filing of an Arizona proceeding but before service of the Arizona process. *Loper v. Superior Court*, 126 Ariz. 14, 16, 612 P.2d 65, 67 (Ct. App. 1980). See cases cited *supra* note 352.

358. Some differences of terminology seem insignificant. For example, the difference between "such" state and "this" state, compare 28 U.S.C.A. § 1738A(c)(2)(A)-(D) (West Supp. 1980) with U.C.C.J.A. § 3(a)(1)-(4) (1968), and the difference between "on the date" and "at the time," compare 28 U.S.C.A. § 1738A(c)(2)(A)(i) (West Supp. 1980) with U.C.C.J.A. § 3(a)(1)(i) (1968), and the difference between "the State whose jurisdiction is in issue," and "this State," compare 28 U.S.C.A. § 1738A(c)(2)(D)(i) (West Supp. 1980) with U.C.C.J.A. § 3(a)(4)(i) (1968), do not appear meaningful. Another mean-

Some of these jurisdictional differences between the two acts are relatively minor. For example, a state may claim jurisdiction under the catchall provision of U.C.C.J.A. section 3(a)(4) if no other state has jurisdiction "substantially" in accordance with the other section 3 bases of jurisdiction;³⁵⁹ section 1738A(c)(2)(D)(i) lacks a comparably flexible term.³⁶⁰ Also, the U.C.C.J.A.'s "extended home state"³⁶¹ provision, which gives jurisdiction to a state from which a child is absent if that state was the child's home state less than six months before commencement of the proceeding, is applicable only if "a parent or person acting as parent" continues to live in the forum state.³⁶² The similar federal provision is applicable only if a "contestant" continues to live in the forum state.³⁶³ Although the definitions of these state and federal terms are quite similar,³⁶⁴ the differences between them, or the differences of interpretation that may arise, may in a few cases cause the U.C.C.J.A. and Wallop Act to treat a state's exercise of concurrent jurisdiction differently.

The difference between the emergency jurisdiction criteria in the two acts is likely to be more significant. Section 1738A limits federal "emergency" jurisdiction to cases in which children have been "subjected to or threatened with mistreatment or abuse."³⁶⁵ The similar U.C.C.J.A. provision not only covers these cases, but also covers children "otherwise neglected" and gives states the option to cover those who are "dependent."³⁶⁶ States have enacted various versions of this provision. Some have included³⁶⁷ and some have omitted³⁶⁸ coverage of "dependent" children; some have made cross-references to other stat-

ingless difference is the absence in the Wallop Act of a superfluous provision like U.C.C.J.A. section 3(c), which says that "[p]hysical presence of the child, while desirable, is not a prerequisite for jurisdiction to determine his custody." U.C.C.J.A. § 3(c) (1968).

359. U.C.C.J.A. § 3(a)(4) (1968).

360. 28 U.S.C.A. § 1738A(c)(2)(D)(i) (West Supp. 1980) reads in part that custody determinations are consistent with the section only if "no other State would have jurisdiction under subparagraphs [A-C, E], or another State has declined to exercise jurisdiction."

361. See Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction under the U.C.C.J.A.*, 14 FAM. L.Q. 203, 208 (1981).

362. U.C.C.J.A. § 3(a)(1)(ii) (1968).

363. 28 U.S.C.A. § 1738A(c)(2)(A)(ii) (West Supp. 1980).

364. Compare *id.* § 1738A(b)(2) with U.C.C.J.A. § 2(9) (1968).

365. 28 U.S.C.A. § 1738A(c)(2)(C)(ii) (West Supp. 1980).

366. U.C.C.J.A. § 3(a)(3)(ii) (1968).

367. See, e.g., IDAHO CODE § 5-1003(a)(3)(ii) (1979).

368. See, e.g., FLA. STAT. ANN. § 61.1308(1)(c)(2) (West Supp. 1981); ME. REV. STAT. ANN. tit. 19, § 804.1.c. (1981).

utes on abuse, neglect, and dependency;³⁶⁹ some have added further possible categories of endangered children;³⁷⁰ and a few have required only that there be an emergency requiring protection of a child present in the state.³⁷¹ In most U.C.C.J.A. states this basis for concurrent jurisdiction, therefore, is significantly broader than the criterion in the corresponding federal provision. As a result, the U.C.C.J.A. may force state *B* to respect state *A*'s ongoing exercise of initial jurisdiction over a child, because state *A* satisfies the U.C.C.J.A. broad test of emergency jurisdiction. At the same time, subsection (g) of the Wallop Act may not require state *B* to respect state *A*'s proceeding, because state *A* has not satisfied the narrower federal basis of emergency jurisdiction requiring the child to be "subjected to or threatened with mistreatment or abuse."³⁷²

Finally, the Wallop Act provision that bases jurisdiction on the state's possessing a "significant connection" with both the child and the child's parents or a contestant³⁷³ contains two limiting phrases that the corresponding U.C.C.J.A. paragraph does not contain. First, the federal provision requires a significant connection "other than mere physical presence" in the state.³⁷⁴ U.C.C.J.A. section 3 is similar: "physical presence . . . of the child, or of the child and one of the contestants, is not alone sufficient to confer jurisdiction . . ."³⁷⁵ This U.C.C.J.A. provision, however, addresses an issue different from the issue that the federal provision addresses. The U.C.C.J.A. provision only notes that jurisdiction requires more than physical presence.³⁷⁶ It does not address the question of whether physical

369. See, e.g., ALASKA STAT. § 25.30.020(a)(2) (1977).

370. See, e.g., N.D. CENT. CODE § 14-14-03.1.c.(2) (1971) (covering "deprived" children).

371. See, e.g., N.H. REV. STAT. ANN. § 458-A:3.I.(c)(2) (Supp. 1979); N.Y. DOM. REL. LAW § 75-d.1.(c)(ii) (McKinney Supp. 1980).

372. See 28 U.S.C.A. § 1738A(c)(2)(C)(ii), (g) (West Supp. 1980).

373. *Id.* § 1738A(c)(2)(B).

374. Compare *id.* § 1738A(c)(2)(B)(ii)(I) with U.C.C.J.A. § 3(a)(2)(i) (1968).

375. U.C.C.J.A. § 3(b) (1968).

376. This provision is superfluous since the only U.C.C.J.A. jurisdictional bases that refer to presence of the child expressly impose other requirements as well. See *id.* §§ 2(5), 3(a)(1), (3). Moreover, U.C.C.J.A. section 3(b) is not only superfluous but potentially misleading. It excepts from that provision the "catchall" and "emergency" jurisdictional bases of sections 3(a)(3) and (4). Section 3(b), therefore, implies that physical presence is sufficient to confer jurisdiction under those paragraphs. A sentence in the Commissioners' Note, if taken out of context, expressly confirms this implication, saying in connection with paragraph (3) that the "[p]resence of the child in the state is the only prerequisite." U.C.C.J.A. § 3 Commissioners' Note, 9 U.L.A. 124 (1979). Nevertheless, the language of section 3(a)(3) and the Commissioners' Note make it clear

presence can satisfy the significant connection component of the jurisdictional standards. The federal provision directly addresses this question and requires a significant connection other than "mere" physical presence. On its face this federal provision, therefore, departs from the U.C.C.J.A. language.³⁷⁷ One should not, however, consider it a significant departure. Even apart from such a limiting phrase, the U.C.C.J.A. clearly requires more than mere physical presence to establish a "significant" connection. Both the legislative history³⁷⁸ and judicial decisions construing the U.C.C.J.A.³⁷⁹ support this interpretation.

Second, under the U.C.C.J.A., the home state and significant connection bases of jurisdiction are independent; jurisdiction under each can exist regardless of the existence of jurisdiction in another state on the other basis.³⁸⁰ On the other hand, a state cannot exercise significant connection jurisdiction consistently with the federal Act unless "it appears that no other State would have" home state jurisdiction.³⁸¹ Both the wording of the U.C.C.J.A. provision³⁸² and experience under it can aid in assessing the significance of this federal-state difference.

The Commissioners recognized that the flexible criteria of

that physical presence alone is not sufficient under section 3(a)(3), noting that there must also be an emergency or other specified circumstances. *Id.* Section 3(b) has not misled the courts in this way. *See, e.g.,* Brock v. District Court, 620 P.2d 11, 14-15 (Colo. 1980).

377. This language was added to the federal legislation after the Senate passed the measure in the 95th Congress, 124 CONG. REC. 783-87 (1978), and before it was introduced as a separate bill in the 96th Congress, 1st Sess., 125 CONG. REC. 740 (1979).

378. *See* U.C.C.J.A. § 3 Commissioners' Note, 9 U.L.A. 123-24 (1979).

379. *See, e.g.,* Agnello v. Becker, 440 A.2d 172, 176 (Conn. 1981).

380. U.C.C.J.A. § 3(a)(1), (2) (1968); R. CROUCH, *supra* note 70, at 15-16; Bodenheimer, *supra* note 7, at 1230. The statement in the text only refers to the existence of jurisdiction. For discussion of U.C.C.J.A. provisions limiting its exercise, see *supra* text accompanying notes 74-133; *infra* text accompanying notes 573-81.

381. 28 U.S.C.A. § 1738A(c)(2)(B)(i) (West Supp. 1980). Since this federal provision only refers to the exercise of jurisdiction, it may appear inappropriate to contrast it to the U.C.C.J.A.'s treatment of the home state and significant connection provisions that govern the existence of jurisdiction. It is not. The federal statute has provisions limiting the exercise of jurisdiction that correspond to some of the U.C.C.J.A. limitations on such exercise referred to previously. *See supra* note 380. There is, however, no U.C.C.J.A. provision similar to the federal clause making home state jurisdiction exclusive of significant connection jurisdiction for the purposes of the federal Act, neither as a limitation on the existence of jurisdiction nor as a restriction on its exercise. The difference is, therefore, real.

382. *See supra* text accompanying note 71.

the significant connection basis of jurisdiction, and the validity of the basis even if a child has a home state, created the possibility that this basis might be overused.³⁸³ They and commentators have thus urged courts to interpret and to apply this jurisdictional base narrowly.³⁸⁴ Some courts have nevertheless construed and applied it quite broadly, especially in reaching results favoring their own jurisdiction.³⁸⁵ This broad construction of the significant connection provision was criticized during the congressional hearings on the Wallop Act.³⁸⁶ The desire not to build the same problems into section 1738A apparently motivated Congress to depart from the U.C.C.J.A. language on significant connection jurisdiction.³⁸⁷

It is relatively clear how this federal provision, restricting significant connection jurisdiction to cases in which "it appears that no other State would have" home state jurisdiction,³⁸⁸ affects the application of subsection (g).³⁸⁹ If state *A* meets the

383. U.C.C.J.A. § 3 Commissioners' Note, 9 U.L.A. 124 (1979).

384. See, e.g., *id.*; Frumkes & Elser, *The Uniform Child Custody Jurisdiction Act—The Florida Experience*, 53 FLA. B.J. 684, 690 (1979); Note, *Uniform Child Custody Jurisdiction Act: An Attempt to Stop Child Rustling*, 12 WILLAMETTE L.J. 623, 632-33 (1976).

385. This practice was discussed above in connection with initial jurisdiction. See *supra* text accompanying note 80. It has affected enforcement and modification of decrees as well. See cases cited *infra* notes 575, 581, 583.

386. See, e.g., 1980 Senate Hearing, *supra* note 4, at 145, Addendum at 270; 1979 Senate Hearing, *supra* note 299, at 51-52.

387. See 126 CONG. REC. S11,486 (daily ed. Aug. 25, 1980).

388. One noteworthy feature of subparagraph (B) that seems to leave no room for interpretation is its failure to follow subparagraph (D) and to allow a state to exercise jurisdiction if another state declines to exercise it. Thus, if state *A* has home state jurisdiction but has declined to exercise it, state *B* lacks significant connection jurisdiction simply because another state has home state jurisdiction. It cannot hear the case regardless of the extent of its connections to the child and the parties. Unless state *B* or another state has jurisdiction under the catchall of subparagraph (D), the proceeding will not occur. Although this makes no sense, it is not likely to cause significant harm.

389. One faces two difficulties in interpreting the provision restricting significant connection jurisdiction, 28 U.S.C.A. § 1738A(c)(2)(B) (West Supp. 1980), but the resolutions of both appear reasonably clear. The first problem arises because subparagraph (B), like the catchall jurisdictional provision subparagraph (D), uses the introductory clause "it appears that." One could thus interpret subparagraph (B) as allowing state *A* to prove fairly easily that it has acted consistently with section 1738A, at least in comparison to subparagraphs (A) and (C) from which this introductory clause is absent.

The phrase, "it appears that," comes from the U.C.C.J.A., which uses it not only to introduce the catchall jurisdictional base, U.C.C.J.A. § 3(a)(4) (1968), but also to provide that one state shall not modify another state's decree unless "it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree." *Id.* § 14(a)(1). The U.C.C.J.A., however, omits this phrase in other

conditions of the significant connection subparagraph but cannot claim home state jurisdiction, and if state *B* can claim

key provisions that condition the action of the forum court upon what another state's court has done or can do. *See id.* §§ 6(a), 13.

It seems that the drafters of the U.C.C.J.A. used "it appears" not to create distinctions among degrees of persuasion, but rather to note on random occasions that a court must determine the dispositive facts. A number of other unsystematic and apparently insignificant variations in language occur in the U.C.C.J.A. *Compare id.* § 6(a) ("a court of another state exercising jurisdiction substantially in conformity with this Act") *with id.* § 13 ("decree of a court of another state . . . which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act"); *compare id.* § 2(2) (defining "custody determination" to mean "a court decision and court orders and instructions providing for the custody of a child, including visitation rights") *and id.* § 12 (referring to modification of a "custody determination") *with id.* § 2(4) (defining "decree" to mean "a custody determination contained in a judicial decree or order made in a custody proceeding") *and id.* §§ 13, 14 (referring to modification of a "decree"); *compare id.* § 2(4) (providing that the term "decree" includes "an initial decree and a modification decree") *with id.* §§ 3(a), 7(a) (expressly covering an "initial or modification decree"). The sporadic use of "it appears" thus seems to be simply another lapse in draftsmanship.

The Commissioners' Notes to both sections 3(a)(4) and 14(a) suggest that these provisions depend upon the actual facts, not upon appearances. U.C.C.J.A. §§ 3, 14 Commissioners' Notes, 9 U.L.A. 124, 154-55 (1979). The late Professor Bodenheimer, the Reporter in the preparation of the Act, did not call attention to this issue and also treated these sections as depending upon the facts. *See, e.g.,* Bodenheimer, *supra* note 7, at 1230, 1236. It thus appears that this introductory phrase in U.C.C.J.A. sections 3(a)(4) and 14 is not significant.

In adapting U.C.C.J.A. language for incorporation in the federal bill, the drafters of section 1738A eliminated unsystematic variations in language. *Compare* 28 U.S.C.A. § 1738A(a), (g) (West Supp. 1980) (referring to custody determinations made "consistently with the provisions of this section" and to cases in which another state is exercising jurisdiction "consistently with the provisions of this section") *with* U.C.C.J.A. §§ 6(a), 13 (1968) (using varying language quoted *supra*). Similarly, the introductory phrase "it appears that" was omitted in the provision forbidding modification. 28 U.S.C.A. § 1738A(a) (West Supp. 1980). Through a drafting lapse this phrase was not omitted, however, in the catchall jurisdictional provision, subparagraph (D)(i) of § 1738A(c)(2). Late in the processing of the federal bill, another lapse led to the use of the same phrase to introduce the new subparagraph (B)(i) limitation of significant connection jurisdiction. *See* 126 CONG. REC. S11,483, 11,486 (daily ed. Aug. 25, 1980).

One should consider the use of this phrase in these two subparagraphs of section 1738A to be as insignificant as in the provisions in the U.C.C.J.A. There is a floor statement parroting the language limiting the significant connection jurisdiction to cases without a home state, *id.*, and there is testimony in hearings that recommends adoption of such a limitation, *see* authorities cited *supra* note 384, but there is no indication that the introductory phrase is of any consequence. It would be inconsistent with the scheme of the Wallop Act, in which application of the statutory duties depends upon actual facts rather than appearances, for this phrase in section 1738A(c)(2)(B) to affect the amount of proof needed to make one state respect another state's proceeding.

The second problem arises because of the use of the word "jurisdiction" in subparagraph (B)(i) and its cross-reference to subparagraph (A). The similar

home state jurisdiction, then state *A* cannot exercise initial jurisdiction consistently with the federal Act. For that reason, if a suit for an initial award of custody is brought in state *B* while a custody proceeding concerning that same child is pending in state *A*, subsection (g) of the federal Act does not require state *B* to refrain from exercising its jurisdiction.³⁹⁰

(4) *Exceptions to Statutory Duties*

Unlike the three differences previously discussed, the fourth difference in breadth between the federal and state statutory duties not to exercise concurrent jurisdiction is not rooted in express differences in the language of the acts. Instead, it concerns whether one should infer exceptions to the mandatory duties that each act imposes.

A number of authorities have concluded that the U.C.C.J.A.

language in the catchall provision, subparagraph (D) (i), causes a similar problem.

The language in subparagraphs (B) and (D) that no state would have jurisdiction under other subparagraphs may imply that the Wallop Act grants or restricts jurisdiction. This implication is incorrect. As mentioned above, the initial drafts of subsection (c) gave a state court jurisdiction if and only if its own law so provided and if it complied with one of subparagraphs (A) through (D), but the revised version of section 1738A makes these two conditions mere criteria that measure whether a custody determination was consistent with section 1738A. *See supra* note 305. All of these criteria are, however, jurisdictional rather than substantive or procedural in nature. Thus, with the exception of subsection (g), references elsewhere in section 1738A to the criteria of subsections (c) (1) and (c) (2) (A)-(D) are stated in terms of "jurisdiction under" those criteria, *see* 28 U.S.C.A. § 1738A(c) (2) (B), (D) (West Supp. 1980), and in terms of a state's "jurisdiction" being "in issue," *see id.* § 1738A(c) (2) (D), not in terms merely of consistency with those criteria. Thus, subparagraphs (B) and (D) say that no state has jurisdiction under other subparagraphs for convenience only, not to imply that subparagraphs (A)-(D) grant or restrict jurisdiction.

The cross-reference to subparagraph (A) is slightly more troublesome. The obvious intent of subparagraph (B) is to provide that a custody determination is consistent with subparagraph (B) only if no other state would have jurisdiction consistent with subparagraph (A) and its own state law. Yet the cross-reference in (B) refers only to (A) and not also to paragraph (1), which requires jurisdiction under state law. This oversight resulted from the use in subparagraph (B) of the term "jurisdiction," which on its face seems to embody the requirement of paragraph (1). It seems appropriate to interpret subparagraphs (B) and (D) to give them their intended effect since the phrase "have jurisdiction" is broad enough to permit incorporation of paragraph (1)'s requirement of jurisdiction under state law as well as the requirement demanding consistency with the specified subparagraphs.

390. *See* 28 U.S.C.A. § 1738A(g) (West Supp. 1980). Subsection (g) would even allow a state whose jurisdiction is not consistent with the federal standards to exercise jurisdiction. State *A*'s exercise of jurisdiction does not qualify for the protection of subsection (g), regardless of which state subsequently begins proceedings.

exempts certain cases from some of its mandatory duties.³⁹¹ Most of the cases finding such exceptions in the U.C.C.J.A. have involved the duties to enforce and not to modify foreign decrees.³⁹² The rationales of some of these cases, however, appear applicable to the section 6(a) duty to respect concurrent proceedings as well.³⁹³ Indeed, some courts have used recognized exceptions to modify or to delay enforcement of foreign custody orders in cases to which section 6(a) otherwise appeared applicable.³⁹⁴

There is no basis in the U.C.C.J.A. text or Commissioners' Notes for exceptions to the section 6(a) duty to avoid concurrent proceedings,³⁹⁵ the section 13 duty to recognize and enforce decrees,³⁹⁶ or the section 14(a) duty not to modify

391. One widely recognized exception involves emergencies. *See, e.g., In re Schwander*, 79 Cal. App. 3d 1013, 1020, 145 Cal. Rptr. 325, 329 (1978) (dictum); *Brock v. District Court*, 620 P.2d 11, 14-15 (Colo. 1980) (dictum); R. CROUCH, *supra* note 70, at 30, 34-36; S. KATZ, *supra* note 59, at 7, 19, 28, 42-49, 76, 80, 116-17; Bodenheimer, *supra* note 361, at 225-26. Some authorities also believe that an exception exists to the duties to recognize and to enforce and not to modify foreign decrees if the decree punishes a parent rather than benefits a child. *See, e.g., Brooks v. Brooks*, 20 Or. App. 43, 530 P.2d 547 (1975); Comment, *Temporary Custody Under the Uniform Child Custody Jurisdiction Act: Influence Without Modification*, 48 U. COLO. L. REV. 603, 617-18 (1977). In some cases, courts have even temporarily modified, *see, e.g., Fry v. Ball*, 190 Colo. 128, 544 P.2d 402 (1975) (en banc); *Lord v. Lord*, 7 Fam. L. Rep. (BNA) 2244 (Conn. Super. 1981), or denied enforcement of foreign decrees, *see, e.g., id.; In re McDonald*, 74 Mich. App. 119, 253 N.W.2d 678 (1977), merely because there is a local interest in the children and a lack of confidence either in past foreign proceedings or in the course of future proceedings.

392. *See, e.g.,* cases cited *supra* note 391.

393. *See, e.g., Fry v. Ball*, 190 Colo. 128, 544 P.2d 401 (1976) (en banc); cases cited *supra* note 391.

394. *E.g., Mondy v. Mondy*, 395 So. 2d 193 (Fla. Dist. Ct. App. 1981); *Barcus v. Barcus*, 278 N.W.2d 646 (Iowa 1979); *In re McDonald*, 74 Mich. App. 119, 253 N.W.2d 678 (1977).

395. U.C.C.J.A. § 6(a) (1968); *id.* Commissioners' Note, 9 U.L.A. 134-35 (1979).

396. U.C.C.J.A. § 13 (1968); *id.* Commissioners' Note, 9 U.L.A. 151-52 (1979). The Note to section 13 states that courts "may be reluctant to recognize" decrees that they consider "punitive or disciplinary" measures. 9 U.L.A. 152 (1979). It also cites a page of a law review article in which Professor Ehrenzweig approved the practice that he found courts followed before 1965 which treated disciplinary changes of custody as exceptions to a rule that demanded enforcement of foreign decrees against parties deemed to have "unclean hands." *Id.* (citing Ehrenzweig, *supra* note 34, at 404). This statement and citation do not, however, suggest that section 13 or any other U.C.C.J.A. provision contains an exception for punitive decrees. On the contrary, the Note refers to section 13 as establishing a "mandate." The Note cites Ehrenzweig only to support the proposition that the mandate "could cause problems" in punitive cases. The Note concludes by discussing means by which courts can grant visitation rights without entering punitive decrees.

The Note, therefore, states in effect that section 13 is mandatory, that punitive decrees could cause courts to be reluctant to obey section 13's mandate,

decrees.³⁹⁷ The only clear exception to a U.C.C.J.A. duty applies to the section 15 duty to enforce decrees.³⁹⁸ Courts and commentators have found other exceptions³⁹⁹ largely because of the published writings of the late Professor Brigitte Bodenheimer, whose views of the Act have been widely considered authoritative.⁴⁰⁰ In some of her writings she favored the recognition of certain exceptions to the mandates of the U.C.C.J.A.⁴⁰¹

Regardless of the soundness of these exceptions, they are the law of the states acknowledging them. The Wallop Act's duties, however, should not be subject to any of these exceptions. Section 1738A unambiguously makes its duties mandatory and unqualified apart from the express conditions

that prior to the U.C.C.J.A. courts denied interstate enforcement to punitive decrees, and that the U.C.C.J.A. controls the problem not by excepting such decrees from section 13 but by reducing the incentive to enter such decrees through the provision of improved legal tools for enforcement of visitation rights. This interpretation of the Note is consistent with the absence of an explicit exception in the text of section 13 and with the nearly contemporaneous views of the Reporter for the Act, Professor Bodenheimer. See Bodenheimer, *supra* note 7, at 1220, 1238-40. In later years, however, Bodenheimer reversed her interpretation of this section. See authorities cited *infra* note 401.

397. U.C.C.J.A. § 14(a) (1968); *id.* Commissioners' Note, 9 U.L.A. § 154-55 (1979).

398. U.C.C.J.A. § 15 (1968). The Note to section 15 clearly implies that state *B* may, even under the U.C.C.J.A., stay enforcement of a foreign decree in a dangerous emergency. *Id.* Commissioners' Note, 9 U.L.A. 158 (1979). Although no such exception appears in the text of section 15, most legal means to enforce custody decrees are discretionary. See, e.g., *Bergen v. Bergen*, 439 F.2d 1008, 1015 (3d Cir. 1971) (contempt of court); *Baker v. Baker*, 93 N.M. 463, 466, 601 P.2d 433, 436 (1979) (posting of performance bond); *Brooks v. Brooks*, 131 Vt. 86, 92, 300 A.2d 531, 535 (1973) (forfeiture of cash bond); 1979 *Senate Hearings*, *supra* note 299, at 165 (criminal prosecution). Moreover, courts even have some discretion over when to apply remedies to which parties are entitled as of right. See, e.g., *Mitchell v. Pincock*, 99 Idaho 56, 57, 59, 577 P.2d 343, 344, 346 (1978) (habeas corpus). Thus, there is no inconsistency between the Note and the statutory text.

399. See *supra* notes 391-94.

400. See, e.g., *Beebe v. Chavez*, 226 Kan. 591, 600, 602 P.2d 1279, 1287 (1979).

401. See, e.g., Bodenheimer, *Progress Under the Uniform Child Custody Jurisdiction Act and Remaining Problems: Punitive Decrees, Joint Custody, and Excessive Modifications*, 65 CALIF. L. REV. 978, 992-95 (1977) [hereinafter cited as *Progress*] (exception to section 14(a) for emergencies); *id.* at 1003-07 (exception to sections 6, 13, and 14(a) for punitive modifications); Bodenheimer, *The Uniform Child Custody Jurisdiction Act*, 3 FAM. L.Q. 304, 309-12 (1969) (vaguely defined exception to sections 13 and 14(a)). But see Bodenheimer, *The Rights of Children and the Crisis in Custody Litigation: Modification of Custody In and Out of State*, 46 U. COLO. L. REV. 459, 503-04 (1975) (merely suggesting temporary stays of section 13 enforcement of punitive decrees); Bodenheimer, *supra* note 7, at 1220, 1238-40 (no exception to sections 13 and 14(a) for punitive or other unwise decrees).

restricting their scope.⁴⁰² The legislative history of the Act also suggests that its duties are not subject to exceptions. Conversations between the drafter of the Wallop proposal and Professor Bodenheimer during the proposal's initial drafting⁴⁰³ led to the initial inclusion of exceptions to the duties to enforce and not to modify decrees. The exceptions covered "punitive" decrees and decrees "inconsistent with a strong public policy" of the state.⁴⁰⁴ Severe criticism of both proposed exceptions⁴⁰⁵ caused their deletion from the legislation before its enactment.⁴⁰⁶ This legislative history suggests not only that section 1738A contains no exception for punitive or impolitic decrees, but also that Congress did not intend the statute's duties to be subject to any unstated exceptions or conditions.⁴⁰⁷ These federal duties, including the duty not to conduct concurrent proceedings, therefore differ in scope from the similar duties under the U.C.C.J.A. in states recognizing such exceptions.

b. Application of Subsection (g)

The federal duty not to conduct concurrent proceedings should have significant nationwide effects on the practices of state courts. Subsection (g) provides a rule of deference to ongoing, foreign proceedings that in many cases is broader than state law.⁴⁰⁸ Furthermore, the federal rule is less subject to manipulation by the forum to which the rule is addressed. The duty of a court under U.C.C.J.A. section 6(a) to defer to another state's prior, pending proceeding exists only if the second forum decides that the first is exercising jurisdiction "substantially in conformity" with the U.C.C.J.A.⁴⁰⁹ Some courts, however, have made questionable decisions favoring their own jurisdiction in such cases.⁴¹⁰ The Wallop Act limits such pro-

402. 28 U.S.C.A. § 1738A(a), (e), (g) (West Supp. 1980).

403. Original memoranda and correspondence on file with the *Minnesota Law Review*.

404. 124 CONG. REC. 785 (1978).

405. See, e.g., *Legislation to Revise and Recodify Federal Criminal Laws: Hearings on H.R. 6869 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st & 2d Sess., 1017-18, 2562-63, 2817-18 (1977-78) [hereinafter cited as *1977-78 House Hearings*].

406. S.105, 96th Cong., 1st Sess., 125 CONG. REC. S374, 376 (daily ed. Jan. 23, 1979); see S. REP. NO. 553, 96th Cong., 1st Sess. 1253 (1980).

407. See *1980 Senate Hearing*, *supra* note 4, at 134, 142, 146-50, Addendum at 105-06, 117-19, 268, 278.

408. See *supra* text accompanying notes 365-72, 391-407. But see *supra* text accompanying notes 380-90.

409. See *supra* text accompanying note 82.

410. See *supra* text accompanying notes 135-38.

chialism by making the application of subsection (g) depend entirely upon federal law and the law and actions of the first forum. The federal duty to defer to a proceeding already pending in state *A* is therefore the same in state *B* and state *C*; neither state can manipulate the scope of that duty.⁴¹¹

An example of a case whose outcome would be changed by application of subsection (g) is *Mondy v. Mondy*,⁴¹² a recent decision by a Florida District Court of Appeals. The court affirmed the trial court's award of temporary custody to the children's mother and approved the continuing exercise of jurisdiction to determine permanent custody. The court affirmed the trial court's jurisdiction notwithstanding an Idaho court's recent award of temporary custody to the children's father in apparent conformity with the U.C.C.J.A.⁴¹³ The Idaho proceeding was presumably pending when the Florida petition was filed and acted upon.⁴¹⁴

The court held that Florida had significant connection jurisdiction.⁴¹⁵ It also cited emergency jurisdiction under section 3,⁴¹⁶ quoting the mother's allegations that the "'children had been abused and [that] they had regressed in their speech patterns and were in an extreme state of emotional distress.'"⁴¹⁷ The court held that "[r]egardless of the truth of this particular allegation, the trial court may, at least temporarily, assume jurisdiction to insure that the children are not threatened with mistreatment, abuse, or neglect."⁴¹⁸ The court justified its decision by stating that "neither party comes before this Court with clean hands, and somewhere someone has to make an attempt

411. In addition, a federal forum is available to correct at least some errors in interpretation and application of the federal duty. If a state misapplies federal law insofar as it incorporates the law of another state, 28 U.S.C.A. 1738A(c)(1) (West Supp. 1980), or imposes requirements independent of state law, *id.* § 1738(c)(2)(d), (e), the aggrieved party can seek review in the United States Supreme Court. A party aggrieved by a custody decree could at least petition for certiorari in the Supreme Court on the ground that the state court's exercise of jurisdiction violated section 1738A(g). 28 U.S.C. § 1257(3) (1976); *cf.* *Kulko v. Superior Court*, 436 U.S. 84, 86 (1978) (reviewing on certiorari state assertion of personal jurisdiction over a nonresident parent of a minor child domiciled in state that violated due process). Whether other avenues into federal courts are available to deal with alleged violations of the various duties created by section 1738A is beyond the scope of this Article.

412. 395 So. 2d 193 (Fla. Dist. Ct. App. 1981).

413. *See id.* at 196-97 (Joanos, J., dissenting).

414. *See* 395 So. 2d at 195.

415. *Id.* at 196.

416. *See* U.C.C.J.A. § 3(a)(3) (1968).

417. 395 So. 2d at 196.

418. *Id.*

to stop the childnapping and determine what is in the best interests of the children.⁴¹⁹ Although Florida had enacted the U.C.C.J.A., the court failed to cite section 6 of the Act.

Application of subsection (g) would probably have prevented the exercise of Florida's jurisdiction.⁴²⁰ Subsection (g) would have forbidden Florida's exercise of jurisdiction if the Idaho proceeding was still pending when the Florida proceeding was commenced⁴²¹ and if the Idaho court continued to exercise jurisdiction,⁴²² provided that the ongoing exercise of Idaho jurisdiction was consistent with section 1738A. Idaho apparently gave the mother reasonable notice and an opportunity to

419. *Id.* at 195.

420. The applicability of section 1738A to the *Mondy* case depends upon the resolution of two questions of interpretation of the Wallop Act. First is the question of the effective date of section 1738A. Though there is some authority that the effective date of the Act was delayed until July 1, 1981, *see, e.g., Shermer v. Cornelius*, 278 S.E.2d 349, 351 n.1 (W. Va. 1981) (dictum), the better conclusion is that the Wallop Act took effect immediately upon its enactment. H.R. 8406, a bill on Social Security coverage of pneumococcal vaccine, H.R. 8406, 96 Cong., 2d Sess., 126 CONG. REC. H12,109 (daily ed. Dec. 5, 1980), contained a delayed effective date of July 1, 1981, when the House of Representatives first passed it on December 5, 1980. 126 CONG. REC. H12,109 (daily ed. Dec. 5, 1980). When amendments, including the Wallop Act, were later added to the bill, 126 CONG. REC. S16,504-08 (daily ed. Dec. 13, 1980), no need was seen to except these amendments from the provisions of the main bill, which had no application to the Wallop Act. The most significant aspect of the legislative history supporting this interpretation is the absence of any delay in the effective date of the Wallop Act legislation throughout its processing as part of the Domestic Violence bill, from August through October of 1980. *See* H.R. 2977, 96th Cong., 2d Sess., 126 CONG. REC. S11,455, 11,465-69, 11,483-99 (daily ed. Aug. 25, 1980); *id.* at H10,400-08 (daily ed. Oct. 1, 1980). The House-Senate conference report on the Domestic Violence bill approved a version of the Wallop measure that would have taken effect immediately upon enactment. H.R. REP. NO. 1401, 96th Cong., 2d Sess. 16-22 (1980). The conference committee made substantive and unique changes in certain aspects of the Wallop Act legislation as a result of negotiation and compromise between Senate and House members of the committee. *Compare id.* at 16-22, 41-43 with 126 CONG. REC. S11,455, 11,465-69, 11,483-99 (daily ed. Aug. 25, 1980) and H.R. 6915, 96th Cong., 2d Sess. 458-61 (Sept. 25, 1980). The actions of the Senate and House in precisely incorporating in Public Law 96-611 the language of the conference committee, rather than any of the other versions, make it clear that the intention was to enact the Wallop Act in the form that had been agreed on by representatives of the two Houses in the conference committee and had been later approved by the whole House. 126 CONG. REC. H10,400-08 (daily ed. Oct. 1, 1980). The inference is very strong that both Houses intended the Wallop measure to be immediately effective when enacted as part of Public Law 96-611 just as it would have been if the conference report had been approved by the Senate and signed by the President.

The second question, to what extent the section 1738A duties are applicable to cases pending on appeal when it took effect, is beyond the scope of this Article. *See generally Bradley v. Richmond School Bd.*, 416 U.S. 696 (1973); *In re Leonard*, 122 Cal. App. 3d 443, n.10, 175 Cal. Rptr. 903, 912-13 n.10 (1981).

421. 28 U.S.C.A. § 1738A(g) (West Supp. 1980).

422. *Id.*

be heard,⁴²³ and Idaho apparently had jurisdiction under its own law.⁴²⁴ Moreover, the Idaho proceeding met the federal conditions specified by section 1738A(c)(2), because no state met the home state test,⁴²⁵ and Idaho met either the significant connection test⁴²⁶ or the catchall test.⁴²⁷ The children had been absent from their former home state of Alabama for well over six months, and the mother had moved from Alabama to Florida during their absence. Because no custody proceedings had occurred before the pendency of the Idaho proceeding, Idaho acted consistently with the duties created by subsections 1738A(a) and (g). Thus, the Idaho court was apparently "exercising jurisdiction consistently with the provisions of [section 1738A] to make a custody determination."⁴²⁸ It therefore appears that the Florida court would have been prohibited from exercising its jurisdiction.

Perhaps under the circumstances, the Florida court should nevertheless have been permitted to act under an allegation of emergency. Alternatively, a proceeding in Florida might have been more effective at stopping the childnapping, the Florida court might have been better able to determine the children's best interests, or Florida might simply have been a more appropriate forum. Under the federal statute, however, these issues would have been matters for authoritative decision by the Idaho court, not for a succession of possibly inconsistent decisions by the courts of both states.

c. Inapplicability to Prior Proceedings

In some cases both subsection (g) and U.C.C.J.A. section 6 fail to erect a mandatory bar to simultaneous litigation. For example, simultaneous litigation is not barred if the state in which proceedings are first commenced lacks jurisdiction consistent with U.C.C.J.A. and federal standards, but acquires it before another state satisfying those standards can make a custody order.

A hypothetical case⁴²⁹ illustrates the operation of the rele-

423. 395 So. 2d at 195. See 28 U.S.C.A. § 1738A(e) (West Supp. 1980).

424. 28 U.S.C.A. § 1738A(c)(1) (West Supp. 1980); see 395 So. 2d at 196-97 (Joanos, J., dissenting); IDAHO CODE § 5-1003(a)(2), (4) (1979).

425. 28 U.C.S.A. § 1738A(b)(4), (c)(2)(A) (West Supp. 1980).

426. *Id.* § 1738A(c)(2)(B).

427. *Id.* § 1738A(c)(2)(D).

428. *Id.* § 1738A(g).

429. The pertinent facts of *In re Verbin*, 92 Wash. 2d 171, 595 P.2d 905 (1979) (en banc), are similar in some respects to those of this hypothetical case.

vant statutory provisions. The prohibitions of the U.C.C.J.A.⁴³⁰ and the Wallop Act⁴³¹ against simultaneous proceedings apply only to the state in which proceedings are subsequently filed or commenced. Suppose that a suit for the initial determination of a child's custody is first filed by the mother in the state of Washington, where she has very recently relocated the child from the family's former home in Maryland. At the time of filing, Washington does not come within the jurisdictional standards of either the U.C.C.J.A. or the Wallop Act. Assume that shortly thereafter the father files suit in Maryland, which has jurisdiction as the extended home state under the U.C.C.J.A.⁴³² and Wallop Act criteria.⁴³³ If more than six months elapse before the Maryland court makes a custody order consistent with section 1738A and the U.C.C.J.A., Washington can decide the child's custody without violating the federal or, presumed, the state statute.

The federal prohibition against the exercise of jurisdiction during the pendency of another case is inapplicable to Washington, because the Washington case was not "commenced during the pendency"⁴³⁴ of the Maryland case. The federal requirement of enforcement and nonmodification is inapplicable to Washington, because Maryland has not made a "custody determination."⁴³⁵

The U.C.C.J.A. bar to the simultaneous exercise of jurisdiction is inapplicable to Washington, because the Maryland proceeding was not pending at "the time of filing the petition"⁴³⁶ in Washington. The U.C.C.J.A. duty of recognition and enforcement applies only to decrees,⁴³⁷ and Maryland has made none. The only duty imposed by the U.C.C.J.A. in response to a custody petition filed later in another state is the duty of the state in which suit was initially filed to "inform the other court [that the proceeding is pending] to the end that the issues may be litigated in the more appropriate forum."⁴³⁸ The U.C.C.J.A. gives the Washington court discretion to decide which court is

430. U.C.C.J.A. § 6(a) (1968). Another provision requires a stay under certain circumstances but is likewise applicable only to the state assuming jurisdiction second. *Id.* § 6(c).

431. 28 U.S.C.A. § 1738A(g) (West Supp. 1980).

432. U.C.C.J.A. §§ 2(5), 3(a)(1)(ii) (1968).

433. 28 U.S.C.A. § 1738A(b)(4), (c)(2)(A)(ii) (West Supp. 1980).

434. *Id.* § 1738A(g).

435. *Id.* § 1738A(a), (b)(3).

436. U.C.C.J.A. § 6(a), (c) (1968).

437. *Id.* § 13.

438. *Id.* § 6(c).

the more appropriate forum,⁴³⁹ and, of course, the Washington courts establish the authoritative interpretations of the Washington U.C.C.J.A.

The result is that, even though the Washington and Maryland suits were commenced when Maryland had jurisdiction consistent with the state and federal standards and Washington did not, the Washington court could find itself free to decide the case. Since the father failed to reach the Maryland clerk of court before the mother filed in Washington, and the Maryland court failed to make a custody order within six months, Washington could decide the case without violating the Wallop Act through an application of the U.C.C.J.A. that was probably reasonable and very clearly within the power of the Washington courts.

The outcome of the race to the respective courthouses is thus decisive only when litigation is first commenced in a state satisfying the relevant statutory criteria. If the first proceeding is commenced in a state not satisfying those criteria, the outcome of this race is immaterial, and the only significant race becomes the race to judgment—to obtain the first custody determination satisfying the statutory standards.⁴⁴⁰

3. *Indirect Effects on Initial Jurisdiction*

In summary, although the Wallop Act's provision on notice and opportunity to be heard will have a relatively minor impact on state court jurisdiction, its provision on concurrent initial jurisdiction will have a substantial impact upon the power of state courts to conduct initial custody proceedings. The Act may also have an indirect impact upon the inclination of state courts to exercise initial jurisdiction in cases in which it is not restricted by the federal statute.

Section 1738A establishes a federal duty of state enforcement and nonmodification of custody orders of other states in some cases in which state law does not impose such a requirement.⁴⁴¹ Although possessing jurisdiction under its own law, a court in which an initial custody proceeding is filed may consider whether the exercise of that jurisdiction would be consistent with section 1738A. The resulting decree would be entitled under the federal statute to interstate enforcement only if

439. *Id.* § 7.

440. *See infra* text accompanying notes 851-53.

441. *See infra* text accompanying notes 631-46.

made consistently with section 1738A.⁴⁴² A court in state *A* may find, for example, that exercise of its jurisdiction would not be consistent with section 1738A, and that the case involves state *B* to the extent that *B* could exercise jurisdiction consistently with the federal Act.⁴⁴³ The court of state *A* might consider the possibility that state *B* could supersede any order it might make.⁴⁴⁴ That possibility would not, however, be a substantial one in many cases, because state *B* might forbid its courts to exercise their jurisdiction in particular circumstances.⁴⁴⁵ Even an exercise of jurisdiction by state *B* under certain circumstances might be unlikely to produce a different outcome.⁴⁴⁶ Nevertheless, a court⁴⁴⁷ may sometimes conclude that, although it has jurisdiction under its own law and is free to exercise it, its decree would not be entitled to federally mandated enforcement. The court might therefore decline to exercise its jurisdiction. This option clearly is available in U.C.C.J.A. states,⁴⁴⁸ and the law of some non-U.C.C.J.A. states appears to permit it as well.⁴⁴⁹ Because the Wallop Act provisions on enforcement and nonmodification of decrees add this

442. See 28 U.S.C.A. § 1738A(a) (West Supp. 1980).

443. Consistency with section 1738A always depends in part upon the existence of jurisdiction under the law of a state. *Id.* § 1738A(c)(1), (d), (f). In this instance, the applicable law is that of the state of the other possible forum, state *B*. *Id.* § 1738A(c)(1). *B* would be able to exercise jurisdiction consistently with the federal Act only if it had jurisdiction under its own law. Application of the federal duty to *A* does not, however, depend upon the law of state *B* permitting *B*'s exercise of jurisdiction. This hypothetical case, therefore, considers the possibility that the court of *A* would find that *B* had jurisdiction under its own law and thus could act consistently with the Wallop Act, but would also find that *B*'s own law would not permit it to exercise jurisdiction.

444. See *infra* text accompanying notes 614-46.

445. See *supra* text accompanying notes 74-78, 82-90; *infra* text accompanying notes 573-83.

446. An early and major change in the outcome of a custody case might seem unlikely in a situation, for example, in which the first court to decide the case is in a position, through collateral estoppel and perhaps through full faith and credit, to preclude relitigation of essential factual issues resolved by that court. See *infra* text accompanying notes 512-47, 584-618.

447. Although this situation is more likely to arise in a state which has failed to pass the U.C.C.J.A., it can arise in a case involving two U.C.C.J.A. states. For example, the forum in which the initial proceeding is commenced may have significant connection jurisdiction, but because of the Wallop Act may decline to exercise it in deference to the home state. See *supra* text accompanying notes 380-90.

448. U.C.C.J.A. § 7 (1968).

449. See, e.g., *Schiller v. Schiller*, 194 A.2d 665 (D.C. App. 1963); *Corliss v. Smith*, 560 S.W.2d 166 (Tex. Civ. App. 1977); Comment, *The Jurisdiction of Texas Courts in Interstate Child Custody Disputes: A Functional Approach*, 54 TEX. L. REV. 1008, 1034 (1976). But see *Oubre v. Oubre*, 575 S.W.2d 363 (Tex. Civ. App. 1978).

federal disincentive to the exercise of jurisdiction in such cases, they may have a significant indirect impact on the exercise of initial custody jurisdiction.

III. RECOGNITION, ENFORCEMENT, AND MODIFICATION OF DECREES

After a court has determined the custody of a child, subsequent proceedings may result in recognition, enforcement, or modification⁴⁵⁰ of the prior order, or in various combinations of those dispositions.⁴⁵¹ The question of jurisdiction to entertain such subsequent proceedings can be considered separately for recognition and enforcement on the one hand, and for modification on the other.⁴⁵² In addition, the existence of jurisdiction to grant one or more of those kinds of relief can be distinguished from the propriety of its exercise.⁴⁵³ Furthermore, the propriety of exercising modification jurisdiction can be distinguished from the questions of whether and how, on the basis of substantive⁴⁵⁴ or procedural⁴⁵⁵ law, a court that has decided to exercise its jurisdiction should modify a prior award of custody.⁴⁵⁶

Until recently, however, courts have often failed to make these distinctions. And those jurisdictions that recognize these distinctions often make them in ways that vary from one state to another. Assume, for example, that a father violates state A's prior decree granting custody to the mother by taking the

450. See *supra* note 18.

451. If the subsequent proceeding occurs in the state which made the prior decree, there is, of course, no occasion for recognition of the decree. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 5, topic 2, introductory note (1971). Only enforcement and modification can be at issue. If the subsequent proceeding occurs in a different state, all three questions can arise.

452. See Bodenheimer, *supra* note 7, at 1235; Ratner, *supra* note 37, at 799-800, 832.

453. See *Hawkins v. Hawkins*, 264 Or. 221, 235-40, 504 P.2d 709, 716-18 (1972).

454. By "substantive" law this Article refers to standards for deciding custody between litigating parties. An example of a general standard of this kind is the best interests of the child. See *Foster & Freed, supra* note 217, at 435-37. More specific standards include, for example, the tender years rule, see *Jones, The Tender Years Doctrine: Survey and Analysis*, 16 J. FAM. L. 695, 697-701 (1977-78), and the rule that violation of another's right to custody or visitation reflects unfavorably on the relative fitness of a party to have custody. See *In re Walker*, 228 Cal. App. 2d 217, 226, 39 Cal. Rptr. 243, 248 (1964) (dictum); *Entwistle v. Entwistle*, 61 A.D.2d 380, 384-85, 402 N.Y.S.2d 213, 215-16 (1978).

455. By "procedural" law this Article refers, for example, to rules concerning required degrees of persuasion. See, e.g., N.C. GEN. STAT. § 7A-289.30-33 (1981) (requiring "clear, cogent, and convincing evidence" for all findings of fact in proceeding for termination of parental rights and providing for disposition of custody upon such termination).

456. See *Hawkins v. Hawkins*, 264 Or. 221, 235-40, 504 P.2d 709, 716-18 (1972).

child to state *B* and petitioning state *B* to modify custody. Assume further that the mother asks state *B* to dismiss the father's petition and to enforce the prior decree. State *B* might enforce state *A*'s decree and dismiss the father's claim, concluding that it lacked jurisdiction to modify custody because the father brought the child to state *B* in violation of the prior decree.⁴⁵⁷ If the father had instead taken the child to state *C* and petitioned its courts for modification, state *A*'s decree might be recognized on the ground that, although the courts of state *C* possess jurisdiction to modify the decree, it should not be exercised.⁴⁵⁸ If, however, the father had taken the child to state *D* and petitioned its court for modification, the courts of state *D* might have exercised jurisdiction, denied the father's claim on the merits because his wrongful conduct showed him to be ill-suited to have custody, and made and enforced a local award conforming to the foreign custody decree.⁴⁵⁹ As these examples illustrate, the variety of approaches to cases presenting questions of jurisdiction to enforce or to modify custody decrees makes a generalization about the traditional bases of jurisdiction hazardous. Some basic rules, however, have had relatively wide acceptance.

A. EXISTENCE OF JURISDICTION

The existence of jurisdiction under state law to make an initial custody decree or to modify a custody decree of another state has traditionally depended upon the same criteria.⁴⁶⁰ These criteria have also been considered sufficient to support a state's jurisdiction to modify its own decree.⁴⁶¹ In addition, many states have claimed that once a court has exercised jurisdiction over the custody of a child, its jurisdiction continues although the circumstances upon which the initial exercise of jurisdiction was based have ceased to exist.⁴⁶²

Federal law placed no limits on subject matter jurisdiction to enter an initial decree or to modify a custody decree.⁴⁶³ Initial and modification jurisdiction were, however, arguably sub-

457. See, e.g., *Chapman v. Walker*, 144 Okla. 83, 84, 289 P. 740, 741 (1930); *Jones v. McCloud*, 19 Wash. 2d 314, 325, 142 P.2d 397, 402 (1943).

458. See, e.g., *State v. Black*, 239 Ala. 644, 647, 196 So. 713, 715 (1940).

459. See, e.g., *In re Walker*, 228 Cal. App. 2d 217, 225-26, 39 Cal. Rptr. 243, 248 (1964) (dictum).

460. See *Ratner, supra* note 37, at 796-98. For a discussion of these factors, see *supra* text accompanying notes 34-54.

461. See *Ratner, supra* note 37, at 797.

462. *Id.*; *Stansbury, supra* note 36, at 827-28.

463. See *supra* text accompanying notes 39-41.

ject to the requirements of personal jurisdiction.⁴⁶⁴ Nevertheless, when a state hears a petition to modify its own decree, some courts have considered the existence of personal jurisdiction in the initial proceeding to be sufficient justification for the ongoing assertion of personal jurisdiction, regardless of whether the second action satisfies the jurisdictional requirements.⁴⁶⁵

Questions concerning jurisdiction to enforce a custody decree have not been especially troublesome, either practically or theoretically. Because enforcement seeks to vindicate a court's dignity and authority in addition to the private interests served by a decree, the court entering a decree retains jurisdiction to enforce it despite a parent's removal of a child from the state.⁴⁶⁶ Moreover, petitions for habeas corpus⁴⁶⁷ and contempt⁴⁶⁸ proceedings—the principal means of enforcement of custody decrees—necessarily take place in the jurisdiction where the child or the violator is found.⁴⁶⁹ The presence of the child, whose current restraint is the subject of the writ of habeas corpus, confers jurisdiction on the forum when habeas corpus is used merely to enforce a prior decree.⁴⁷⁰ The presence of the violator similarly provides the court with personal jurisdiction over him or her in a contempt proceeding. Because a defendant can only be found in contempt of a foreign custody decree after the decree is adopted by the enforcing court,⁴⁷¹ jurisdiction to vindicate the authority underlying the adopted decree, coupled with personal jurisdiction over the defendant, forms a sufficient jurisdictional basis for an adjudication of contempt.⁴⁷²

464. See, e.g., *In re Hall*, 25 Wash. App. 530, 535-36, 607 P.2d 898, 900-01 (1980). For a discussion of the requirements of personal jurisdiction, see *supra* text accompanying notes 141-244.

465. See, e.g., *Follak v. Brown*, 530 S.W.2d 882, 883-84 (Tex. Civ. App. 1975).

466. See, e.g., *Baker v. Baker*, 93 N.M. 463, 465, 601 P.2d 433, 435 (1979).

467. See, e.g., *Stuard v. Bean*, 27 Ariz. App. 350, 352, 554 P.2d 1293, 1295 (1976); *Mitchell v. Pincock*, 99 Idaho 56, 59, 577 P.2d 343, 346 (1978); *State ex rel. Butler v. Morgan*, 34 Or. App. 393, 396-97, 578 P.2d 814, 815 (1978).

468. See, e.g., *Bergen v. Bergen*, 439 F.2d 1008, 1014 (3d Cir. 1971); *Brooks v. Brooks*, 131 Vt. 86, 90, 300 A.2d 531, 533 (1973).

469. See *Ratner*, *supra* note 37, at 810-11. See generally RESTATEMENT (SECOND) OF JUDGMENTS ch. 2, introductory note at 9-10 (Tent. Draft No. 5, 1978).

470. See, e.g., *Stuard v. Bean*, 27 Ariz. App. 350, 352, 554 P.2d 1293, 1295 (1976); *Mitchell v. Pincock*, 99 Idaho 56, 59, 577 P.2d 343, 346 (1978).

471. See U.C.C.J.A. § 15(a) (1968); cf. *Ehrenzweig v. Ehrenzweig*, 86 Misc. 2d 656, 662-53, 668-70, 383 N.Y.S.2d 487, 492-93, 496-97 (Sup. Ct. 1976), *aff'd*, 61 A.D.2d 1003, 402 N.Y.S.2d 638 (1978) (Connecticut contempt judgment based on husband's failure to pay arrears not enforceable when divorced husband did not appear in contempt proceeding).

472. Cf. *Ehrenzweig v. Ehrenzweig*, 61 A.D.2d 1003, 1003, 402 N.Y.S.2d 638,

B. EXERCISE OF JURISDICTION

In practice, the courts' exercise of their jurisdiction in interstate cases has varied considerably. Professor Ehrenzweig wrote in 1953 that he discerned a long-standing practice of many courts to decline to modify foreign decrees at the behest of petitioners with "unclean hands," preferring instead to recognize and enforce them against such miscreants.⁴⁷³ He nevertheless noted exceptions to that practice. One prominent exception was the case in which the petitioner's hands were "unclean" due only to a violation of a custody modification that in Ehrenzweig's view was entered as a measure of discipline for disobedience to a previous order. In such a case, he wrote, courts further modified the order.⁴⁷⁴ Although his equitable rationale for the results of such cases has had mixed reception by commentators,⁴⁷⁵ the literature generally acknowledges that courts have quite commonly exercised jurisdiction to modify foreign decrees.⁴⁷⁶

C. PRE-U.C.C.J.A. OBSTACLES TO APPLICATION OF FULL FAITH AND CREDIT TO CUSTODY DECREES

The federal full faith and credit clause⁴⁷⁷ and the statute implementing it⁴⁷⁸ have not tightly restrained courts from modifying one another's custody orders. The few United States Supreme Court decisions on the subject have clearly and firmly established only one rule—a state may make any modification of another state's custody decree that the law of the rendering state would permit its courts to make under the circumstances.⁴⁷⁹ Furthermore, these cases have been interpreted as

639 (1978) (contempt judgment not enforceable when original personal jurisdiction was unclear).

473. Ehrenzweig, *supra* note 34, at 357-69.

474. *Id.* at 370-71.

475. See S. KATZ, *supra* note 59, at 66; Bodenheimer, *supra* note 7, at 1215; Jarrett, *Jurisdiction in Interstate Child Custody Disputes*, 12 GONZ. L. REV. 423, 436-38 (1977). See generally Note, *Court's Adoption of Uniform Child Custody Jurisdiction Act Offers Little Hope of Resolving Child Custody Conflicts*, 60 MINN. L. REV. 820, 825 n.22 (1976).

476. See, e.g., S. KATZ, *supra* note 59, at 11, 13-14; Bodenheimer, *supra* note 7, at 1216, 1236; Ratner, *supra* note 37, at 797-98; Stansbury, *supra* note 36, at 828-30; Note, *Child Custody Decrees—Interstate Recognition*, 49 IOWA L. REV. 1178, 1185-1200 (1964); Note, *supra* note 475, at 822-26.

477. U.S. CONST. art. IV, § 1.

478. 28 U.S.C. § 1738 (1976).

479. See *Ford v. Ford*, 371 U.S. 187, 194 (1962); *Kovacs v. Brewer*, 356 U.S. 604, 607 (1958); *May v. Anderson*, 345 U.S. 528, 534 (1953); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615 (1947).

leaving open the question of whether federal law permits a court under some circumstances to make a modification of a foreign decree that even a court of the rendering state could not have made.⁴⁸⁰ In response to the lack of Supreme Court guidance, state courts have adopted various interpretations of the full faith and credit clause and statute.⁴⁸¹ There has thus existed the opportunity and some need for Supreme Court definition of the extent to which full faith and credit requires states to recognize and to enforce foreign custody determinations.⁴⁸²

It is understandable, however, that the Court has been reluctant in the past to address the issue. Although dissatisfied litigants might have presented a question of interstate claim preclusion which the Court would not have hesitated to answer,⁴⁸³ discontented custody claimants have not had to resort to such extremes.⁴⁸⁴ State law uniformly allows intrastate modification of custody decrees at any time on a showing of a sufficient change of circumstances.⁴⁸⁵ Petitions for modification on this ground raise different claims from those previously decided.⁴⁸⁶ Claim preclusion is thus ordinarily inapplicable, and the state-law basis for application of full faith and credit in interstate cases has therefore been collateral estoppel or issue

480. See e.g., *Pratt v. Pratt*, 431 A.2d 405, 407 (R.I. 1981) (dictum); R. LEFLAR, *AMERICAN CONFLICTS LAW* 493 (1977).

481. E.g., compare *Mitchell v. Pincock*, 99 Idaho 56, 577 P.2d 343 (1978) (full faith and credit given); *Goldsmith v. Salkey*, 131 Tex. 139, 145, 112 S.W.2d 165, 168 (1938) (dictum) (same); and *Brooks v. Brooks*, 131 Vt. 86, 300 A.2d 531 (1973) (same), with *Layman v. Dehart*, 560 P.2d 1206 (Alaska 1977) (full faith and credit not given when modified decree better protects child's interests); *Dehart v. Layman*, 536 P.2d 789 (Alaska 1975) (same); *Copple v. Copple*, 186 Neb. 696, 699, 185 N.W.2d 864, 848 (1971) (dictum) (same); *Borys v. Borys*, 76 N.J. 103, 386 A.2d 366 (1978) (child custody decrees not entitled to full faith and credit); and *Bachman v. Mejias*, 1 N.Y.2d 575, 136 N.E.2d 866, 154 N.Y.S.2d 903 (1956) (same).

482. *In re Gibling*, 304 Minn. 510, 517, 232 N.W.2d 214, 219 (1975).

483. For example, a parent who lost a custody contest could sue again on the same grounds in a different state, merely because in his or her view the first forum inaccurately determined the facts or made errors of law, the law of the rendering state changed after the decree, or a different state's law should be applied to the new proceeding.

484. But see, e.g., *Borys v. Borys*, 76 N.J. 103, 386 A.2d 366 (1978) (full faith and credit denied Florida custody award in proceeding based on same claim).

485. See H. CLARK, *supra* note 201, at 599-600; Foster & Freed, *supra* note 217, at 623-25; *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1331 (1980). The recent adoption by some jurisdictions of rules requiring stronger showings for modification of custody decrees than for initial decrees, see, e.g., ILL. ANN. STAT. ch. 40, § 610 (Smith-Hurd 1980), are not departures from the general principle stated in text, and do not affect the first conclusion drawn in this Article from that principle; such rules merely change the extent of showings deemed sufficient to justify modification.

486. Ehrenzweig, *supra* note 54, at 7.

preclusion.⁴⁸⁷ The changed circumstances doctrine has been a significant, but loose, prohibition of relitigation of issues.⁴⁸⁸

The Supreme Court has written that to apply collateral estoppel, "we must look to the pleadings making the issues, and examine the record to determine the questions essential to the decision of the former controversy."⁴⁸⁹ In addition, it once was thought that collateral estoppel was only very narrowly applicable to issues of law.⁴⁹⁰ Even today, authorities on the application of collateral estoppel in litigation other than custody proceedings apply different and more narrow preclusive rules to issues of law.⁴⁹¹ Application of collateral estoppel has, therefore, depended upon distinctions among questions of law, fact, and mixed law and fact;⁴⁹² the degree of similarity between the issues presented in the two proceedings;⁴⁹³ the extent to which an issue previously decided was actually litigated;⁴⁹⁴ whether the factual and legal circumstances of the prior proceeding are similar enough to those of the subsequent proceeding to justify preclusion;⁴⁹⁵ and the extent to which the court actually relied upon its resolution of particular issues in making its ultimate

487. See *United States v. Silliman*, 167 F.2d 607, 620-21 (3d Cir.), *cert. denied*, 335 U.S. 825 (1948); *Shell Oil Co. v. Texas Gas Transmission Corp.*, 176 So. 2d 692, 697 (La. Ct. App. 1965). There apparently has been no intrastate application of collateral estoppel to unmixed issues of law decided in custody cases. No occasion has arisen, therefore, for consideration of interstate preclusion of such issues under the law of full faith and credit. In addition, custody law and practice have characteristics that make more rigorous preclusion of issues of fact difficult, even in proceedings to modify a state's own prior decree. See *infra* text accompanying notes 497-503.

488. See, e.g., *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 613-14 (1947); *Randolph v. Dean*, 27 Ill. App. 3d 913, 327 N.E.2d 473 (1975); *In re Greisamer*, 276 Or. 397, 555 P.2d 28 (1976) (en banc). Most courts have also applied the doctrine of changed circumstances in interstate cases as a matter of comity or of their interpretation of federal requirements, *Ratner*, *supra* note 37, at 798, further obviating the necessity of a Supreme Court announcement of any corresponding federal duty based on full faith and credit.

489. *United Shoe Mach. Corp. v. United States*, 258 U.S. 451, 459 (1922).

490. See, e.g., RESTATEMENT OF JUDGMENTS § 70 comments a-f (1942).

491. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS §§ 68, 68.1(b) comment b (Tent. Draft No. 4, 1977).

492. See authorities cited *supra* notes 490-91. See generally 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.442[1] (1980).

493. See RESTATEMENT (SECOND) OF JUDGMENTS § 68 comment c (Tent. Draft No. 4, 1977); RESTATEMENT OF JUDGMENTS § 68 comment q (1942).

494. See RESTATEMENT (SECOND) OF JUDGMENTS § 68 comment e (Tent. Draft No. 4, 1977); RESTATEMENT OF JUDGMENTS § 68 comments d-i (1942).

495. See *Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 504-06 (3d Cir. 1979) (dictum), *vacated on other grounds*, 448 U.S. 902 (1980); RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(b)-(d) comments b-f (Tent. Draft No. 4, 1977); RESTATEMENT OF JUDGMENTS § 70 comments a-f (1942). See generally 1B J. MOORE & T. CURRIER, *supra* note 492, at ¶¶ 0.415, 0.443, 0.448.

decision.⁴⁹⁶ These distinctions and questions are often difficult, and in custody litigation they have been potentially even more problematic.

The peculiar characteristics of custody law and practice have made collateral estoppel especially difficult to apply in particular cases. Although custody law has traditionally varied from state to state,⁴⁹⁷ the following characteristics have been almost universally shared. The law has given trial courts wide discretion.⁴⁹⁸ The legal boundaries of that discretion have been marked less by explicit rules than by appellate precedents in similar, but almost inevitably distinguishable, cases and have therefore tended to be relatively unclear.⁴⁹⁹ A great variety of facts has been deemed significant, but their relative legal significance and interrelationships have been left largely unspecified.⁵⁰⁰ In custody practice and procedure, pleadings and other pretrial devices have traditionally not defined issues narrowly

496. See RESTATEMENT (SECOND) OF JUDGMENTS § 68 comments h-j (Tent. Draft No. 4, 1977); RESTATEMENT OF JUDGMENTS § 68 comments m-p (1942).

497. See Foster & Freed, *supra* note 217, at 615; Mnookin, *supra* note 217, at 234-46.

498. See, e.g., *Bordelon v. Bordelon*, 390 So. 2d 1325 (La. 1980); H. CLARK, *supra* note 201, at 578; Mnookin, *supra* note 217, at 231. *But see, e.g.,* Hugo v. Hugo, 430 A.2d 1183 (Pa. Super. 1981).

499. See Okpaku, *Psychology: Impediment or Aid in Child Custody Cases?*, 29 RUTGERS L. REV. 1117, 1129-36 (1976).

500. See, e.g., *Gallo v. Gallo*, 7 Fam. L. Rep. (BNA) 2499 (Conn. 1981) (proper factors determining appropriate restrictions on father's visitation privileges were the father's extramarital cohabitation, the small size of his living quarters, his lack of effort to further the child's religious education, and the child's strained relationship with the child of the father's female companion); *In re Scheidt*, 89 Ill. App. 3d 92, 97-99, 411 N.E.2d 554, 559-60 (1980) (proper factors in an award of guardianship of orphans between their grandparents were religious beliefs, stability of marriage, length of continuous employment by a single employer, and previous contributions to the children's support); *Farmer v. Farmer*, 109 Misc. 2d 137, 143, 439 N.Y.S.2d 584, 590 (Sup. Ct. 1981) (proper factors in a custody dispute between parents were the parents' respective races, their histories of emotional and economic stability, and the degrees of consistency shown in their previous child rearing activities); *In re Gomez*, 6 Fam. L. Rep. (BNA) 2903 (N.Y. Sup. Ct. 1980) (proper factors in a custody dispute between parents were the seven-year-old child's desire to live with his father, the father's remarriage, his "good job" with his employer, the child's performance in school, and the mother's relationship with a male friend who lived at her home and kept guns there, accessible to the children); *Jacobson v. Jacobson*, 7 Fam. L. Rep. (BNA) 2218 (Ohio App. 1981) (proper factors in a custody contest between child's father and grandparents were the ages of the child and grandparents); *In re Tremayne Quame Idress R.*, 429 A.2d 40, 45-47 (Pa. Super. 1981) (proper factors in a custody dispute between the two-year-old child's foster mother and maternal grandmother were the length of the child's residence with the foster mother and the child's relationships with grandmother and other maternal relatives); Mnookin, *supra* note 217, at 234-46, 250-55.

or specifically.⁵⁰¹ Although trial courts often make findings of fact,⁵⁰² these findings may be written in vague and conclusory language or may fail to indicate which specific facts were crucial to the ultimate decision.⁵⁰³

Given these traditional characteristics of custody law and practice, even extraordinary attempts to create the kind of record necessary to show violations of generally applicable rules of collateral estoppel would appear unlikely to succeed.⁵⁰⁴ Thus, although the Supreme Court could in theory review a case in which the record showed that a state had failed to give a custody decree of another state the issue-preclusive effect it would have had there, the question has been of relatively little practical importance. The matter therefore has remained un-

501. See, e.g., *Easterling v. Caton*, 260 Ala. 543, 546, 71 So. 2d 835, 838 (1954); *Capuder v. Misko*, 177 So. 2d 592, 596 (La. App. 1965); *Kell v. Texas Children's Home & Aid Soc'y*, 191 S.W.2d 900, 903 (Tex. Civ. App. 1945).

502. See, e.g., *Cacic v. Cacic*, 164 Colo. App. 103, 487 P.2d 612 (1971). But see, e.g., *Nicpon v. Nicpon*, 9 Mich. App. 373, 377, 157 N.W.2d 464, 467 (1968) (trial courts in Michigan before 1963 did not make explicit findings of fact in divorce cases); cf. *Wagner v. Wagner*, 465 S.W.2d 655, 659 (Mo. Ct. App. 1971) (approving implicit, general findings of the trial court in custody modification case in which no explicit findings had been made); *Trudgen v. Trudgen*, 134 Mont. 174, 184, 329 P.2d 225, 230 (1958) (in custody modification proceedings "if the evidence justifies but one conclusion, formal findings are unnecessary").

503. See, e.g., *Cacic v. Cacic*, 164 Colo. App. 103, 487 P.2d 612 (1971); *Mnookin*, *supra* note 217, at 253-54.

In addition to these problems, some courts have declined to preclude the relitigation of previously decided issues of pure fact in the belief that collateral estoppel would impair the court's ability to act in the interest of the child when it is asked to modify a prior order. See, e.g., *Layman v. Dehart*, 560 P.2d 1206, 1207-09 (Alaska 1977); *Dehart v. Layman*, 536 P.2d 789, 790-92 (Alaska 1975); *Bachman v. Mejias*, 1 N.Y.2d 575, 580-81, 136 N.E.2d 866, 869, 154 N.Y.S.2d 903, 907 (1956). On appeal, the question is ordinarily discussed, not in terms of generally applicable principles of issue preclusion but, in terms of the changed circumstances rule for custody proceedings. See, e.g., *Prevatt v. Penney*, 138 So. 2d 537, 539 (Fla. Dist. Ct. App. 1962); *Paintin v. Paintin*, 241 Iowa 411, 415-17, 41 N.W.2d 27, 29-30 (1950); *Henrickson v. Henrickson*, 225 Or. 398, 403-05, 358 P.2d 507, 510 (1961); H. CLARK, *supra* note 201, at 599-600; Note, *The Changed Circumstances Rule in Child Custody Modification Proceedings*, 47 Nw. U.L. Rev. 543 (1952). Indeed, some courts have on occasion said that principles of res judicata and collateral estoppel, as such, are inapplicable to custody decrees. See e.g., *In re R.L.L.*, 487 Pa. 223, 228-31, 409 A.2d 321, 324 (1979) (dictum).

504. See, e.g., *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 613 (1947). Cases in which changes in legal and factual circumstances made preclusion of particular issues unjust, for example, might be particularly difficult to identify. Indeed, if the pleadings and records loosely define the factual issues, and the substantive law makes no particular facts essential to any given outcome, courts might not find it possible either to rule that an issue was precluded by the first proceeding or, if they found the issue precluded, to determine that the ultimate decision in the second proceeding turned on the precluded issue. See *id.* at 613.

settled, and the states have appeared free to apply their varying views on the subject.

Throughout the first two-thirds of this century, states commonly refused to recognize and enforce one another's custody decrees. By the 1960's, the law of custody enforcement and modification was viewed as a flawed part of the interstate system of justice and as a serious social problem—an inducement to lawless self-help by parents and a danger to the welfare of children.⁵⁰⁵ Development of the U.C.C.J.A. was, among other things, a response to these concerns.⁵⁰⁶ Its provisions designed to require interstate enforcement of decrees and to bar their interstate modification were perhaps even more central to the Act than were the provisions limiting initial jurisdiction.⁵⁰⁷ In the several states where the U.C.C.J.A. has not been adopted,⁵⁰⁸ the law regarding recognition, enforcement, and modification of foreign custody decrees still generally conforms to the pattern described above.⁵⁰⁹

D. RECOGNITION, ENFORCEMENT, AND MODIFICATION OF DECREEES UNDER THE U.C.C.J.A.

1. *Res Judicata*

Section 12 of the U.C.C.J.A. prescribes the extent to which the Act precludes a court of an enacting state from reconsidering claims and issues earlier resolved by a court of that state. Section 12 first identifies the persons who are bound by the decree. Its first sentence provides that if the court "had jurisdiction under section 3," then its decree "binds all parties who have been served in this State or notified in accordance with section 5 or who have submitted to the jurisdiction of the court, and who have been given an opportunity to be heard."⁵¹⁰ Addressing the decree's effect on these parties, section 12 establishes that the decree "is conclusive as to all issues of law and

505. See U.C.C.J.A. Commissioners' Prefatory Note, 9 U.L.A. 111-13 (1979); Bodenheimer, *supra* note 7, at 1207-10; Currie, *supra* note 41, at 116; Hazard, *supra* note 146, at 392-95.

506. See U.C.C.J.A. Commissioner's Prefatory Note, 9 U.L.A. 111-13 (1979).

507. See Bodenheimer, *supra* note 7, at 1235.

508. See *supra* text accompanying note 60.

509. See *supra* text accompanying notes 460-503. For a sample of cases in non-U.C.C.J.A. jurisdictions, see, e.g., *Boone v. Boone*, 150 F.2d 153 (D.C. Cir. 1945); *Buchanan v. Buchanan*, 353 Mass. 351, 231 N.E.2d 570 (1967); *Garza v. Shoffner*, 386 So. 2d 397 (Miss. 1980); *Allen v. Allen*, 243 Miss. 23, 136 So. 2d 627 (1962); *Jorgensen v. Jorgensen*, 12 V.I. 491 (1976); *In re Hutchins*, 8 V.I. 223 (1970).

510. U.C.C.J.A. § 12 (1968).

fact decided and as to the custody determination made unless and until that determination is modified pursuant to law, including the provisions of this Act.”⁵¹¹ It is far from clear, however, what the Commissioners meant by this provision and how it will be interpreted by the courts.

a. Claim Preclusion

Section 12 does not appear to incorporate a rule of claim preclusion. The language making a decree conclusive, as “the custody determination made,” is of little or no significance. A custody determination is defined in U.C.C.J.A. section 2(2) as a “court decision and court orders and instructions” providing for custody and visitation rights.⁵¹² The phrase “orders and instructions” seems to refer only to the relief granted; it apparently does not refer to the combination of relief and grounds encompassed by the concept of claims or causes of action.⁵¹³ The word “decision,” on the other hand, could have been intended to refer to this concept. It seems more likely, however, that the word “decision” was intended to refer only to the disposition of the case. The provision that a decree is conclusive “as to the custody determination made” is followed immediately by, and is clearly governed by, the limiting clause “unless and until that determination is modified pursuant to law.” There is no apparent reason to limit claim preclusion in this manner.⁵¹⁴ Conclusiveness of the disposition made, on the other hand, is so limited. The terms “decision” and “determination” were therefore probably intended to refer only to the disposition of the child’s custody. This part of the section 12 rule of conclusiveness thus seems to mean only that a custody disposition is conclusive as to the parties until a different disposition is duly made, a proposition hardly in need of codification.

511. *Id.*

512. *Id.* § 2(2).

513. See generally RESTATEMENT (SECOND) OF JUDGMENTS § 61 comment a (Tent. Draft No. 5, 1978); McCaskill, *Actions and Causes of Action*, 34 YALE L.J. 614, 638 (1925).

514. Suppose, for example, that a court awarded custody of a child to the mother and visitation to the father, and shortly thereafter reduced the father’s visitation rights due to his improper conduct after the original decree. The fact that the “determination . . . [has been] modified pursuant to law,” U.C.C.J.A. § 12 (1968), hardly justifies treating claim preclusion as inapplicable, thus allowing the father to sue now for a transfer of custody on the very grounds upon which he relied in the initial litigation.

b. Issue Preclusion

Interpretation of the provision in section 12 that the decree is conclusive "as to all issues of law and fact decided" is a more important and a more difficult problem. It is unclear whether the limiting language, "unless and until [the custody] determination is modified pursuant to law," refers to the conclusiveness of custody determinations *and* issues, or refers only to custody determinations. If the limiting clause is given the former interpretation, then the rule of conclusiveness does not apply to any proceeding which could result in modification "pursuant to law."⁵¹⁵ Under this interpretation, section 12 would impose no requirement of issue preclusion on a U.C.C.J.A. state having jurisdiction to modify its own prior decree.⁵¹⁶ If, on the other hand, the clause limiting the conclusiveness provided by section 12 applies only to the conclusiveness of determinations, and does not modify the provision that a decree is conclusive of issues, then this section takes a remarkable step: it precludes relitigation by the specified parties of "all issues of law and fact decided" by a court of

515. A modification "pursuant to law" is one which is consistent with the U.C.C.J.A. and other applicable law. The rule that a decree is conclusive "until [the] determination is modified," *id.* (emphasis added), might be interpreted so that issue preclusion would apply even to a "lawful" modification proceeding. After a modification, however, relitigation of the issues decided in the first proceeding would not be precluded by section 12, but relitigation of the issues decided in the modification proceeding might well be precluded. This interpretation appears to be unsound; it is arbitrary and unsupported by the Commissioners' Notes or case law under the U.C.C.J.A.

516. This interpretation would merely incorporate by reference the requirements established elsewhere in the U.C.C.J.A. for jurisdiction, notice, and opportunity to be heard. The only significant utility of the provision for issue preclusion, then, would be as an attempt by the U.C.C.J.A. state to require other states entertaining modification proceedings that were not lawful in this sense to give issue-preclusive effects to the U.C.C.J.A. state's decrees. The Commissioners apparently did not, however, intend that section 12 have this effect. In their Note to section 14(b), which requires a court of an enacting state to give due consideration to any record it can obtain of the previous proceeding in another state before modifying that state's decree, *see also id.* §§ 21, 22, the Commissioners wrote: "How much consideration is 'due' this transcript, whether or under what conditions it is received in evidence, are matters of local, internal law which are not affected by this interstate act." *Id.* § 14 Commissioners' Note, 9 U.L.A. 155 (1979). This statement of the Commissioners seems, therefore, clearly to indicate that in successive proceedings in two U.C.C.J.A. states, the U.C.C.J.A. leaves the extent of issue preclusion unchanged from prior law. There is no indication in the U.C.C.J.A. or in the Commissioners' Notes of an intent to require only nonenacting states to apply broader issue preclusion to foreign decrees of U.C.C.J.A. states. It therefore must be concluded that, if section 12's provision for issue preclusion is inapplicable to all lawful proceedings for modifications, then it is intended to restrict neither enacting nor nonenacting states, and thus is superfluous.

the enacting state having jurisdiction under the section 3 standards. So interpreted, section 12 broadly precludes the relitigation of factual and legal issues with few of the limitations on the application of issue preclusion that apply to other areas of the law.⁵¹⁷ This provision could therefore constitute a radical change in the law affecting custody proceedings.

An analysis of the Commissioners' Notes to section 12 does not aid the resolution of this important question of statutory construction. The Note to section 12 states only that the section

deals with the intrastate validity of custody decrees which provides the basis for their interstate recognition and enforcement [S]ince a custody decree is normally subject to modification in the interest of the child, it does not have absolute finality, but as long as it has not been modified, it is as binding as a final judgment.⁵¹⁸

Any rule of issue preclusion contained in section 12 involves the effect and not the "validity" of a decree. Furthermore, issue preclusion neither results in "absolute finality" of decrees nor prevents "modification in the interest of the child." This Note language therefore does not indicate an answer to the question.

The references in the section 12 Note, and in other parts of the U.C.C.J.A.⁵¹⁹ and Notes,⁵²⁰ to recognition of decrees as well as to their enforcement may be relevant to the question of issue preclusion. The Commissioners' Notes repeatedly cite the 1967 Proposed Official Draft of the *Restatement (Second) of Conflict of Laws*,⁵²¹ which states that the recognition of a foreign judgment requires that it be given "the same effect that it has in the state where it was rendered with respect to the parties, the subject matter of the action and the issues involved."⁵²² The apparent significance of the Commissioners' references to recognition is belied, however, by their failure to explain what they meant by the term, or to discuss or cite authorities concerning collateral estoppel.

The only exception to this omission is the statement in the

517. See *supra* text accompanying notes 489-92.

518. U.C.C.J.A. §§ 13 & 15 Commissioners' Notes, 9 U.L.A. 149-50 (1979).

519. U.C.C.J.A. § 13 (1968).

520. U.C.C.J.A. §§ 13 & 15 Commissioners' Notes, 9 U.L.A. 151, 158 (1979).

521. See, e.g., U.C.C.J.A. §§ 4, 7, 12, 13, 23 Commissioners' Notes, 9 U.L.A. 130, 139, 150, 151, 152, 168 (1979).

522. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 5, topic 2, introductory note, at 342 (Proposed Official Draft Part I, 1967). See also *id.* § 95 comment g, at 353. The final draft approved by the Institute kept this language. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 5, topic 2, introductory note, (1969).

Note to section 14(b)⁵²³ that, in an interstate proceeding to modify a custody decree, a U.C.C.J.A. state's reception and consideration of evidence of a prior proceeding of another state are matters of local law that are unaffected by the U.C.C.J.A. This statement does not necessarily indicate that section 12 does not require intrastate issue preclusion. The statement appears in a Note to a section dealing only with modification of sister states' decrees⁵²⁴ and refers only to consideration of foreign proceedings.⁵²⁵ There would be no inconsistency between, on the one hand, including in the U.C.C.J.A. a rule that a decree of an enacting state broadly precludes relitigation of issues in the same state and, on the other hand, leaving to other local law of enacting states and to the unsettled constitutional law⁵²⁶ the question of the extent to which relitigation of issues decided elsewhere is precluded in the enacting state. To the contrary, such possibly disparate treatment of local and sister states' decrees may reasonably have been considered useful. It would make some allowance for the greater confidence judges of an enacting state are likely to have in the decisions of that state's courts, or for the greater convenience of applying intrastate issue preclusion. It may even have been a concession to expected political pressures in states that would consider enactment of the U.C.C.J.A.

Examination of the statutory context and the Notes seems, therefore, to produce little evidence relevant to the interpretation of section 12. The interpretation more probably consistent with the Commissioners' intent is that section 12 requires broad intrastate issue preclusion. There are three reasons for this conclusion.

First, it is the only interpretation under which the second sentence of section 12 is not essentially superfluous.⁵²⁷ That reason is not very persuasive when applied to a statute containing a number of other drafting anomalies,⁵²⁸ but it is a factor traditionally deemed significant in statutory interpretation.⁵²⁹

In addition, a requirement of intrastate issue preclusion

523. See *supra* note 516.

524. U.C.C.J.A. § 14(b) (1968).

525. See U.C.C.J.A. § 14(b) Commissioners' Note, 9 U.L.A. 154-55 (1979).

526. See *supra* text accompanying notes 477-82.

527. See *supra* note 516.

528. See, e.g., *supra* notes 96, 104, 112, 376, 389.

529. 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 46.06 (4th ed. 1973) (a revision of *Sutherland Statutory Construction*).

seems consistent with the language of section 12. A lawful modification proceeding may result in a new custody disposition solely on the basis of changed circumstances; no issue of fact or law that was decided in the prior proceeding need be inconsistently decided or even challenged in the later proceeding.⁵³⁰ The previous custody disposition would thus cease to be conclusive, but there is no apparent reason to treat the earlier determinations of issues as having lost their conclusive effect. If section 12 were intended to limit the conclusiveness of determinations of issues, the drafters could have used language clearly expressing that intent.⁵³¹ Instead, by its terms, section 12 acknowledges that custody dispositions can be changed when other provisions of the U.C.C.J.A. are complied with, and provides a broad rule of intrastate issue preclusion.⁵³²

Finally, at least some participants in the development of the Act were deeply committed⁵³³ to the stated U.C.C.J.A. policy of discouraging "continuing controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child."⁵³⁴ Because broad intrastate issue preclusion would further these policies, it seems likely that the drafters intended to incorporate such a rule into section 12.

While these considerations support the conclusion that the Commissioners meant to establish a broad rule of intrastate issue preclusion, they fall short of establishing that this rule is a wise one. State courts should evaluate its wisdom. The more important question, after all, is not what the Commissioners intended when they promulgated section 12, but what each enacting legislature intended and how the courts of each state should interpret the section.⁵³⁵

530. See H. CLARK, *supra* note 201, at 599.

531. The drafters might have written, for example, that a decree is conclusive as to all issues of law and fact decided, unless and until they are otherwise decided pursuant to law, and as to the custody disposition made, unless and until it is modified pursuant to law.

532. The drafting of section 12 would, however, have better indicated the purpose had there been a comma after the word "decided" or an explanation in the Notes to indicate that the limiting clause modifies only the provision for conclusiveness of custody dispositions.

533. See, e.g., Bodenheimer, *supra* note 7, at 1208-09, 1212.

534. U.C.C.J.A. § 1(a)(4) (1968).

535. There apparently have been no reported decisions determining the effects of section 12 on intrastate issue preclusion. *But cf.* Commonwealth *ex rel.* Zaubi v. Zaubi, 492 Pa. 183, 188-90, 423 A.2d 333, 336 (1980) (relying on section 12 in holding that relitigation of issues decided by Danish court was precluded); Commonwealth *ex rel.* Piggins v. Kifer, 427 A.2d 185, 192 (Pa. Super. 1981) (rely-

Although a review of the intent of the legislature of each state that has enacted the U.C.C.J.A. is beyond the scope of this Article, a broad rule of intrastate issue preclusion would serve several important state policies. State courts, to one degree or another, share with the Commissioners the policy favoring stability of environment and relationships for children.⁵³⁶ In addition, the policies served in other kinds of litigation by collateral estoppel—parties' repose, protection of courts' prestige, and conservation of judicial and other social resources⁵³⁷—apply to custody proceedings.

Moreover, recent legal developments affecting custody litigation should tend to reduce the special problems that in the past have impeded strict application of principles of issue preclusion to custody cases.⁵³⁸ There has been a trend in recent years toward the adoption of increasingly specific, substantive rules of custody law, which in some instances reduce the scope of judicial discretion and indicate or even require particular determinations under specified circumstances. Examples are California's statutory presumption favoring joint custody,⁵³⁹ several states' statutes restricting custody modifications unless specified and relatively extreme grounds are established,⁵⁴⁰ and certain states' narrowing and specifying of the grounds for state removal of children from their parents' homes.⁵⁴¹ In addition, some states require trial courts to express relatively specific findings of fact.⁵⁴² These developments should often make determination of whether and how issue preclusion applies to a particular case more practicable than it formerly has been.

Inflexible application of the section 12 provision on intrastate issue preclusion, however, might unduly derogate other considerations. Even the policy disfavoring repetitive litigation, particularly in custody litigation because of the effects it can

ing on section 12 in holding that relitigation of issues decided by court of sister state was precluded).

536. See generally *In re Tremayne Quame Idress R.*, 429 A.2d 40, 48 n.6 (Pa. Super. 1981) (collecting authorities reflecting various views on the importance of such stability).

537. Vestal, *Rationale of Preclusion*, 9 ST. LOUIS U.L.J. 29, 31-35 (1964).

538. For a discussion of these problems, see *supra* text accompanying notes 497-503.

539. CAL. CIV. CODE § 4600.5 (West Supp. 1981).

540. *E.g.*, COLO. REV. STAT. § 14-10-131 (1974); ILL. ANN. STAT. ch. 40, § 610 (Smith-Hurd 1980); KY. REV. STAT. § 403.340 (Supp. 1980).

541. See, *e.g.*, N.C. GEN. STAT. § 7A-574 (1981).

542. *E.g.*, *Nicpon v. Nicpon*, 9 Mich. App. 373, 377-78, 157 N.W.2d 464, 467 (1968).

have on the stability of a child's life, would not inevitably be served by issue preclusion. Suppose, for example, that a court awarded custody of a child to the father and later changed custody in a decision clearly dependent upon the court's ruling that modification is proper whenever shown to be in the best interests of the child.⁵⁴³ Assume that the legislature then enacted a statute preventing modifications in the absence of proof that the existing custodial arrangement is harmful to the health of the child.⁵⁴⁴ If the father thereafter sought a new modification, the court would apparently be required by the terms of U.C.C.J.A. section 12 to treat as conclusive the earlier decision that only a showing as to the child's best interests is necessary for modification.⁵⁴⁵

Moreover, in some situations the policies favoring parties' repose, courts' prestige and efficiency, and children's stability may be outweighed by other important policies. It may serve a child's interest as well as his or her parent's to allow relitigation of an issue if, for example, the parent has not had adequate opportunity and motivation to litigate it,⁵⁴⁶ the factual or legal context of the issue has substantially changed,⁵⁴⁷ or the circumstances otherwise indicate that the likely impact upon the child of a result dictated by issue preclusion justifies relaxing its application.⁵⁴⁸ If the rule that section 12 seems to establish is inflexible, these countervailing policies may be sacrificed.

These competing policy concerns may lead some states to reject the interpretation of section 12 that establishes a broad and inflexible rule of issue preclusion, and to develop instead a common law doctrine of issue preclusion that incorporates the required degree of flexibility.⁵⁴⁹ Other states might give section

543. See, e.g., *Trunik v. Trunik*, 179 Conn. 287, 426 A.2d 274 (1979); *Howell v. Howell*, 391 So. 2d 1304, 1305-06 (La. App. 1980).

544. See, e.g., ILL. ANN. STAT. ch. 40, § 610 (Smith-Hurd 1980).

545. See generally Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 928-30 (1975) (discussion of effects of state intervention in child placement).

546. See generally RESTATEMENT (SECOND) OF JUDGMENTS § 68.1(a), (e)(ii), (iii) (Tent. Draft No. 4, 1977).

547. See generally *id.* § 68.1(b).

548. See generally *id.* § 68.1(e)(i).

549. If the legislative history of the U.C.C.J.A. in that state and its law concerning statutory interpretation allowed it to do so, techniques are readily available for reaching the desired end. A state could reasonably interpret section 12 as making the statutory requirement of issue preclusion inapplicable to a proceeding in which a court of the enacting state properly considers modification of its own prior decree. See *supra* note 516. That state could then hold

12 an interpretation generally similar to the one the Commissioners seem to have intended and nevertheless secure some of the benefits of a flexible rule. The courts of such a state might read "conclusive" to mean in effect "as conclusive as collateral estoppel otherwise is" and "decided" to mean in effect "decided after full litigation."

2. Enforcement

Sections 13 and 14 of the U.C.C.J.A. contain the crucial provisions on interstate recognition, enforcement, and modification of decrees. Section 13 provides that the courts of the enacting state

shall recognize and enforce an initial or modification decree of a court of another state which had assumed jurisdiction under statutory provisions substantially in accordance with this Act or which was made under factual circumstances meeting the jurisdictional standards of the Act, so long as this decree has not been modified in accordance with jurisdictional standards substantially similar to those of this Act.⁵⁵⁰

Although application of this duty depends on whether the decree in question has been modified, cases can arise in which section 13 is applicable, yet modification is not an issue. That is, a party may ask an enacting state to recognize and to enforce a foreign decree, modification of which neither has occurred nor is requested by the opponent of recognition and enforcement.⁵⁵¹ For example, a mother may win an award of custody in state *A*. She may then ask a court of state *B*, in which the father is withholding the child, to cause delivery of the child to her and to impose sanctions on the father for contempt of court. Rather than asking for modification of the initial custody award, the father may simply oppose the mother's petition.⁵⁵² Although in this situation the duties established by U.C.C.J.A. section 13 seem clear, they may actually depend upon three questions which warrant further consideration—whether the decree satisfies the alternative jurisdictional tests of section 13, whether the decree is punitive, and whether an element of discretion tempers the duty to enforce the decree.⁵⁵³

that since section 12's provision of issue preclusion is, consequently, superfluous, it does not displace other law the state has or might subsequently develop.

550. U.C.C.J.A. § 13 (1968).

551. For a discussion of the significance of a mere request to modify a decree, see *infra* text accompanying notes 573-75.

552. See, e.g., *State ex rel. Butler v. Morgan*, 34 Or. App. 393, 578 P.2d 814 (1978).

553. Application of section 13 can also present a fourth question: whether and to what extent it requires interstate issue preclusion. See *infra* text accompanying notes 584-600. It should be noted also that section 13, like sections

Failure to satisfy the criteria implicit in these questions may render a decree unenforceable.

The test for jurisdiction under section 13 establishes in the alternative a statutory and a factual test. Under the statutory test, a decree of state *A* does not qualify for recognition and enforcement in state *B* unless, at the time that state *A*'s court "assumed jurisdiction,"⁵⁵⁴ state *A* had enacted the U.C.C.J.A. jurisdictional provisions in a form "substantially in accordance with" state *B*'s version of them.⁵⁵⁵ The determination of whether state *A* has "assumed jurisdiction under statutory provisions substantially in accordance" with state *B*'s version of the U.C.C.J.A. can be analyzed in three different ways.

First, state *B* may interpret this test as requiring state *A* to have enacted satisfactory versions not only of section 3, which contains the criteria for the existence of jurisdiction, and section 14, which sets forth the basic prohibition of modification of foreign decrees, but also of other U.C.C.J.A. sections. It was argued above⁵⁵⁶ that the interstate duties created by section 13 should be interpreted as conditional only on the specified degrees of conformity to the section 3 criteria of jurisdiction, the section 4 and 5 requirements of notice and opportunity to be heard, and the section 14 standards for modification. Those duties are not also conditional, it was argued, on conformity to the mandatory or discretionary standards in sections 6, 7, and 8 for

6 and 14, leaves an enacting state free to show greater deference to other states' proceedings than the mandatory duty created by the statute. See Bodenheimer, *supra* note 7, at 1235. But see *Roundtree v. Bates*, 630 P.2d 1299, 1302-03 (Okla. 1981).

554. One U.C.C.J.A. provision appears to treat the term to "assume" jurisdiction as synonymous with the term to "exercise" jurisdiction. Compare U.C.C.J.A. §§ 7(a), 8(a), (b) (1968) (dealing with a prohibition of and authority for declining the exercise of jurisdiction to modify custody decrees) with *id.* § 14 (exempting from the prohibition against modification of foreign decrees cases in which foreign courts have declined to assume jurisdiction to modify the decrees). Exercise of jurisdiction seems to include not only the making of custody decisions, but also the taking of any judicial step in the process that can lead to such decisions, including the hearing and consideration of a case. See *id.* § 6(a) (prohibiting exercise of jurisdiction in a case in which the petition was filed when a proceeding "was pending in a court of another state exercising jurisdiction substantially in conformity with this Act."). Other provisions appear, however, to treat the assumption of jurisdiction not as synonymous with its exercise, but as referring only to the beginning of its exercise. See *id.* §§ 6(c); 7(i). Ascribing one meaning or the other to the term "assumption" of jurisdiction could determine the applicability of the statutory test to a decree rendered in a state where the U.C.C.J.A. jurisdictional provisions were enacted during the pendency of the proceeding leading to the decree.

555. *Id.* § 13.

556. See *supra* text accompanying notes 91-134.

the exercise of jurisdiction. In at least one state, however, the statutory test of section 13 has been interpreted as requiring enactment of at least some of the latter sections.⁵⁵⁷

In addition, application of the statutory test may depend upon interpretation of sections 3 and 14. Although the language of sections 3 and 14 as enacted does not vary substantially among the states,⁵⁵⁸ there is significant variation among state court interpretations of the provisions of these sections. Some states have construed these sections to implement a preference for their own jurisdiction and to expand their authority to modify foreign decrees to a greater extent than others view the U.C.C.J.A. as permitting.⁵⁵⁹ The argument, therefore, could be made that the authoritative interpretations of sections 3 and 14 by the courts of state *A* have rendered those sections not "substantially in accordance" with the perhaps identically worded statutes of state *B*. State *A*'s decrees, therefore, are not automatically qualified for recognition and enforcement under the statutory test of section 13. Courts, however, seem to have ignored this argument and appear to read other states' U.C.C.J.A. enactments literally in determining whether they satisfy the statutory test of section 13.⁵⁶⁰

Finally, Professor Sanford Katz has argued that section 13 requires enforcement of decrees entered in U.C.C.J.A. states only if the decrees were "issued in accordance with the Act's provisions."⁵⁶¹ Professor Katz suggests that this determination will fall to the forum court's discretion.⁵⁶² This discretionary test represents a third conceivable interpretation of the statutory test.

In the alternative, the factual test for section 13 jurisdiction applies if state *A* lacks a jurisdictional statute "substantially in

557. *Pasqualone v. Pasqualone*, 63 Ohio St. 2d 96, 104-05, 406 N.E.2d 1121, 1127 (1980) (referring apparently to sections 7 and 8).

558. See R. CROUCH, *supra* note 70, at 75-83; 9 U.L.A. 125 (1979); *id.* at 15-16 (Supp. 1981). See also *State ex rel. Butler v. Morgan*, 34 Or. App. 393, 578 P.2d 814 (1978) (applying section 13 statutory test on the basis of foreign conformity to section 3, despite foreign statutory reference to domicile).

559. *E.g., compare In re Weinstein*, 87 Ill. App. 3d 101, 408 N.E.2d 952 (1980) (preference for own jurisdiction); *Fernandez v. Rodriguez*, 97 Misc. 2d 353, 411 N.Y.S.2d 134 (Sup. Ct. 1978) (same) and *Haynes v. Willock*, 431 A.2d 341 (Pa. Super. 1981) (same) with *Both v. Superior Court*, 121 Ariz. 381, 590 P.2d 920 (1979) (en banc) (greater deference to foreign decrees) and *Terrill v. Terrill*, 431 A.2d 1194, 1198 (R.I. 1981) (same).

560. See, *e.g., State ex rel. Butler v. Morgan*, 34 Or. App. 393, 578 P.2d 814 (1978).

561. S. KATZ, *supra* note 59, at 32.

562. *Id.*

accordance with" state *B*'s Act or if *A*'s statute was enacted after *A* assumed jurisdiction in the proceeding that led to the decree. In either situation, the decree is not qualified for recognition and enforcement unless "made under factual circumstances meeting the jurisdictional standards of the Act."⁵⁶³ In contrast to other sections of the U.C.C.J.A., this requirement is not modified by the word "substantially";⁵⁶⁴ thus, the factual circumstances must conform exactly to the jurisdictional standard. Moreover, it is the law of *B* that determines whether the applicable jurisdictional standard consists only of sections 3, 4, 5, and 14 or also includes sections 6 through 8.⁵⁶⁵ In addition, *A*'s action is measured against *B*'s version of the applicable sections, and *B*'s court applies these standards to the factual circumstances. The court of *B* therefore has some latitude to hold that *A*'s decree is not qualified for recognition and enforcement under the factual test, even though a court of *A* or another state might reach a different conclusion if presented with a very similar case.⁵⁶⁶ There have indeed been cases in which foreign decrees were held not qualified for recognition and enforcement in this manner.⁵⁶⁷

Notwithstanding satisfaction of one of the alternative jurisdictional standards of section 13, a sister state may deny an action for enforcement if the foreign decree is punitive within the meaning of any exception for such decrees. Some authority supports the existence of such an exception⁵⁶⁸ despite the contrary language and legislative history of the U.C.C.J.A.⁵⁶⁹

Finally, even if a decree qualifies for recognition and enforcement under section 13's statutory or factual test and is not deemed to fall within an exception for punitive decrees, a question can arise as to the meaning of the duty to enforce it. Enforcement is mandatory⁵⁷⁰ if a certified copy of the decree has been filed with the clerk of the court of the enforcing state "in like manner as a custody decree rendered by a court" of the en-

563. U.C.C.J.A. § 13 (1968).

564. Compare *id.* § 13 ("factual" test) with *id.* §§ 3(a), (4)(i), 6(a), 13 ("statutory" test and test concerning modification), 14(a).

565. See *supra* text accompanying notes 90-133.

566. If the court of *A* actually decided issues that are also presented in *B*, the questions of interstate issue preclusion and full faith and credit that are discussed *infra* text accompanying notes 584-619, 753-805 arise.

567. See, e.g., *In re Weinstein*, 87 Ill. App. 3d 101, 308 N.E.2d 952 (1980); *Fernandez v. Rodriguez*, 97 Misc. 2d 353, 411 N.Y.S.2d 134 (Sup. Ct. 1978).

568. See *supra* notes 391, 396-98.

569. See *supra* text accompanying notes 395-96.

570. U.C.C.J.A. § 13 Commissioners' Note, 9 U.L.A. 151 (1979); see U.C.C.J.A. § 13 (1968).

acting state.⁵⁷¹ Judicial application of some of the principal techniques for enforcement of custody decrees is, however, discretionary.⁵⁷² Through the exercise of its discretion, an enforcing court could therefore mitigate section 13's mandatory duty of interstate enforcement by providing relatively weak enforcement to foreign decrees of which the court disapproved.

Courts do not appear, however, to have had many occasions for resort to any of these methods of blunting the section 13 duty. When interstate enforcement of a decree is opposed under the U.C.C.J.A., there is almost always an issue concerning modification; a court inclined not to enforce a foreign decree thus can often completely avoid its enforcement by modifying it.

3. *Modification*

The U.C.C.J.A. duty of recognition and enforcement is applicable only "so long as [the foreign] decree has not been modified in accordance with jurisdictional standards substantially similar to those of" the forum's U.C.C.J.A.⁵⁷³ Section 14(a) provides:

If a court of another state has made a custody decree, a court of this State shall not modify that decree unless (1) it appears to the court of this State that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this Act or has declined to assume jurisdiction to modify the decree and (2) the court of this State has jurisdiction.⁵⁷⁴

If a foreign decree is modified pursuant to this provision, the original decree need not be enforced. Moreover, when a court first considers a request for modification of a foreign decree, it can, consistently with section 14(a), make a temporary order which remains pending during the suit, thereby deferring the question of enforcement of the decree until it decides whether to order a permanent modification.⁵⁷⁵ The vital issues in U.C.C.J.A. litigation after the initial decree thus have typically been the interpretation and application of the section 14(a)

571. U.C.C.J.A. § 15(a) (1968).

572. *See supra* note 390.

573. U.C.C.J.A. § 13 (1968).

574. *Id.* § 14(a).

575. *See, e.g.,* Wenz v. Schwartze, 598 P.2d 1086, 1089-90 (Mont. 1979), *cert. denied*, 444 U.S. 1071 (1980). Similarly, a court can simply decide to hear simultaneously the petitions for enforcement and for modification, and leave the status quo, which may be physical possession of the child by one party in violation of a foreign decree, unchanged in the meantime. *See, e.g.,* Howard v. Howard, 378 So. 2d 1329, 1330 (Fla. Dist. Ct. App. 1980).

standards for the exercise of jurisdiction to modify foreign decrees.

The Commissioners clearly intended those standards to allow modification of a foreign decree only on the basis of the rendering state's lack of jurisdiction at the time of the proposed modification, and not also on the basis of its earlier lack of jurisdiction when the decree was rendered. The Commissioners stated in the Note to section 14 that the rendering state's failure to satisfy the Act's jurisdictional standards when it first assumes jurisdiction to make a decree is not a ground for modification of the decree by a sister state at a later time if the rendering state has become able to satisfy the criteria of the Act.⁵⁷⁶ The Note is entirely consistent with the language of section 14(a), which excepts from the prohibition against modification only cases in which the rendering court "does not *now* have jurisdiction."⁵⁷⁷

Interpretation of sections 13 and 14 according to their terms and the clearly expressed intent of the Commissioners can create the anomalous result that a foreign decree cannot be modified consistently with section 14, but need not be recognized or enforced under section 13. This limbo can be the fate of a decree made by a state that did not satisfy the statutory or factual test of section 13 when the decree was made, but that does satisfy the jurisdiction test of section 14 when modification is later sought. In such a case a sister state must reject a request for modification, yet it is also free to reject a request for enforcement of the foreign decree.⁵⁷⁸

There are many more cases, however, in which state *B* can not only refuse enforcement but also modify a decree of state *A*. Under section 14(a), state *B* has several avenues, analogous to those available under section 13, through which it can avoid facing a duty not to modify state *A*'s decree. The law of *B* determines whether *B* has jurisdiction and whether *A*'s potential jurisdiction to modify is to be measured only against section 3 or also against one or more of sections 4 through 8, and 14.⁵⁷⁹ The law of state *B* also supplies the authoritative version of the applicable sections and determines whether *A*'s potential jurisdiction is "substantially in accordance" with *B*'s jurisdictional

576. 9 U.L.A. 155 (1979).

577. U.C.C.J.A. § 14(a) (1968) (emphasis added). There is in this respect an important difference between the U.C.C.J.A. and the Wallop Act. See *infra* text accompanying note 630.

578. But see S. Katz, *supra* note 59, at 77, 85, 89.

579. See *supra* text accompanying notes 90-133.

requirements. The court of *B* makes all findings of fact concerning *B*'s jurisdiction and *A*'s potential jurisdiction that are not precluded by previous findings in *A*,⁵⁸⁰ and applies its relevant law to these facts. There have indeed been cases in which courts have modified foreign decrees on one or more of these bases.⁵⁸¹ Some courts have even ignored the difference in the scope of the duty of enforcement in section 13 and the duty of nonmodification in section 14.⁵⁸² These courts have modified custody decrees of a sister state on the ground that the state's past jurisdiction was defective, without regard to the sister state's jurisdiction at the time of the modifications.⁵⁸³

4. Recognition

To modify a foreign decree, a sister state must determine whether it is collaterally estopped from litigating any of the factual and legal issues presented. Many states have required a form of interstate issue preclusion through application of the changed circumstances rule or of general principles of collateral estoppel.⁵⁸⁴ In addition, the U.C.C.J.A. may be interpreted to create a stricter requirement of interstate issue preclusion. Section 13 provides that an enacting state shall "*recognize and enforce*" a foreign decree meeting specified criteria.⁵⁸⁵ Furthermore, section 15(a) provides that, upon proper filing, a foreign decree "*has the same effect and shall be enforced in like manner*" as a domestic decree.⁵⁸⁶ It is unclear, however, what the Commissioners meant by this language.

According to the 1967 Proposed Official Draft of the *Restate-*

580. See *infra* text accompanying notes 584-619, 753-805.

581. See, e.g., cases cited *supra* note 575; Commonwealth *ex rel.* Piggins v. Kifer, 427 A.2d 185, 186-88, 192 (Pa. Super. 1981).

582. See *supra* text accompanying notes 576-78.

583. See, e.g., Howard v. Howard, 378 So. 2d 1329, 1331 (Fla. Dist. Ct. App. 1980); Baird v. Baird, 374 So. 2d 60, 63 (Fla. Dist. Ct. App. 1979); cf. Webb v. Webb, 245 Ga. 650, 266 S.E.2d 463 (1980), *cert. dismissed for want of jurisdiction*, 451 U.S. 493 (1981) (noting that Florida court had violated its duty to confer with Georgia court, in opinion justifying exercise of jurisdiction by Georgia court to modify Florida decree); *In re* Weinstein, 87 Ill. App. 3d 101, 109, 408 N.E.2d 952, 958 (1980) (relying on failure of Montana court to cooperate with Illinois court, in opinion justifying exercise of jurisdiction by Illinois court to modify Montana decree). See also Haynes v. Willock, 431 A.2d 341 (Pa. Super. 1981).

584. See *supra* note 488 and accompanying text.

585. U.C.C.J.A. § 13 (1968) (emphasis added).

586. *Id.* § 15(a) (emphasis added). This section is not by its terms made applicable only to decrees meeting the criteria of section 13 for recognition and enforcement, but the Note accompanying section 15 implies such a limitation. See U.C.C.J.A. § 15 Commissioners' Note, 9 U.L.A. 158 (1979).

ment (*Second*) of *Conflict of Laws*, on which the Commissioners relied in several of the Notes,⁵⁸⁷ recognition and enforcement were separate topics.⁵⁸⁸ Enforcement of a judgment was said to occur "when, in addition to being recognized, a party is given the affirmative relief to which the judgment entitles him."⁵⁸⁹ Recognition of a judgment was said to be "a condition precedent to its enforcement,"⁵⁹⁰ which was satisfied when the judgment was "given the same conclusive effect that it has in the state of rendition with respect to the persons, the subject matter of the action and the issues involved."⁵⁹¹ The Draft also noted that under some circumstances a judgment can or must be recognized, even if it need not or cannot be enforced.⁵⁹²

It is conceivable that the Commissioners intended to implement these principles through the term "recognize" in section 13 and the language quoted above from section 15(a). If so, section 13 would require a court otherwise permitted to modify a foreign decree under section 14 to treat as precluded every issue that would have been precluded in the rendering state, provided that the rendering state originally had met section 13's jurisdictional standards.⁵⁹³ Under this interpretation, section 13 would in some instances add to the rigor of interstate preclusion of factual issues in custody litigation.⁵⁹⁴

Nevertheless, the Commissioners do not appear to have contemplated the creation of such a rigorous rule of interstate

587. See, e.g., U.C.C.J.A. §§ 4, 7, 12, 13, 23 Commissioners' Notes, 9 U.L.A. 130, 139, 150, 151-52, 168 (1979).

588. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 5, topic 2, introductory note (Proposed Official Draft 1967). The *Restatement (Second) of Conflict of Laws*, finally approved by the American Law Institute, is the same as the Proposed Official Draft with respect to the principles noted in the text accompanying notes 566-70 *infra*. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 5, topics 2 & 3 introductory notes, § 93 comment b, § 102 comments a-c (1969).

589. RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 5, topic 2 introductory note (Proposed Official Draft 1967).

590. *Id.*

591. *Id.* § 93 comment b.

592. *Id.*, ch. 5, topic 2 introductory note; *id.*, ch. 5, topic 3 introductory note; *id.* § 102 comments a-c.

593. The state would, of course, remain free under section 13 to determine for itself the jurisdictional issues upon which the application of section 13 depends. See U.C.C.J.A. § 13 (1968). See generally *Progress, supra* note 401, at 998-1000.

594. This could occur particularly when the state so interpreting section 13 has traditionally applied the changed circumstances rule loosely, but now is considering modification of a decree duly made by a court of a U.C.C.J.A. state where, under section 12 or other law, there is relatively strict intrastate preclusion of issues of fact in custody cases.

issue preclusion. The term "recognize" appears only in sections 13 and 23, which require an enacting state to "recognize and enforce" the decrees of sister states and of other nations, respectively.⁵⁹⁵ Although the Commissioners' Notes frequently use both the terms "recognize" and "enforce,"⁵⁹⁶ neither the Notes nor the statute defines either term. The Notes' use of these two terms separately and together, however, makes it quite clear that the Commissioners treated recognition as nothing more than a necessary and sufficient precondition of enforcement, having no significance if a decree was not enforced.⁵⁹⁷

The Note to section 15 appears to support the conclusion that the Commissioners did not intend to incorporate a rule of issue preclusion in that section's reference to the interstate effect of a custody decree. The Note refers nine times to "enforcement" of decrees, but uses the word "effect" only in saying that, upon its filing with the court clerk, a decree "becomes in effect a decree of the state of filing and is enforceable."⁵⁹⁸ The Note's failure to mention any particular effects other than enforcement suggests that section 15 does not create a rule of issue preclusion.

Moreover, the section 13 clause terminating the duty to enforce a properly made foreign decree when the decree is later modified also applies to the duty of recognition. If section 13 required interstate issue preclusion, there would be no apparent reason to cease requiring it when a decree was modified.⁵⁹⁹ The appropriate conclusion is, therefore, that the Commissioners did not intend to require interstate issue preclusion at all, much less to require it for an artificially limited period of time.

It must again be noted, however, that the Commissioners' views may not prevail in the interpretation of every state's ver-

595. U.C.C.J.A. §§ 13, 23 (1968).

596. U.C.C.J.A. Commissioners' Prefatory Note & §§ 4, 12, 13, 15, 23 Commissioners' Notes, 9 U.L.A. 112, 114, 130, 149-52, 158, 168 (1979).

597. See U.C.C.J.A. § 13 Commissioners' Note, 9 U.L.A. 151-52 (1979) (Note using various forms of the word "recognize" interchangeably with various forms of the phrase "recognize and enforce"); *id.* § 15 Commissioners' Note, 9 U.L.A. 158 (1979) (Note stating that "out-of-state custody decrees which are required to be recognized are enforced by other states"). The Note to section 14 comes closest to explicit treatment of issue preclusion, yet it fails to use the word "recognize." See *id.* § 14 Commissioners' Note, 9 U.L.A. 155 (1979). Section 14 also fails to mention recognition. As discussed previously, section 14 does not affect interstate issue preclusion. See *supra* note 516.

598. U.C.C.J.A. § 15 Commissioners' Note, 9 U.L.A. 158 (1979).

599. Cf. *supra* note 515 (interpretation of section 12 applying issue preclusion to "lawful" modification proceedings).

sion of the U.C.C.J.A. Indeed, the courts of one state appear to have found in the language of sections 12, 13 and 15 a rule limiting interstate relitigation of issues.⁶⁰⁰

E. ISSUE PRECLUSION UNDER FULL FAITH AND CREDIT

The other possible source of legal limitations on interstate relitigation of issues is, of course, the federal full faith and credit clause and statute. The enactment of relatively specific and partially uniform federal and state criteria of custody jurisdiction and enforcement has given new significance to the question of the possible application of full faith and credit. Full faith and credit could conceivably limit interstate relitigation of findings made in applying these criteria. Moreover, the increased likelihood that in a given case intrastate issue preclusion will be required⁶⁰¹ and will be feasible⁶⁰² has increased the significance of full faith and credit.

The question often has been framed as whether full faith and credit requirements apply to custody decrees, as if a simple yes or no would suffice.⁶⁰³ It is unlikely, however, that the answer is a flat negative; the affirmative answer is probably the qualified one that full faith and credit requires that many custody decrees be given some interstate effects under most circumstances. Although it is impossible within the scope of this Article to chart all the contours of these requirements, it is possible and appropriate to establish one point concerning them—in custody cases, full faith and credit ordinarily forbids relitigation of issues of fact unmixed with legal questions when such relitigation is precluded under the law of the state duly rendering a custody decree. Some exceptions to this rule may be justifiable,⁶⁰⁴ but no policy supported by authority or reason

600. See *Commonwealth ex rel. Piggins v. Kifer*, 427 A.2d 185, 192 (Pa. Super. 1981); cf. *Commonwealth ex rel. Zaubi v. Zaubi*, 492 Pa. 183, 190, 423 A.2d 333, 336 (1980) (U.C.C.J.A. section 13 makes conclusive all issues determined by valid foreign nation custody decree).

601. See *supra* text accompanying notes 510-49.

602. See *supra* text accompanying notes 483-504, 538-42.

603. See, e.g., RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 103 comment b & reporter's note (1971); Currie, *supra* note 41, at 109-18; Stansbury, *supra* note 36, at 831-32; Stumberg, *supra* note 39, at 58-59; Note, *supra* note 475, at 824-25, 837-38; Comment, *supra* note 449, at 1024-26.

604. For example, relitigation may not be precluded by a previous judgment if the rendering court lacked jurisdiction, cf. *Griffin v. Griffin*, 327 U.S. 220 (1946) (absence of procedural due process resulting in no personal jurisdiction renders judgment unenforceable in foreign jurisdiction), or if a state that lacked adequate connections with the child or access to crucial evidence decided the factual issues. Cf. *Kovacs v. Brewer*, 356 U.S. 604, 613-14 (1958) (Frankfurter, J.,

dictates wholesale exclusion of custody decrees from the full faith and credit requirement of interstate preclusion of factual issues.

Although the Supreme Court has not yet squarely faced this issue,⁶⁰⁵ the Court has in various other contexts treated full faith and credit as requiring claim and issue preclusion relatively broadly and inflexibly, even in the face of competing state, federal, and individual interests.⁶⁰⁶ An example is the recent workers' compensation case of *Thomas v. Washington Gas Light Company*.⁶⁰⁷ The opinions in *Thomas* indicated that five Justices currently on the Court view the full faith and credit statute as requiring strict interstate preclusion of claims,⁶⁰⁸ despite the unique policy underlying workers' compensation, which arguably justifies relaxation of the full faith and credit mandate.⁶⁰⁹ Even more pertinent to the matter of issue preclusion in custody proceedings is the opinion of the other four Justices. Although they considered workers' compensation awards exempt from one aspect of interstate claim preclusion under the full faith and credit statute, they described as "unexceptionable" the "full faith and credit principle that resolutions of

dissenting) (minimum nexus between rendering court and child, i.e., the child's presence, should exist before foreign court must honor custody decree).

605. The opinions of the Supreme Court in the custody cases in which full faith and credit questions have been decided or avoided have not contained any dicta on the specific matter of interstate preclusion of issues of unmixed fact. See cases cited *supra* note 479. The separate opinions of Justice Frankfurter in two of those cases, reasoning that courts should not give custody decrees the same full faith and credit that other judgments receive, were written in cases presenting questions of interstate enforcement of dispositions and interstate claim preclusion. See *Kovacs v. Brewer*, 356 U.S. 604, 611-14 (1958) (Frankfurter, J., dissenting); *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., dissenting). The opinions, therefore, may not have represented a considered and total rejection of interstate preclusion of pure questions of fact. Justice Frankfurter's dissent in *Kovacs* argued that in a custody case the welfare of the child is "more important" than the full faith and credit clause's policy that precludes relitigation of decided issues. 356 U.S. at 611-12. A reading of both his opinion and the opinion of the Court, however, suggests that Justice Frankfurter was using the word "issues" to refer generally to claims as well as issues, not to distinguish issues from claims and dispositions of custody. Under any interpretation, his opinion fails to address separately preclusion of issues of fact and preclusion of issues of law and issues of mixed law and fact. *Id.* at 609-16. Neither of those opinions was joined by any other Justice.

606. See, e.g., *Allen v. McCurry*, 449 U.S. 90 (1980); *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

607. 448 U.S. 261 (1980).

608. See *id.* at 286-90 (White, J., concurring in the judgment, joined by Burger, C.J., and Powell, J.), 290-96 (Rehnquist, J., dissenting, joined by Marshall, J.).

609. See *id.* at 277-86 (plurality opinion) (Stevens, J., joined by Brennan, Stewart, and Blackmun, JJ.).

factual matters underlying a judgment must be given the same *res judicata* effect in the forum State as they have in the rendering State."⁶¹⁰

That principle is unexceptionable even as applied to custody proceedings; indeed, none of the many analyses of the application of full faith and credit to custody decrees published in the past fifty years specifically object to it. Though a number of commentators have predicted or supported special treatment of child custody, they have relied on the interests of each state in applying its own law and retaining discretion to determine the disposition of a case, and not on any interest in contradicting prior findings of fact.⁶¹¹ Those who have addressed the interstate preclusion of factual issues in custody proceedings have concluded that full faith and credit and sound policy require such preclusion.⁶¹² Professor Ehrenzweig specifically approved the application of full faith and credit to preclude the relitigation of factual issues in interstate custody cases,⁶¹³ after having earlier "hoped" that the Supreme Court would approve what he called "a clear trend against full faith and credit and for full discretion."⁶¹⁴

Nevertheless, a state as *parens patriae* does have special obligations to protect the young, and states use various laws and patterns of discretion to discharge that duty. They therefore arguably have especially strong interests in custody proceedings that should be balanced against the full faith and credit obligation to recognize foreign custody decisions embodying another state's legal standards and exercise of discretion.⁶¹⁵ There is no legitimate state interest, however, even

610. *Id.* at 281 (dictum).

611. See, e.g., R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 259, 535-37 (2d ed. 1980); Currie, *supra* note 41, at 109-18; Stansbury, *supra* note 36, at 831-32; Stumberg, *supra* note 39, at 58-59; Note, *Custody Awards and Their Recognition in Other Jurisdictions*, 80 U. PA. L. REV. 712, 714-15 (1932).

612. See Ehrenzweig, *supra* note 54, at 7-8; Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 173-75 (1949). See also Goodrich, *supra* note 187, at 6-7 (courts should interpret full faith and credit clause as forbidding relitigation of the question of a child's custody under certain circumstances).

613. Ehrenzweig, *supra* note 54, at 7-8.

614. A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS 292 (1962). See also *id.* at 295 n.14.

615. Whether those interests qualify a general constitutional duty to enforce or give preclusive effects to decrees is a question beyond the scope of this Article. Cf. *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933) (reserving question whether South Carolina could impose further child support obligations on a father domiciled in that state despite a prior Georgia judgment that exhausted his duty of child support under Georgia law and that is entitled to full

when children are concerned, in reexamining an issue of pure fact that has already been decided through fair procedures by a court properly exercising jurisdiction over the parties and the controversy. Although the first court's finding of fact may have been inaccurate or biased,⁶¹⁶ there is no assurance that a second court's contrary decision of the issue will be less biased or more accurate. No policy warrants a departure from the constitutional and congressional mandates of the national unification of the judicial system.⁶¹⁷

It must be acknowledged, however, that there are issues as to which the distinction between facts and the application of law to facts is elusive.⁶¹⁸ Because of states' special interests in applying their own law and discretion in custody cases, the requirement of interstate preclusion of fact issues should arguably be confined to the clearest questions of pure fact. Nevertheless, for the purposes of this discussion, it is sufficient to conclude that full faith and credit applies to many decisions of factual issues in custody proceedings and may also apply to decisions of legal issues, mixed questions of law and fact, and entire claims.

F. ENFORCEMENT AND MODIFICATION UNDER THE WALLOP ACT

To the preexisting federal and state law on interstate recognition, enforcement, and modification of custody decrees, section 1738A(a) adds: "The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State."⁶¹⁹ Like section 14(a)

faith and credit). It should be observed, however, that a proper analysis balances those interests against the policies that full faith and credit serves as a "nationally unifying force" in the administration of justice, *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430, 439 (1943), and perhaps also more specific policies to protect children and their custodians from the instability, expense, and inconvenience of repetitive litigation. *See generally* cases cited *supra* note 481.

616. *Cf. Autry v. Autry*, 359 S.W.2d 272, 277-78 (Tex. Civ. App. 1962) (per curiam) (most courts profess that the proper place to raise children is in their state).

617. There are precedents for treating full faith and credit as requiring that a foreign judgment be given issue-preclusive effects even though, due to a lack of finality, *see In re Burns*, 49 Hawaii 20, 407 P.2d 885 (1965), or a lack of jurisdiction to grant a particular kind of relief, *see Cuevas v. Cuevas*, 191 So. 2d 843 (Miss. 1966), full faith and credit does not require recognition and enforcement of every aspect of the judgment.

618. *See RESTATEMENT (SECOND) OF JUDGMENTS* § 68.1 comment b (Tent. Draft No. 4, 1977).

619. 28 U.S.C.A. § 1738A(a) (West Supp. 1980).

of the U.C.C.J.A.,⁶²⁰ this provision allows a court to deny enforcement to a foreign decree at the virtual outset of a proceeding by entering a temporary modification. The modification provisions of subsection (f) must therefore be considered in conjunction with the basic mandate of subsection (a). Subsection (f) provides:

A court of a State may modify a determination of the custody of the same child made by a court of another State, if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.⁶²¹

Examination of the operation of section 1738A should begin, however, with the observation that the statute does not by its terms do certain things that it conceivably might have done. First, it does not purport to require recognition of decrees. The omission of such a requirement should not be deemed inadvertent in a federal statute which closely follows the language of the U.C.C.J.A. in several other important respects,⁶²² and which nevertheless departs from the U.C.C.J.A.'s uniform references to "recognition and enforcement."⁶²³ This omission can be viewed as a decision to commit questions of interstate issue preclusion to state law⁶²⁴ and federal constitutional law.⁶²⁵ Whether intentional or not, congressional reticence regarding interstate issue preclusion is prudent given the unsettled character of the law of issue preclusion in general,⁶²⁶ the somewhat limited role it traditionally has played in custody litigation,⁶²⁷ and the uncertainty as to whether U.C.C.J.A. section 12 has in some states unduly expanded the scope of intrastate preclusion

620. See *supra* text accompanying notes 573-75.

621. 28 U.S.C.A. § 1738A(f) (West Supp. 1980).

622. *E.g., compare id.* § 1738A(b)(2), (4), (6), (7), (c)(2)(A), with U.C.C.J.A. §§ 2(1), (5), (8), (9), 3(a)(1) (1968) (similar language).

623. U.C.C.J.A. §§ 13, 23 (1968).

624. See *supra* text accompanying notes 584-600.

625. See *supra* text accompanying notes 601-18. There is no indication in the text or legislative history of the Wallop Act that Congress intended to render the provisions of 28 U.S.C. § 1738 (1976) inapplicable to custody proceedings, or to supplant any requirements imposed in such proceedings by the full faith and credit clause itself. See 124 CONG. REC. 787 (1978); *infra* text accompanying notes 771-805. In addition, it can be doubted that Congress would have the power to take the latter step. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n.18 (1980); *infra* text accompanying note 780.

626. See generally RESTATEMENT (SECOND) OF JUDGMENTS reporter's memorandum, §§ 68, 68.1 & accompanying comments & reporter's notes (Tent. Draft No. 4, 1977).

627. See *supra* text accompanying notes 483-505.

of issues of law as well as fact in custody proceedings.⁶²⁸ In addition, section 1738A does not by its terms expressly require a state to modify or forbid it to enforce a foreign custody order that was not made consistently with the federal statutory standards.⁶²⁹

Having identified the significant omissions in section 1738A, the duties affirmatively created by the Wallop Act can be explored. The duties of enforcement and of nonmodification created by subsection (a) are coextensive. Both exist only as to a custody determination made consistently with section 1738A, and both expire when the determination is modified in the manner authorized by subsection (f). There is therefore no limbo under federal law similar to the one created by the U.C.C.J.A.,⁶³⁰ in which a decree cannot be modified but need not be enforced. Every decree either is entitled under section 1738A to interstate enforcement or can be modified without violation of the provisions of that section. The Wallop Act does not, however, attempt to eliminate the limbo created by the U.C.C.J.A. If, for example, the law of state *B* does not permit its court to modify a decree of state *A*, but neither *B*'s law nor section 1738A requires enforcement of the decree, then the Wallop Act also permits the anomalous result permitted by the U.C.C.J.A.

The criteria that determine whether a custody determination was made consistently with section 1738A differ in several additional ways from the U.C.C.J.A. criteria for recognition, enforcement, and nonmodification of decrees. Although some of these differences were discussed as they relate to subsection 1738A(g)'s prohibition of concurrent exercise of jurisdiction, they are also significant for subsection (a)'s requirement of enforcement and nonmodification. The federal duty of enforcement and nonmodification depends upon the law of state *A* rather than state *B*⁶³¹ and upon federal criteria that give a special role to the "home state"⁶³² and limit "emergencies" to those involving "mistreatment or abuse."⁶³³ The federal duty is not, however, made dependent upon an evaluation of the sub-

628. See *supra* text accompanying notes 512-49.

629. But see *infra* text accompanying notes 647-726 for a discussion of whether section 1738A preempts state law by implication.

630. See *supra* text accompanying notes 576-78.

631. *Virginia E.E. v. Alberto S.P.*, 440 N.Y.S.2d 979, 982 (Fam. Ct. 1981); see *supra* text accompanying note 409.

632. *Virginia E.E. v. Alberto S.P.*, 440 N.Y.S.2d 979, 982 (Fam. Ct. 1981); see *supra* text accompanying notes 380-81.

633. See *supra* text accompanying notes 365-72.

stantiality of a state's conformity to the applicable criteria.⁶³⁴ Nor is it made subject to exceptions for emergencies, for other temporary stays and modifications, or for punitive decrees.⁶³⁵

Three other federal departures from the U.C.C.J.A. criteria will often be significant in applying the federal duty of enforcement and nonmodification. One is the rejection, for purposes of the federal Act, of the proposition that every decree made by a state that has enacted a suitable statute is entitled to mandatory interstate enforcement without regard to whether the provisions of the statute were properly applied. The federal statute thus has no statutory test like that in U.C.C.J.A. section 13;⁶³⁶ whether section 1738A requires enforcement of a decree depends upon whether it was made consistently with the provisions of that section in addition to relevant state law.⁶³⁷

Another such departure appears in subsection (d), which provides that

the jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.⁶³⁸

The "requirement of subsection (c)(1)" referred to is that "such court has jurisdiction under the law of such State."⁶³⁹ The function, therefore, of subsection (d) is neither to confer jurisdiction nor to broaden the federal statutory duty of nonmodification, but to limit that duty according to a specific federal test.⁶⁴⁰ In effect, subsection (d) provides that, even if the state that rendered a custody decree still has jurisdiction

634. See *supra* text accompanying note 348.

635. See *supra* text accompanying notes 391-407 and *infra* text accompanying notes 885-88.

636. *Virginia E.E. v. Alberto S.P.*, 440 N.Y.S.2d 979, 983 (Fam. Ct. 1981); see *supra* text accompanying notes 554-61.

637. Whether a custody order was made consistently with section 1738A depends, by the terms of the statute, not only upon conformity to the specified, federal criteria, but also upon the court making the order having had jurisdiction under its own law. 28 U.S.C.A. § 1738A(c)(1), (d) (West Supp. 1980). The state law in effect when the rendering state acted is, therefore, significant under section 1738A. Even in this respect section 1738A is, however, different from the statutory test of U.C.C.J.A. section 13. Consistency with the federal statute depends in this respect upon whether the circumstances required by state law existed; satisfaction of the statutory test in section 13 depends only upon what statute was in force.

638. 28 U.S.C.A. § 1738A(d) (West Supp. 1980).

639. *Id.* § 1738A(c)(1).

640. See *Virginia E.E. v. Alberto S.P.*, 440 N.Y.S.2d 979, 983 (Fam. Ct. 1981). When the test of subsection (d) is satisfied, the state need not also meet the test of subsection (c)(2).

under its own law when a modification is later sought, if that state no longer "remains the residence of the child or of any contestant,"⁶⁴¹ then it "no longer has jurisdiction"⁶⁴² in this sense: section 1738A does not forbid another state to modify its decree.⁶⁴³ This provision thus establishes a threshold criterion of continuing jurisdiction to modify a state's own decree, thereby preventing abuse by a rendering state of the concept that its jurisdiction, once exercised, continues to the exclusion of other states.

The Wallop Act's final departure from U.C.C.J.A. criteria for interstate enforcement of decrees bases the federal duty of interstate enforcement and nonmodification on the subsection (g) prohibition against the simultaneous exercise of jurisdiction. In this respect the federal Act differs from U.C.C.J.A. section 6(a) as the Commissioners intended it⁶⁴⁴ and as some states have interpreted it.⁶⁴⁵ Even in states that regard compliance with section 6(a) as a condition of the duty of interstate enforcement, there may be differences between the scope of the section 6(a) duty not to exercise concurrent jurisdiction and the scope of the similar federal duty created by section 1738A(g).⁶⁴⁶ Thus, section 1738A may make a state's exercise of jurisdiction during the pendency of a prior proceeding in a sister state determinative of whether interstate respect must be given to the resulting decree, while under state law interstate respect for the decree may not depend upon this factor, or may depend upon it according to a different set of rules.

IV. RELATIONSHIPS AMONG THE VARIOUS FEDERAL AND STATE REQUIREMENTS

A. WALLOP ACT PREEMPTION OF STATE LAW

This Article has thus far assumed that the Wallop Act

641. 28 U.S.C.A. § 1738A(d) (West Supp. 1980).

642. *Id.* § 1738A(f)(2).

643. It may be questioned, as a matter of interpretation of section 1738A, whether the jurisdiction of the court of the rendering state continues in the sense described in the text only as long as that state continuously remains the residence of the child or a contestant, and continuously possesses jurisdiction under its own law, or also does so when there has been an interruption and then reestablishment of such residence or jurisdiction. The use of the terms "continues" and "remains" in subsection (d) seems to imply that the former interpretation was intended. See *1980 Senate Hearing, supra* note 4, at 151 n.34 (statement of Russell M. Coombs).

644. See *supra* text accompanying notes 91-133.

645. See authorities cited *supra* note 135.

646. See *supra* text accompanying notes 345-407.

preempts state law only to the extent that compliance with both federal and state law is literally impossible.⁶⁴⁷ It now is necessary to discard this assumption. Foster and Freed have asserted that the Wallop Act broadly "preempts the field" and permits a court, regardless of its own law, to disregard a foreign decree that does not satisfy the federal criteria.⁶⁴⁸ Since the question appears to be substantial, a complete analysis must determine the extent to which the Wallop Act preempts state law.

The Supreme Court recently reiterated the well-established⁶⁴⁹ principle that "consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law."⁶⁵⁰ Search for a contrary intent would, of course, begin with the statute and its legislative history. If the legislative record indicates with relative clarity that, except for literally irreconcilable state law, preemption was not intended by Congress, the Court can be expected to acquiesce in the demonstrated congressional intent. The legislative history of the Wallop Act does not reveal an intention to preempt state law, and the text of the Act seems to give the same indication.

1. *Relevant Statutory Language*

The Act contains no provision explicitly addressing the preemption of state law. It does contain an express finding, however, that it was necessary

to establish national standards under which the courts of [the states, the District of Columbia, Puerto Rico, and the territories and possessions of the United States] will determine their jurisdiction to decide [custody and visitation] disputes and the effect to be given by each

647. See generally *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1963).

648. Foster & Freed, *supra* note 297, at 1, col. 1.

649. See, e.g., *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

650. *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). The court noted, however, that:

Such a purpose [to displace state law] may be evidenced in several ways. The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for States to supplement it. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. Or the state policy may produce a result inconsistent with the objective of the federal statute.

Id. at 746-47 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (citations omitted)).

such jurisdiction to such decisions by the courts of other such jurisdictions.⁶⁵¹

The express finding does not indicate whether the national standards are to be comprehensive in the sense that they would preclude the application of supplementary state standards.

The Act also states its six general purposes. These include promoting cooperation between states in making custody determinations, promoting the interstate exchange of information and mutual assistance, facilitating interstate enforcement of custody decrees, discouraging continuing interstate controversies, avoiding jurisdictional competition, and deterring interstate abductions of children.⁶⁵² Section 1738A serves all of the stated purposes to one degree or another without implicitly preempting state law. Each of the stated purposes is a very close paraphrase of one of the nine stated purposes of the U.C.C.J.A.⁶⁵³ Three of the U.C.C.J.A. purposes are, however, omitted from the federal Act. Examination of the nature of the omitted purposes and of the specific U.C.C.J.A. provisions that serve these purposes suggests that the federal omission reflects a congressional decision to leave various important matters to state law.

One omitted purpose is to "assure that [custody] litigation take place ordinarily in the state with which the child and his family have the closest connection and where significant evidence . . . is most readily available."⁶⁵⁴ Among the U.C.C.J.A. provisions designed to serve this purpose are the section 3 limitation of jurisdiction, the section 7 guidelines on forum non conveniens, and the section 8 standards on unclean hands.⁶⁵⁵ The Wallop Act's failure to adopt this purpose, coupled with its failure to limit initial jurisdiction per se,⁶⁵⁶ and its omission of federal forum non conveniens and unclean hands provisions seems to reflect a decision to leave these matters to state law.

The Wallop Act is also silent on the U.C.C.J.A.'s purpose to avoid "relitigation of custody decisions of other states."⁶⁵⁷ Indeed, section 1738A creates federal bars to interstate relitigation of decisions that in many instances are narrower than the

651. Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, § 7(b), 94 Stat. 3569.

652. *Id.* § 7(c).

653. Compare *id.* with U.C.C.J.A. § 1(a)(1), (2), (4), (5), (7), (8) (1968).

654. U.C.C.J.A. § 1(a)(3) (1968).

655. See *supra* text accompanying notes 69-78.

656. See *supra* text accompanying notes 295-305.

657. U.C.C.J.A. § 1(a)(6) (1968).

state bars created by the U.C.C.J.A.⁶⁵⁸ The federal statute thus appears to be designed to leave state law free to impose additional limits on relitigation.

The final omitted purpose is to "make uniform the law of those states which enact" the U.C.C.J.A.⁶⁵⁹ Although the federal Act necessarily creates uniformity on the specific points covered by its express commands and prohibitions, its failure to incorporate a paraphrase of this U.C.C.J.A. purpose suggests a federal tolerance of interstate variation on other points.

2. Legislative History

There are numerous references in the Wallop Act's legislative history to broad purposes ascribed to the legislation,⁶⁶⁰ and the legislative history contains many understandably oversimplified and inaccurate summaries of its provisions.⁶⁶¹ The more technical analyses presented to the Congress, however, noted that the bill created only a limited role for federal law.⁶⁶² The analysis indicated that passage of the Wallop Act would not eliminate the need for further state enactments of the U.C.C.J.A.,⁶⁶³ on the contrary, it would stimulate additional state legislation.⁶⁶⁴ These analyses urged that section 1738A and state laws,⁶⁶⁵ including the U.C.C.J.A.,⁶⁶⁶ would complement each other, each performing vital functions.

Perhaps the most significant part of the legislative history is a section-by-section analysis of the measure submitted to a

658. See *supra* text accompanying notes 619-46.

659. U.C.C.J.A. § 1(a)(9) (1968).

660. See, e.g., 124 CONG. REC. 787 (1978) (remarks of Sen. Thurmond). Identification of the purposes of legislation in preemption analysis should be based primarily upon the congressionally stated findings and purposes, rather than on the legislative history. See *United States v. Public Utilities Comm'n*, 345 U.S. 295, 315 (1953).

661. See, e.g., 1980 Senate Hearing, *supra* note 4, at 4 (statement of Senator Cranston).

662. See, e.g., *id.* at 133, 144-45, 149-50 (testimony and statement of Russell M. Coombs); *id.*, Addendum at 117-18 (footnotes to Justice Department's proposed revision of legislation); *Reform of the Federal Criminal Laws: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess., Part XIV, at 10,671-72 (1979) (statement of Russell M. Coombs); 1979 Senate Hearing, *supra* note 299, at 64 (submission of Professor Brigitte Bodenheimer), 279-80 (reprinting published article).

663. See, e.g., 1979 Senate Hearing, *supra* note 299, at 64 (submission of Professor Brigitte Bodenheimer).

664. See, e.g., *id.* at 280 (reprinting published article).

665. See, e.g., 1980 Senate Hearing, *supra* note 4, at 133 (testimony of Russell M. Coombs).

666. See, e.g., 1979 Senate Hearing, *supra* note 299, at 64 (submission of Professor Brigitte Bodenheimer).

joint hearing of two Senate subcommittees⁶⁶⁷ by Senator Wallop, who, as the original⁶⁶⁸ and principal sponsor of the legislation, wrote with special authority concerning the legislation. This submission described section 1738A as adopting the "principle [sic] jurisdictional provisions of the Uniform Child Custody Jurisdiction Act,"⁶⁶⁹ a characterization which accurately noted by implication that not all of the U.C.C.J.A. jurisdictional provisions were incorporated in the federal bill. It predicted that if enacted, section 1738A would induce states to enact the U.C.C.J.A. The submission stated that, "assuming all fifty states and the District of Columbia do adopt the act, this statute will retain its usefulness in those cases in which a court might ignore the state law but would be hard pressed to ignore both the state *and* federal law."⁶⁷⁰ Senator Wallop wrote in conclusion that "once all . . . have enacted the law, we should then reassess the scope and usefulness of the federal law."⁶⁷¹ His clear implication was that the scope of the federal law might then be further narrowed.

The principal sponsor of this bill thus apparently foresaw additional states enacting the entire U.C.C.J.A., rather than a version of it truncated by implicit federal preemption. Furthermore, he considered it possible that such universal adoption of the U.C.C.J.A. would permit a further narrowing of the scope of section 1738A. It is inconceivable that such further state and federal enactments would eventuate if section 1738A implicitly preempted the provisions of the U.C.C.J.A. that can be applied without violating the express provisions of the federal statute.

3. *Application of Preemption Principles and Precedents*

Even if the statutory language and legislative history did not signal the intended relationship between federal and state law, application of the analysis used by the Supreme Court in other recent preemption cases⁶⁷² would lead to the conclusion that section 1738A creates no implicit preemption. The Court has articulated two general ways in which state law can be preempted, even though it is not literally inconsistent with federal law. One is for Congress fully to occupy a field of regulation; the other is for Congress to enact provisions whose effective

667. 1980 Senate Hearing, *supra* note 4, Addendum at 138-43.

668. 124 CONG. REC. 783-88 (1978).

669. 1980 Senate Hearing, *supra* note 4, Addendum at 138.

670. *Id.* at 139-40 (emphasis in original).

671. *Id.* at 140.

672. See *supra* notes 649-50 and accompanying text.

operation is obstructed by certain state laws.⁶⁷³

a. Occupation of the Field

(1) *Pervasiveness of federal regulation*

The Court has on some occasions treated the pervasiveness of a scheme of federal regulation as a factor supporting the conclusion that Congress has completely occupied the regulated field. It is worthwhile, therefore, to examine in some detail the extent and limitations of the requirements expressly created by section 1738A, and to determine whether they pervade the subjects of custody jurisdiction, recognition, enforcement, and modification.

The statute imposes three requirements. One is that "before a child custody determination is made, reasonable notice and opportunity to be heard shall be given" to specified classes of persons.⁶⁷⁴ The Act fails to incorporate related provisions that are found in the U.C.C.J.A. or other state law. Missing are: a provision granting or limiting judicial power to give notice and opportunity to be heard to additional classes of persons or to give them in a manner that is more than reasonable;⁶⁷⁵ specific requirements for the timing and manner of giving notice;⁶⁷⁶ a provision specifying the consequences of a violation of the stated federal notice requirement;⁶⁷⁷ and, a provision describing the extent of contacts, if any, that must exist between a defendant and the forum state in order to render a decree immune from a subsequent charge of inadequate notice.⁶⁷⁸

673. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525-26 (1977). The recent preemption decisions of the Supreme Court in the area of family law are inapposite, because they concern not implicit preemption but the scope of explicit preemption. See *Ridgway v. Ridgway*, 50 U.S.L.W. 4006, 4009 (1981) (No. 80-1070); *McCarty v. McCarty*, 101 S. Ct. 2728, 2762 (1981); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

674. 28 U.S.C.A. § 1738A(e) (West Supp. 1980).

675. Compare *id.* (reasonable notice) with statutes cited *supra* note 338 (30 day notice).

676. Compare 28 U.S.C.A. § 1738A(e) (West Supp. 1980) (reasonable notice) with U.C.C.J.A. § 5 (1968) (notice must be given in prescribed manner ten to twenty days before hearings).

677. See *supra* text accompanying notes 335-37. Compare 28 U.S.C.A. § 1738A(a), (e) (West Supp. 1980) (states must enforce foreign decrees if made consistent with federal law; reasonable notice required) with *Allison v. Superior Court*, 99 Cal. App. 3d 993, 999-1001, 160 Cal. Rptr. 309, 312-13 (1979) (court not bound by Texas default judgment, because Texas three day notice period does not conform to U.C.C.J.A. ten day period).

678. Compare 28 U.S.C.A. § 1738A(e) (West Supp. 1980) (no provision) with

In addition, the federal statute forbids a state court under specified circumstances to exercise its custody jurisdiction during the pendency of a prior proceeding in another state concerning the same child.⁶⁷⁹ Here, too, the Act fails to regulate various related matters. Section 1738A does not require the state in which proceedings were first commenced to: defer to the second state,⁶⁸⁰ grant, limit, or provide standards for the exercise of either state's power to defer to the other in the event the circumstances specified in section 1738A do not exist,⁶⁸¹ or prescribe consequences of forbidden concurrent proceedings beyond exclusion of any resulting decree from the federal statutory duty of interstate enforcement and nonmodification.⁶⁸²

Section 1738A also provides that "the appropriate authorities of every State" shall enforce and not modify foreign custody decrees under specified circumstances.⁶⁸³ Although there are related provisions which section 1738A might have included, the statute omits: a prohibition against interstate enforcement of decrees that do not satisfy the federal criteria;⁶⁸⁴ a provision for interstate modification of noncomplying decrees despite contrary state law; a provision specifying the required modes of enforcement;⁶⁸⁵ a requirement of interstate claim or issue preclusion;⁶⁸⁶ a prescription of the consequences of a violation of the federal statutory requirement of nonmodification, beyond exclusion of an offending modification decree from the protection of section 1738A; and a provision describing the consequences of a failure to give a foreign decree the required enforcement.

TEX. FAM. CODE ANN. tit. 2, § 11.051 (Vernon Supp. 1982) (contacts must meet one of three requirements).

679. 28 U.S.C.A. § 1738A(g) (West Supp. 1980).

680. See *supra* text accompanying notes 430-40.

681. Compare 28 U.S.C.A. § 1738A(g) (West Supp. 1980) (no provision) with U.C.C.J.A. § 6(b), (c) (1968) (prescribing procedure for selecting appropriate forum through communication between courts of separate jurisdictions).

682. For example, section 1738A does not purport to deprive such proceedings of any protection they may have under the full faith and credit clause and statute. 28 U.S.C.A. § 1738A (West Supp. 1980).

683. *Id.* § 1738A(a).

684. Compare *id.* (no provision) with *Roundtree v. Bates*, 630 P.2d 1299, 1301-03 (Okla. 1981) (U.C.C.J.A. forbids deference to foreign decree not made consistently with U.C.C.J.A. standards).

685. Compare 28 U.S.C.A. § 1738A(a) (West Supp. 1980) ("appropriate authorities . . . shall enforce") with U.C.C.J.A. § 15(a) (1968) (foreign decree filing required; enforced as if local decree). See also *supra* text accompanying notes 570-72.

686. Compare 28 U.S.C.A. § 1738A(a) (West Supp. 1980) (no provision) with U.C.C.J.A. § 13 (1968) (recognition of foreign custody decrees).

Not only does the Wallop Act expressly fail to regulate these matters, but it also fails to address a number of other issues that arise in the creation and administration of rules for custody jurisdiction, recognition, enforcement, and modification. For example, the Act does not proscribe the exercise of jurisdiction by a state lacking the federally specified connections with a case; instead it merely treats such an exercise of jurisdiction as not entitled to the affirmative protection of the Act.⁶⁸⁷ Its commands apply only to determinations of the custody of persons under the age of eighteen,⁶⁸⁸ though the somewhat different and more extensive commands and guidelines established by the U.C.C.J.A. apply in at least one state to young persons over that age.⁶⁸⁹ The federal statute does not require, forbid, or in any other way deal with recognition and enforcement of custody decrees of other nations, despite the explicit treatment of such decrees in the U.C.C.J.A.⁶⁹⁰ Unlike the U.C.C.J.A., section 1738A also fails to address the circumstances under which courts of different states must or may communicate with each other⁶⁹¹ or assist with one another's proceedings,⁶⁹² the ways in which jurisdictional facts are to be pleaded⁶⁹³ and proved,⁶⁹⁴ the propriety of taking depositions in one state by order of the court of another,⁶⁹⁵ expedited procedures for litigation concerning interstate jurisdictional issues,⁶⁹⁶ the manner in which a court can obtain physical possession of a child from outside the state,⁶⁹⁷ registration of one state's decree in the court of another state,⁶⁹⁸ and the assessment of parties' expenses of interstate litigation.⁶⁹⁹ Indeed, in the congressional hearings on this legislation, the bill was

687. See *supra* note 305 and accompanying text.

688. 28 U.S.C.A. § 1738A(a), (b)(1), (e), (g) (West Supp. 1980).

689. See Wyo. STAT. §§ 8-1-102, 20-2-112 (1977).

690. Compare 28 U.S.C.A. § 1738A (West Supp. 1980) (no provision) with U.C.C.J.A. § 23 (1968) (foreign custody decrees recognized and enforced if affected persons received reasonable notice and opportunity to be heard). A decree of another nation could, however, if used by a state as the basis of a decree made consistently with section 1738A, be indirectly a subject of the duties created by section 1738A(a).

691. See U.C.C.J.A. §§ 6(b), (c), 17, 21, 22 (1968).

692. See *id.* §§ 19, 20.

693. See *id.* § 9(a).

694. See *id.* § 9(b).

695. See *id.* § 18.

696. See *id.* § 24.

697. See *id.* §§ 11(b), 19(b), 20(c).

698. See *id.* § 15(a).

699. See *id.* §§ 11(c), 15(b), 19, 20(c). *But cf.* Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, § 8(c), 94 Stat. 3571 (encouraging state courts to give priority to custody cases and to award expenses to parties in such cases).

commended for leaving such questions to state law.⁷⁰⁰ The Congress was told that the U.C.C.J.A. in particular, and other state law generally, would continue to perform important functions if the Wallop proposal were enacted.⁷⁰¹

Section 1738A thus is certainly not pervasive according to the ordinary meaning of the word. That it was intended to be interstitial seems clear from the nature of its provisions and the statute's accompanying legislative history. The statute's interstitial nature is especially significant, because the legal test of pervasiveness appears to be a strict one. Supreme Court decisions that in recent years have found implicit preemption on this basis have typically involved federal regulatory schemes that have not only touched virtually every aspect of the activity regulated, but have included both restrictions on the activity and affirmative grants of federal authority to engage in the activity under specified conditions, such as licenses to operate aircraft⁷⁰² and to trade with Native Americans.⁷⁰³ Section 1738A, however, is entirely silent on a number of important matters related to its general subject⁷⁰⁴ and does not contain affirmative grants of authority which complement the prohibitions it does establish. It should, therefore, not be deemed pervasive in the sense in which preemption cases have used that term.

In any event, pervasiveness seems today to be of less importance than other considerations. As federal regulation of commercial and other activities has become increasingly extensive and detailed in recent years, the Court seems to have become more solicitous of states' interests in concurrently regulating the same matters and skeptical of the argument that the pervasiveness of a body of federal law establishes its preemptive effect.⁷⁰⁵

(2) *Character of the federal purpose and provisions*

According to the United States Supreme Court, a second factor that bears upon federal occupation of a field is "the ob-

700. See, e.g., 1979 Senate Hearing, *supra* note 299, at 279 (reprinting published article).

701. See *supra* Hearings cited in note 662.

702. See *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 628-32 (1973).

703. See *Warren Trading Post Co. v. Arizona Tax Comm'n*, 380 U.S. 685, 688-90 (1965).

704. See *supra* text accompanying notes 674-701.

705. See *DeCanas v. Bica*, 424 U.S. 351, 359-60 (1976); *New York Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 415 (1973).

ject sought to be obtained by the federal law and the character of the obligations imposed by it."⁷⁰⁶ Although the cases seem to employ this factor to determine whether state law impedes attainment of a federal purpose,⁷⁰⁷ its application to the question whether section 1738A occupies the field supports the conclusion that the field is not occupied. The narrowness of the expressed federal purposes and of the obligations created by the Act suggests that there is no implicit preemption.⁷⁰⁸ The same observations suggest that it would be inappropriate to deem preemptive a federal statute which states such limited objects and establishes such limited duties.

(3) *Dominance of the federal interest*

Preemption may also be indicated if the legislation touches "a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."⁷⁰⁹ The Supreme Court has not articulated and consistently applied criteria for determining the dominance of the federal interest in a subject.⁷¹⁰ Furthermore, in cases in which occupation of fields has been found, there has been considerable variation in the characteristics of the particular subjects of regulation. These subjects have ranged from relations between labor unions and businesses⁷¹¹ to regulation of air traffic,⁷¹² and none of the regulatory schemes has resembled the requirements for state judicial conduct contained in section 1738A. There are thus no authoritative precedents or rules that clearly establish whether the federal interest implemented by this statute is so dominant as to preempt all similar state law.

The traditional relationship between federal and state law in this area leaves little doubt, however, as to this matter. As an aspect of domestic relations, the law of child custody is peculiarly within state control, usually to the virtual exclusion of federal influence.⁷¹³ Interstate jurisdiction, recognition, enforcement, and modification of custody decrees were controlled

706. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

707. Wiggins, *Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study*, 13 U.C.D. L. REV. 3, 40 (1979).

708. See *supra* text accompanying notes 651-701.

709. *Rice v. Santa Fe Elevator Corp.*, 311 U.S. 218, 230 (1947).

710. See Wiggins, *supra* note 707, at 34-35.

711. See, e.g., *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

712. See *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 625 (1973).

713. See *In re Burrus*, 136 U.S. 586, 593-94 (1890).

almost solely by the states until enactment of the Wallop Act.⁷¹⁴ Indeed, even outside the field of domestic relations, federal regulation of the conflict of laws has been interstitial, and state law has been of real significance. This has been true not only as to rules governing choice of law,⁷¹⁵ but also as to jurisdiction, recognition, and enforcement of judgments.⁷¹⁶ Thus, regardless of whether the field touched by the Act is described as child custody adjudication, the conflict of laws in such adjudication, or the interstate effects of judicial proceedings of this kind, it cannot be considered one in which the federal interest is "so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."⁷¹⁷

b. State Law Obstacles

It remains, however, to consider whether features of state law that are not literally inconsistent with section 1738A are nevertheless preempted because they produce results "inconsistent with the objective of the federal statute."⁷¹⁸ The application of this standard varies according to the purpose ascribed to the legislation.⁷¹⁹ The Supreme Court has treated a difference between federal and state purposes as a reason not to hold that a state law obstructs the objective of a federal statute.⁷²⁰ The state purposes underlying the U.C.C.J.A. are very broad,⁷²¹ as are those underlying the law of non-U.C.C.J.A. states, and include the comprehensive regulation of custody jurisdiction, recognition, enforcement, and modification. Although narrower objectives underly the Wallop Act, Congress intended to establish certain national standards to apply to interstate child custody disputes.⁷²² Therefore, some overlap exists between these federal and state purposes.

714. See *supra* text accompanying notes 39-41, 462-65, 477-81.

715. See *Allstate Ins. Co. v. Hague*, 499 U.S. 302, 307-08 & n.10 (1981).

716. See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS ch. 2, introductory note, at 1-2 (Tent. Draft No. 5, 1978) (jurisdiction); *id.* at 11 (recognition); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 comment c (1971) (foreign enforcement of equity decrees); UNIFORM ENFORCEMENT OF FOREIGN JUDGMENTS ACT (1964).

717. *Rice v. Santa Fe Elevator Corp.*, 311 U.S. 218, 230 (1947).

718. *Id.*

719. *Wiggins*, *supra* note 707, at 48 n.215.

720. *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 441-46 (1960); *cf.* *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 161-65 (1978) (identity of federal and state purpose as a reason for contrary holding).

721. See U.C.C.J.A. § 1 (1968); *id.* Commissioners' Prefatory Note, 9 U.L.A. 111-14 (1979).

722. See *supra* text accompanying notes 651-71.

That overlap should not, however, be held to create any implicit preemption. When the Court has held state law preempted on the ground that it obstructs a federal statute merely by regulating activities not restricted by federal law, the Court has identified the federal interests in permitting those activities.⁷²³ The federal statutory objectives in such cases have included, in other words, both purposes to be served by establishing certain regulations, such as promoting vessel safety,⁷²⁴ and purposes to be served by avoiding more extreme regulations, such as facilitating eventually uniform international standards for vessel safety.⁷²⁵ The language and legislative history of the Wallop Act, however, contain no indication of any federal purpose to be served by the lack of legal requirements beyond those of section 1738A. On the contrary, the legislative history indicates that the Act's many silences were meant to leave the regulation of state conduct to state and other federal law. It should be concluded, therefore, that enactment of section 1738A has preempted state law only to the extent that compliance with both federal and state requirements is impossible.⁷²⁶ When section 1738A commands a court to give

723. See, e.g., *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165-68 (1978) (federal law imposing certain requirements for vessel safety features and omitting others facilitated future adoption of uniform, international standards, a federal purpose impeded by state regulation); *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 148-51 (1976) (state law preempted when absence of federal regulation served purpose of maintaining balance of labor-management economic power); *Minnesota v. Northern States Power Co.*, 405 U.S. 1035 (1972) (memorandum opinion), *aff'g* 447 F.2d 1143, 1153-54 (8th Cir. 1971) (preemption of state restrictions on emission of radiation is based on the federal purpose of encouraging atomic energy development). See also *Warren Trading Post Co. v. Arizona Tax Comm'n*, 38 U.S. 685 (1965).

724. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 165 (1978).

725. *Id.* at 165-68.

726. A decision that may appear to be to the contrary is *Virginia E.E. v. Alberto S.P.*, 440 N.Y.S.2d 979 (Fam. Ct. 1981). The New York court concluded that section 1738A did not require enforcement or forbid modification of a prior decree of California, and ruled without discussing New York law that "therefore" the court would not decline to exercise its jurisdiction. *Id.* at 983. The court apparently concluded that because modifying an Illinois decree made after a California decree would not violate § 1738A, it therefore was free to do so. *Id.* at 984. It is not clear, however, that the court decided that any restrictions imposed by New York law on the court's exercise of jurisdiction were preempted. The opinion of the court, before stating these rulings, set forth at unusual length the arguments made by the parties for and against the declination to exercise jurisdiction. *Id.* at 980-82. None of the arguments favoring declination relied upon New York law. The possible application of New York law to disposition of the motion thus appears to have been waived or overlooked. The only reference to preemption in the opinion appears in a quotation from *Foster & Freed*, *supra* note 297, at 1, col. 1. See 440 N.Y.S.2d at 983. Other language in

someone notice and opportunity to be heard or to enforce a foreign custody determination, and state law permits or requires a court not to do so, the state law is preempted. Likewise, when the federal statute forbids a court to modify a custody determination or to exercise concurrent jurisdiction, and state law permits or requires the court to do so, the state law is preempted. The Wallop Act does not otherwise preempt state law.

B. CONCURRENT OPERATION OF VARIOUS PRESCRIPTIONS

Given the assorted legal requirements of various state and federal custody laws, it is important to understand their operation in relation to one another. The subject can be confounding. Professor Katz has suggested that "the most accurate approach . . . is probably to presume that the Act [U.C.C.J.A.] makes the issue of full faith and credit irrelevant," for if it were interpreted as requiring full faith and credit, the U.C.C.J.A. would be unconstitutional.⁷²⁷ This Article argues that the interaction among the U.C.C.J.A., the Wallop Act, and full faith and credit is comprehensible and sensible, though complex. Differences between the kinds of duties created respectively by section 1738A and the U.C.C.J.A. on one hand, and by the full faith and credit clause and statute on the other, as well as differences between the jurisdictional conditions for application of those duties, are the main aspects of this interaction.

1. *Distinctions Among and Independence of Particular Duties*

The Wallop Act and the U.C.C.J.A., under certain circumstances, require states to enforce other states' awards or changes of custody and forbid states to make awards or changes of custody. The Wallop Act is entirely silent, however, on the question whether a state which it does not forbid to make or to change a custody award must, when it does take such action, apply any rule of claim or issue preclusion. The full faith and credit clause and statute, on the other hand, surely require some interstate issue preclusion, may well require claim preclusion, and perhaps even require enforcement

the opinion seems to indicate approval of other views of Foster and Freed on the preemptive effect of the Wallop Act. *Id.* at 983-84. Because the court published only part of its opinion, assessment of precedential value is difficult. The case, however, should not be considered as a significant precedent on the question of preemption of state law by the Wallop Act.

727. S. KATZ, *supra* note 59, at 74-75.

of awards or changes of custody.⁷²⁸ They do not, however, otherwise determine whether a state can make or change an award of custody. In short, application of the Wallop Act can determine whether a court can make or change a disposition of a child's custody. If the court is free to do so, however, then full faith and credit determines what claims and issues the court cannot reexamine, and within the boundaries set by those sources of federal law, the U.C.C.J.A. or other state law may further restrict the court.

These various restrictions can operate independently of one another. For example, the second state to consider a case, state *B*, may be permitted under the Wallop Act and the U.C.C.J.A. to modify a custody decree previously made by the first state, state *A*, because *A* has lost or declined to exercise jurisdiction;⁷²⁹ yet the full faith and credit clause and statute may nevertheless require that *B* apply *A*'s law of claim and issue preclusion.⁷³⁰ Conversely, a custody proceeding in state *B* may present a different claim and different essential issues from those earlier decided by *A*, and the court in *B* may therefore be able to decide *de novo* everything of importance in the case without violating the requirement of full faith and credit;⁷³¹ yet the Wallop Act or the U.C.C.J.A. may require state *B* to enforce, and forbid it to modify, *A*'s disposition of the prior claim.⁷³²

2. *Differences Among Jurisdictional Criteria for Application of Duties*

Not only are the duties drawn from the various sources of child custody law different, but also the jurisdictional criteria for their application may be different. This Article previously concluded that the criteria governing application of section 1738A and of the U.C.C.J.A.⁷³³ are the criteria stated within those statutes and are probably subject for most cases to a constitutional prohibition against interstate enforcement of a de-

728. See *supra* text accompanying notes 603-19; RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 comment e (1971).

729. See 28 U.S.C.A. § 1738A(f) (West Supp. 1980); U.C.C.J.A. §§ 13, 14(a) (1968).

730. See *supra* text accompanying notes 603-19. See also *supra* text accompanying notes 585-600, concerning the possibility that U.C.C.J.A. § 13 also requires this result.

731. See *supra* text accompanying notes 484-87, 603-19.

732. See 28 U.S.C.A. § 1738A(a) (West Supp. 1980); U.C.C.J.A. §§ 13, 15(a) (1968).

733. See *supra* text accompanying notes 285, 550-83, 619-46.

cree made by a forum lacking sufficient contacts with the defendant, other parties, the child, and the evidence. Other criteria similarly condition the requirement of full faith and credit. Judgments in general are not entitled to full faith and credit unless a court possessing jurisdiction rendered them.⁷³⁴ The question, therefore, is which rule or rules determine whether a court had jurisdiction such that its custody decree is entitled to interstate recognition.

If a court of a state lacks jurisdiction according to the law of that state, and if its law therefore permits intrastate collateral attack on a resulting custody decree, then full faith and credit clearly does not require interstate recognition of the decree.⁷³⁵ The same conclusion follows if contacts between the forum state and the parties or controversy required by the due process clause of the fourteenth amendment are lacking.⁷³⁶ There are, however, two ways in which federal law may conceivably impose a further jurisdictional prerequisite for full faith and credit.

First, the Supreme Court could adhere to its *May v. Anderson* decision⁷³⁷ and confirm the interpretation given to that case by some commentators that full faith and credit to custody decrees depends upon the existence of defendant-forum contacts beyond any required by the due process clause.⁷³⁸ That outcome is unlikely, because the Court will probably hold that even in custody proceedings due process requires either some defendant-forum contacts or, in exceptional cases, other circumstances that make litigation in a forum lacking such contacts fair.⁷³⁹ If the Court so holds, it will incidentally deprive decrees made in violation of this due process requirement of their claims to full faith and credit. Once the Court definitely holds that custody litigation, like other proceedings, must satisfy the due process contact requirements, it will probably equate the requirements of defendant-forum contacts for due

734. Reese & Johnson, *supra* note 612, at 165.

735. See *Thompson v. Whitman*, 85 U.S. (18 Wall.) 457, 469 (1873); 28 U.S.C. § 1738 (1976); *cf.* *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 615 (1947) (New York modification of Florida decree not shown to have exceeded limits permitted by Florida law).

736. *Pasqualone v. Pasqualone*, 63 Ohio St. 2d 96, 101-04, 406 N.E.2d 1121, 1126-28 (1980); *see* *Riverside & Dan River Cotton Mills v. Menefee*, 237 U.S. 189, 196-97 (1915) (dictum); *Pennoyer v. Neff*, 95 U.S. 714, 733-36 (1877); *supra* text accompanying notes 141-52.

737. 345 U.S. 528 (1953); *see supra* text accompanying notes 141-51.

738. *See supra* text accompanying note 148.

739. *See supra* text accompanying note 285.

process and full faith and credit purposes in custody cases as it has done in other kinds of cases.⁷⁴⁰

Second, courts could possibly hold that, to give full faith and credit to custody decrees, federal law requires connections between the forum state and what many have loosely labeled the "subject matter"⁷⁴¹—the child, one or more of the claimants to custody and visitation, and the evidence bearing on the claims. It is possible to view the rule entitling a divorce decree to full faith and credit only if it is rendered by the state of domicile of one of the parties,⁷⁴² and the rule giving full faith and credit to a judgment determining title to land only if the court of the state in which the land lies renders the judgment,⁷⁴³ as federal requirements.⁷⁴⁴ The courts have applied these rules, however, in lieu of a requirement for defendant-forum contacts, rather than in addition to one.⁷⁴⁵ This application is based upon a conceptual distinction between actions in rem and in personam that recent Supreme Court decisions have undermined.⁷⁴⁶ The Court may eventually complete the process of unifying the rationale of territorial jurisdiction and may characterize all the rules governing this jurisdiction, including the rules for divorce and land cases to the extent that they are derived from federal rather than state law, as applications of the general rule of due process, weighing fairness to defendants against other individual, state, and interstate interests.⁷⁴⁷ In the meantime, the Court will probably provide a flexible requirement of defendant-forum contacts in custody proceedings and rationalize this requirement through the general approach to due process that it has recently used in other kinds of cases.⁷⁴⁸ If so, the Court will probably defer to Congress not only the question whether full faith and credit should depend upon a forum having contacts with the defendant beyond those required by due process, but also the question whether full faith and credit should depend upon additional forum contacts with other parties, the child, or the evidence in the case.

740. See *supra* text accompanying note 736.

741. See, e.g., *Loper v. Superior Court*, 126 Ariz. 14, 17, 612 P.2d 65, 68 (Ct. App. 1980).

742. *Williams v. North Carolina*, 325 U.S. 226, 238 (1945).

743. See *Fall v. Eastin*, 215 U.S. 1 (1909).

744. See authorities cited *supra* note 196.

745. See authorities cited *supra* notes 196, 743.

746. See *supra* text accompanying notes 169-72.

747. See generally *Clermont, supra* note 182; *Hazard, A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241; *Von Mehren & Trautman, supra* note 250.

748. See *supra* note 159 and text accompanying note 740.

Within the limits that the Wallop Act imposes, and in the absence of further congressional action, it will thus continue to be, as it has been in the past, a function of state law and the discretion of state courts to determine which of several states that have sufficient connections with a custody case under the due process clause should decide the case. Such a decision will determine the extent of issue preclusion in that state and, through full faith and credit, in other states as well.

Some might suggest, however, that as a result of enactment of section 1738A, the full faith and credit clause and statute are now applicable to custody proceedings only when they are conducted consistently with section 1738A.⁷⁴⁹ Congress may have lacked power to give the new Act that effect.⁷⁵⁰ In any event, neither the statutory text nor any specific language in the legislative history supports such an interpretation of the Act.⁷⁵¹ Instead, it appears that, in adding new statutory duties to those duties which the courts have already held the full faith and credit clause and statute establish, the Wallop Act provides criteria only for application of its newly created duties.

A result of the Wallop Act's limitation on the application of its criteria is that the duties it creates are inapplicable, as are those created by the U.C.C.J.A., to some cases to which the full faith and credit requirements of issue preclusion, and perhaps claim preclusion, do apply. This difference in scope could be of practical importance if litigants frequently fail to ask courts to comply with the duties that the U.C.C.J.A. and section 1738A create, or fail to pursue appellate review to remedy errors. Such failures by litigants could permit decrees made in violation of section 1738A or of the U.C.C.J.A. to become final and, under the full faith and credit clause and statute, perhaps nationally preclusive of the claim and issues decided. Although constitutional preclusion of claims would rarely be of great practical importance,⁷⁵² to allow a decree made in violation of section 1738A or of the U.C.C.J.A. to preclude relitigation of issues could have significant consequences in later litigation.

749. The possibility that section 1738A in effect may make the requirements of the full faith and credit clause and statute applicable only to proceedings consistent with the new law's provisions differs from the possibility mentioned *supra* note 625, that this section eliminates those requirements entirely.

750. See *Thomas v. Washington Gas Light Co.*, 448 U.S. 261 (1980).

751. See *supra* note 625. *But cf., e.g., 1980 Senate Hearing, supra* note 4, at 140 (statement of Wallace J. Mlyniec & Nancy Lynn Hiestand) (literal language of full faith and credit clause allows Congress to define the scope of full faith and credit in custody cases).

752. See *supra* text accompanying notes 484-87.

3. *Preclusion of Jurisdictional Issues Presented by Statutes*

The consequences of the failure of a litigant to assert and pursue his or her rights under the U.C.C.J.A. or the Wallop Act could sometimes affect the merits of custody decisions by precluding, for example, relitigation of particular issues bearing on the suitability of a proposed custodian. In other cases, however, the failure to assert rights under the U.C.C.J.A. or the Wallop Act could allow federal preclusion of jurisdictional issues upon which later application of these statutes may depend.

A hypothetical case under the U.C.C.J.A. illustrates this situation. U.C.C.J.A. section 13 does not entitle a decree of one state to recognition and enforcement in another unless it passes either a statutory or a factual test.⁷⁵³ The latter test requires that the decree "was made under factual circumstances meeting the jurisdictional standards" of the U.C.C.J.A. The second court, in applying this test, must consider to what extent it may make findings of fact inconsistent with those already made by the first court. Assume, for example, that a mother seeks Colorado enforcement of an Arizona decree. Both states have enacted the U.C.C.J.A.⁷⁵⁴ Under the Arizona version of the Act, however, the home state basis of jurisdiction is applicable either if the criteria in that provision of the U.C.C.J.A., as enacted by Colorado⁷⁵⁵ and most other states,⁷⁵⁶ are met or if Arizona is the domicile of the child when the proceeding is commenced.⁷⁵⁷ Assume that the Arizona court found that, when the proceeding was commenced, Arizona was not the domicile of the child but was, in terms used in both Arizona's and Colorado's definition of a home state,⁷⁵⁸ the state in which the child immediately preceding the time involved⁷⁵⁹ lived with a parent for at least six consecutive months. Assume further that in making these findings, the Arizona court considered conflicting evidence regarding whether the child had been ab-

753. See *supra* text accompanying notes 554-67.

754. ARIZ. REV. STAT. ANN. §§ 8-401 -424 (Supp. 1981); COLO. REV. STAT. §§ 14-13-101 -126 (1974 & Supp. 1981).

755. COLO. REV. STAT. § 14-13-104(1)(a) (1974).

756. See U.C.C.J.A. § 3 Commissioners' Note, 9 U.L.A. 125 (1979); *id.* at 11 (Supp. 1981).

757. *Loper v. Superior Court*, 126 Ariz. 14, 16, 612 P.2d 65, 67 (Ct. App. 1980); ARIZ. REV. STAT. ANN. § 8-403.A.1 (Supp. 1981).

758. ARIZ. REV. STAT. ANN. § 8-402.5 (Supp. 1981); COLO. REV. STAT. § 14-13-103(5) (1974).

759. In this hypothetical case, the time involved is the time of commencement of the Arizona proceeding. ARIZ. REV. STAT. ANN. § 8-403.A.1 (Supp. 1981).

sent from Arizona during the six-month period and the length of the child's absence. The Arizona court found that the child had been absent for only one short period, which the court concluded had been temporary, and therefore treated by the Act⁷⁶⁰ as part of the required six-month period. The Colorado court might rule that the Arizona decree fails the statutory test of section 13 on the basis that Arizona's statutory provisions deal with domicile and, therefore, are not substantially in accordance with Colorado's U.C.C.J.A. In applying the factual test, the issue is whether the Colorado court can hear evidence and decide, despite the contrary Arizona findings, that the child in fact was absent from Arizona for two long periods, that neither absence was temporary, and that, therefore, the Arizona decree was not "made under factual circumstances meeting the jurisdictional standards" shared by the Colorado and Arizona acts.

Colorado law might, of course, preclude such relitigation. The Commissioners probably did not intend that U.C.C.J.A. section 13 require interstate issue preclusion,⁷⁶¹ and certainly did not intend that it require preclusion of the very issues upon which its application depends.⁷⁶² The court, however, may interpret the U.C.C.J.A. in this respect in a way contrary to the intent of the Commissioners,⁷⁶³ and Colorado may treat jurisdictional issues as precluded on the basis of comity or other state law.⁷⁶⁴ Regardless of the Colorado state law on interstate preclusion of jurisdictional issues, federal law may require Colorado to defer to the Arizona findings. If Arizona's U.C.C.J.A. section 12 or other state law precludes intrastate relitigation of jurisdictional issues of fact decided in custody proceedings,⁷⁶⁵ then the full faith and credit clause and statute ordinarily require⁷⁶⁶ that Colorado also preclude relitigation.⁷⁶⁷

760. *Id.* § 8-402.5.

761. *See supra* text accompanying notes 584-99.

762. *See supra* text accompanying notes 592-94.

763. *Cf. Commonwealth ex rel. Piggins v. Kifer*, 427 A.2d 185, 194 (Pa. Super. 1981) (U.C.C.J.A. § 13 prevents a court from exercising independent judgment on facts that determined a foreign court's jurisdiction); *Commonwealth ex rel. Zaubi v. Zaubi*, 492 Pa. 183, 188-90, 423 A.2d 333, 336 (1980) (same); *See also Note supra* note 475, at 836-38.

764. *See Lopez v. District Court*, 606 P.2d 853, 856 (Colo. 1980) (en banc) (Colorado court applying U.C.C.J.A. § 6 found "no reason to dispute" specific finding by California court that it had jurisdiction). *See also Agnello v. Becker*, 7 Fam. L. Rep. (BNA) 2565 (Conn. 1981); *Mixon v. Bullard*, 217 So. 2d 28 (Miss. 1968).

765. *See supra* text accompanying notes 512-49.

766. *See supra* text accompanying notes 603-18.

767. *See, e.g., In re McDonald*, 74 Mich. App. 119, 126-29, 253 N.W.2d 678, 682-84 (1977); *supra* text accompanying notes 601-19; *cf. Durfee v. Duke*, 375 U.S.

The same general question can arise under various provisions of the Wallop Act. For example, state *B* is under the federal statutory duty to enforce and not to modify a decree of state *A* only if state *A* issued its decree in a manner consistent with the provisions of section 1738A.⁷⁶⁸ Whether that condition is met will in some cases partially depend upon whether state *A* had jurisdiction under the law of *A* and upon whether *A* was the child's home state when the proceeding commenced.⁷⁶⁹ If the law of *A* defines "home state" as section 1738A does, and permits jurisdiction to be based on *A*'s status as the home state, which the U.C.C.J.A. does in almost every state,⁷⁷⁰ then state *A* in the course of applying its law may have decided some of the very issues upon which *B*'s application of section 1738A turns. If the law of *A* bars the relitigation of these issues, the next question is whether contrary decisions on these issues by state *B* would constitute a denial of full faith and credit to state *A*'s decree.

Professor Henry Foster and Dr. Doris Freed have suggested that "there may be little or no room under the [Wallop Act] for the res judicata and collateral estoppel principles related to jurisdictional facts," because in their view "the policy expressed in the [Wallop Act] has priority and preempts the field."⁷⁷¹ Section 1738A is silent, however, on this and every other aspect of issue preclusion. Nor does the Act's legislative history indicate that it would affect the law of collateral estoppel.⁷⁷² If Congress had intended to change the law, it should have clearly indicated that intent, for two reasons. The change would have departed not just from general common law principles, but from the long-standing Supreme Court interpretation of the full faith and credit statute, and it would have raised difficult constitutional questions.

The Court has historically interpreted the full faith and

106, 116 (1963) (full faith and credit precludes relitigation of jurisdiction issue in a different state); *Johnson v. Muelberger*, 340 U.S. 581, 583-85 (1950) (same).

768. 28 U.S.C.A. § 1738A(a) (West Supp. 1980).

769. *Id.* § 1738A(c)(1), (2)(A)(i).

770. See U.C.C.J.A. §§ 2 & 3 Commissioners' Notes, 9 U.L.A. 121, 125 (1979); *id.* at 10-11 (Supp. 1981).

771. Foster & Freed, *supra* note 297, at 2, col. 5.

772. Cf. 124 CONG. REC. 787 (1978) (remarks of Sen. Thurmond) (provisions merely limit application of full faith and credit statute that Congress has power to enact). *But cf., e.g., 1980 Senate Hearing, supra* note 4, Addendum at 117-18 (footnotes to Justice Department's proposed revision of legislation), 274 (submission of Russell M. Coombs) (a custody decree will be entitled to interstate enforcement only if it meets the procedural criteria of the Wallop Act on jurisdiction and notice).

credit statute to require interstate preclusion of issues, even jurisdictional issues.⁷⁷³ Although it appears that some flexibility in interstate issue preclusion exists, at least when a party lacked an adequate opportunity to litigate an issue when it first arose⁷⁷⁴ and perhaps under other circumstances,⁷⁷⁵ the courts generally compel preclusion. The Supreme Court will not rule that a federal statute creates an exception to this compulsion unless the statutory language or clear legislative history indicates such a congressional intent.⁷⁷⁶

Furthermore, the adoption of the full faith and credit statute was contemporaneous with the ratification of the Constitution,⁷⁷⁷ and since its adoption, the statute's treatment of judicial proceedings has remained essentially unchanged.⁷⁷⁸ There has consequently been little need for thorough elaboration of the differences in scope between the constitutional and statutory requirements of full faith and credit.⁷⁷⁹ Interpreting the Wallop Act as a partial abrogation of the prior federal law on interstate issue preclusion would probably require further elaboration of those differences. Indeed, this interpretation might present the issue of whether Congress has the power to prescribe that judgments receive less interstate credit than that to which they are entitled under the self-executing provisions of the constitutional clause. The scope of Congress's power to limit the requirements of full faith and credit seems to be a much more difficult constitutional issue⁷⁸⁰ than its power, which it certainly attempted to exercise in the Wallop Act, to expand the requirements.⁷⁸¹ The willingness of Congress to

773. *Davis v. Davis*, 305 U.S. 32, 40 (1938).

774. *Allen v. McCurry*, 449 U.S. 90, 95 (1980) (dictum).

775. *See id.* at 95 n.7 (dictum); *Montana v. United States*, 440 U.S. 147, 162-63 (1979); *supra* note 605 and accompanying text.

776. *Allen v. McCurry*, 449 U.S. 90, 97-99 (1980).

777. Act of May 26, 1790, ch. 11, 1 Stat. 122, *as amended by* Act of March 27, 1804, ch. 56, 2 Stat. 298 (codified at 28 U.S.C. § 1738 (1976)).

778. Whitten, *supra* note 159, at 505.

779. *See, e.g.*, *Davis v. Davis*, 305 U.S. 32, 40 (1938).

780. *See Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 n.18 (1980).

781. Congress, in enacting the Wallop Act, purported to exercise at least its powers under the full faith and credit, due process, and commerce clauses. *See Parental Kidnaping Prevention Act of 1980*, Pub. L. No. 96-611, § 7(a), (b), 94 Stat. 3568-69. The question whether Congress thereby exceeded its powers is beyond the scope of this Article. *See generally Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (dictum) (full faith and credit power); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (commerce power); RESTATEMENT (SECOND) OF JUDGMENTS § 7 comment e & accompanying reporter's note (Tent. Draft No. 5, 1978) (commerce power); Currie, *supra* note 41, at 115-18 (full faith and credit power); Jackson, *supra* note 1 (full faith and credit power); Whitten, *supra* note 159, at 505 n.26, 851-52 (full faith and credit power);

raise the one constitutional question is, therefore, not an indication of its intent to raise the other. On the contrary, the doubtful constitutionality of limiting interstate issue preclusion is, like the coverage of the subject by the full faith and credit statute and like the silence of the Wallop Act and its legislative history, a strong reason to find the absence of any congressional intent to change the law in this respect.

Foster and Freed, however, based their argument not on legislative interpretation, precedent, and general policy, but on specific policies concerning child custody litigation that they believed underlie the Wallop Act. They identified "the paramount public policy consideration" as "stability, continuity, and security of the child's home environment."⁷⁸² If the Act were primarily based on these policies, important questions would remain regarding the inferred congressional weighing and implementation of the policies. The Supreme Court recently held in *Allen v. McCurry*⁷⁸³ that when Congress provided a statutory damage remedy in federal district courts to redress violations of constitutional rights, it did not implicitly restrict the preclusive effects in federal courts of prior state court judgments.⁷⁸⁴ The Court did note that "one strong motive" behind creation of the federal remedy "was grave congressional concern that the state courts had been deficient in protecting federal rights."⁷⁸⁵ Nevertheless, it cited with approval a recent "emphatic reaffirmation" by the Court of its confidence in the ability of state courts to uphold federal law,⁷⁸⁶ and held that their decisions preclude relitigation even of constitutional issues. Thus, the Court in *Allen* held that Congress did not implicitly prefer policies derived in part from the Bill of Rights—policies clearly fundamental and primarily of federal

Note, *Congressional Power to Enforce Due Process Rights*, 80 COLUM. L. REV. 1265 (1980).

782. Foster & Freed, *supra* note 297, at 2, col. 5.

783. 449 U.S. 90 (1980). Respondent McCurry moved to suppress evidence seized by police in his state criminal trial under the fourth and fourteenth amendments. The trial court denied the motion in part, and McCurry's subsequent conviction was affirmed on appeal. *State v. McCurry*, 587 S.W.2d 337 (Mo. App. 1979). Since he failed to assert that the state courts denied him a full and fair opportunity to litigate his search and seizure claim, he was barred from seeking a writ of habeas corpus in federal court. *Stone v. Powell*, 428 U.S. 465 (1976). McCurry sought damages for the alleged constitutional violation under 42 U.S.C. § 1983 (1976), raising the issue of whether the state courts' disposition of respondent's search and seizure claim precluded relitigating that issue in a section 1983 action in federal court. 449 U.S. at 91.

784. 449 U.S. at 97-98.

785. *Id.* at 98-99.

786. *Id.* at 105.

concern—over the policies underlying *res judicata*. Given the *Allen* Court's holding, it does not appear reasonable to infer that Congress, in enacting the Wallop Act, preferred certain policies on child rearing, primarily a matter for state policy making and less obviously fundamental than policies derived from the Bill of Rights, to policies underlying *res judicata*. It also appears unreasonable to infer that Congress, though willing to bind a federal court to a prior state court decision on a federal question, was unwilling, in enacting the Wallop Act, to leave a second state court bound by a decision of the first, or a third state court bound by a decision of the second.⁷⁸⁷ It is doubtful that Congress silently made the unwarranted assumption that a rule permitting repeated litigation of jurisdictional issues, rather than a rule applying the principles of *res judicata* designed to avoid the "vexation of multiple lawsuits,"⁷⁸⁸ to "encourage reliance on adjudication,"⁷⁸⁹ and to minimize "the possibility of inconsistent decisions,"⁷⁹⁰ better serves the policies

787. The Court in *Allen* specifically rejected the argument "that every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court." *Id.* at 103. It is arguable, however, that a decision of an issue made in a context in which review of the decision in a federal court was not available should not preclude relitigation of the issue in another proceeding in which the issue bears upon a federal question. In the context of the Wallop Act, the argument would be that a finding, for example, that a child had lived in state *A* for a given seven-month period made by a court of *A* in deciding that it had jurisdiction under the U.C.C.J.A. should not preclude relitigation of that fact in the course of state *B*'s application of section 1738A, because an eventual petition for certiorari to the Supreme Court is possible in the latter context, but was not in the former. There seems, however, to be no authority establishing such a rule as a matter of constitutional law. Nothing in the Wallop Act or its legislative history indicates that the Act was so intended to limit issue preclusion. As a matter of policy, the argument seems to ignore the unlikelihood that in practice the Supreme Court would often grant certiorari to review the sufficiency of evidence to support such factual findings. *Cf. Stone v. Powell*, 428 U.S. 465, 493-94 n.35 (1976) (suggesting that despite the unlikelihood of certiorari, state courts are fully competent to decide claims of search and seizure violations). The argument also seems to underestimate the effectiveness of review of such questions in state appellate courts. Certainly, the language the Supreme Court recently used in interpreting the full faith and credit statute does not include such a limitation on issue preclusion. *But cf. Allen v. McCurry*, 449 U.S. at 95 n.7 (certain traditional exceptions to collateral estoppel doctrine may defeat such a defense in a section 1983 action). Furthermore, *Davis v. Davis*, 305 U.S. 32, 40 (1938), most likely should be viewed as an application of the full faith and credit statute to preclude relitigation of a mixed issue of fact and law previously decided by a state court in a context not permitting Supreme Court review of the decision, *see generally supra* notes 195-96 and accompanying text, when the issue later became significant to a federal claim of full faith and credit in a court of the District of Columbia.

788. *Allen v. McCurry*, 449 U.S. at 94.

789. *Id.*

790. *Montana v. United States*, 440 U.S. 147, 154 (1979).

identified by Foster and Freed as stability, continuity, and security of the child's home environment.

Regardless of these questionable inferences, the essential point is that Congress did not primarily base the Wallop Act upon the child rearing policies attributed to it by Foster and Freed. The purposes of the Act are limited and commensurate with the narrow scope of the provisions of section 1738A. The general purposes stated in the Act refer to "stability of home environment" and "secure family relationships" only as reasons to "discourage continuing interstate controversies over child custody,"⁷⁹¹ an evil that the principles of *res judicata* largely inhibit rather than aggravate. The Act does not interfere with the states' tasks of selecting and implementing substantive policies, such as the policy of promoting continuity of home environment or the conflicting policy of placing custody of young children with their fulltime homemaking parent even at the cost of disrupting a previously stable placement of the children with their other parent.⁷⁹²

Nor do the policies on which the Act truly rests require a departure from prior federal law on interstate issue preclusion. If the Wallop Act had comprehensively attempted to establish necessary and sufficient conditions for the existence and exercise of jurisdiction, and to dispense with any additional jurisdictional requirements such as forum-defendant contacts, as the U.C.C.J.A. purported to do,⁷⁹³ then it might have been appropriate to attribute to Congress an intent, similar to the apparent intent of the Commissioners,⁷⁹⁴ to leave states free to reexamine each other's jurisdictional decisions. The theory of the Act might then have been that no bases would exist, other than those described in section 1738A, for authority to decide jurisdictional questions in custody cases. The Wallop Act, however, does not create criteria for the existence of jurisdiction, and only imposes interstitial restrictions on the exercise of jurisdiction.⁷⁹⁵ Congress confined itself to imposing duties on state *B* not to conduct proceedings, and to enforce rather than modify a decree of state *A* under certain circumstances. It furthermore made those duties narrow, permitting cases in which state *B* can modify the decree.

791. Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c)(4), 94 Stat. 3568, 3569.

792. See *Randolph v. Dean*, 27 Ill. App. 3d 913, 327 N.E.2d 473 (1975).

793. See *supra* text accompanying notes 166-67.

794. See *supra* text accompanying notes 595-97.

795. See *supra* text accompanying notes 302-03, 674-701.

Due to the nature of the Wallop Act's criteria for governing application of the duties it creates, a court often must receive evidence and decide factual and legal issues to determine that the Act bars the court's consideration of the merits of a case.⁷⁹⁶ Whether the power of a court to make those jurisdictional decisions is labeled "jurisdiction to determine its own jurisdiction" or something else,⁷⁹⁷ it is distinguishable from jurisdiction to make or to modify a custody award on the merits of a case and is useful in this context as in other areas of the Act.⁷⁹⁸ There is no justification to presume that Congress considered, or should have considered, that the interest in strict conformity to the new statutory requirements so predominated over the interests served by res judicata that Congress implicitly rejected conclusiveness for jurisdictional decisions affecting custody.⁷⁹⁹ Instead, Congress, in drafting the Wallop Act, did not provide any rules governing these jurisdictional issues or any other aspects of claim and issue preclusion. The Act thereby leaves to state law and to other federal law the responsibility for defining the limits on a state's power to make decisions on claims and issues binding inside and outside of the state.

4. *Legislative Silence on the Last-in-Time Rule*

These conclusions regarding the general interstate preclusion of jurisdictional issues are also applicable to the more specific problem of recognition, enforcement, and modification of successive, contrary decisions in different states. It is possible, under the rules of res judicata, collateral estoppel, and full faith and credit, that one court having jurisdiction could erroneously deny respect to a judgment of another court also having jurisdiction, and that a third court would then have to decide whether and how it would recognize or enforce each of the prior judgments. A last-in-time rule resolves such conflicts when they occur within a single state under principles of res judicata.⁸⁰⁰ Because the full faith and credit clause and statute

796. See, e.g., 28 U.S.C.A. § 1738A(a), (b)(4), (c), (d), (f), (g) (West Supp. 1980).

797. RESTATEMENT (SECOND) OF JUDGMENTS, ch. 2, introductory note, at 1-2 (Tent. Draft No. 5, 1978).

798. Cf. *id.* §§ 13, 15 (court's power to determine questions of subject matter, or territorial jurisdiction, or adequacy of notice).

799. Cf. *id.* § 14 comment d, at 115-16 (objections to subject matter jurisdiction can be raised any time prior to final judgment to prevent attack subsequent to judgment on subject matter grounds).

800. Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 798 (1969).

give interstate effect to such principles, courts have held that the last-in-time rule governs application of the requirements of full faith and credit subject perhaps to certain exceptions.⁸⁰¹

Application of the Wallop Act can present a similar problem. Assume, for example, that in a custody proceeding in state *C*, the mother invokes section 1738A, claiming that state *C* must enforce and not modify a prior decree of state *B*, and that the father also invokes section 1738A, claiming that state *C* must enforce and not modify a still earlier decree of state *A*. State *A* will not have had occasion to decide whether its own decree was consistent with section 1738A.⁸⁰² In applying any aspects of its state law that are identical to provisions of the Act, state *A* may, however, have decided particular issues that arose later in state *B*. If both *A* and *B* had jurisdiction, and if their internal rules of issue preclusion and the requirements of full faith and credit were such that state *C* would have been bound to recognize each of these contradictory decisions on the issue had it stood alone, then *C*'s recognition of one decision rather than the other may determine to which prior decree the section 1738A duties apply.

Foster and Freed have suggested that "the [Wallop Act] . . . may have changed [the] . . . familiar rules" giving recognition to the latest judgment.⁸⁰³ Neither the Act nor its legislative history specifically indicates such a change in rules. An implicit departure from the last-in-time rule should not be attributed to Congress; if the self-executing provisions of the full faith and credit clause⁸⁰⁴ require the interstate application of the rule, it may be beyond the power of Congress to alter the rule.⁸⁰⁵ The policies underlying the Wallop Act do not require this implication. Consequently, the Act does not affect the prior law on conflicting judgments as it similarly does not affect the law on intrastate and interstate claim and issue preclusion in general. Congress therefore supplemented, not supplanted, preexisting federal and state law affecting interstate custody proceedings. The law of child custody jurisdiction and judgments is currently a system of cumulative requirements and standards primarily derived from the U.C.C.J.A., the due process and full faith and credit clauses, and the old and new federal statutes.

801. *Id.* at 799-800, 831.

802. *See supra* notes 303-05 and accompanying text.

803. Foster & Freed, *supra* note 297, at 2, col. 4.

804. *See Morris v. Jones*, 329 U.S. 545, 554 (1947).

805. *See supra* note 780 and accompanying text.

V. A PERSPECTIVE ON CURRENT AND FUTURE LAW

A general evaluation of this body of law may cause some surprise at the extent to which it consists of statutory law rather than decisional law. Until quite recently, decisional law predominantly governed conflicts in child custody cases,⁸⁰⁶ as it does certain other facets of conflict of laws.⁸⁰⁷ To some critics, the wisdom and adequacy of conflicts statutes are automatically suspect. Brainerd Currie criticized prior congressional legislation on conflict of laws as varying from "meaningless and ineffectual"⁸⁰⁸ to "vastly oversimplified."⁸⁰⁹ He expressed more foreboding than confidence when he considered future use of this avenue of law reform, and stated that "in view of the appalling suggestions that are sometimes made when legislative intervention in matters of conflict of laws is contemplated, one mentions congressional action with grave misgivings, and only because of faith that reason and industry may ultimately prevail even in the field of conflict of laws."⁸¹⁰ The Wallop Act has apparently confirmed these misgivings, according to Foster and Freed. They view its enactment as posing a "serious problem" due to its significant departures from the language of the U.C.C.J.A.⁸¹¹ This Article offers a contrary assessment of the merits of the Wallop Act, and expresses general approval of the current body of custody conflicts law, largely because of the limited purposes claimed by Congress in the Wallop Act and the narrow means selected by Congress to serve those purposes.

A. AN ASSESSMENT OF THE WALLOP ACT

A discussion of the means used by Congress in the Act is the best beginning for its evaluation. Because this Article previously identified the specific provisions which Congress did and did not include in section 1738A,⁸¹² it is only necessary to abstract the two important characteristics common to the Act's vital provisions.

806. See *supra* authorities cited notes 35-54, 457-76.

807. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 5 comment c (1971).

808. B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS 659 n.121 (1963).

809. Currie, *supra* note 41, at 90.

810. B. CURRIE *supra* note 808, at 281-82 n.345.

811. Foster & Freed, *supra* note 297, at 2, col. 1.

812. See *supra* text accompanying notes 303-05, 619, 622-29, 674-701.

1. *Limited Selection of Federal Statutory Duties and Relative Neutrality of Criteria for Their Application*

First, section 1738A addresses only selected aspects of custody jurisdiction and judgments. Most public comment concerning section 1738A has loosely described it as requiring full faith and credit to custody decrees,⁸¹³ and some commentators have discussed it as if it comprehensively controls custody jurisdiction.⁸¹⁴ Actually, the new Act does not require recognition of decrees⁸¹⁵—a function of the full faith and credit clause and statute.⁸¹⁶ Instead, it commands enforcement of decrees, which may not be a command of the full faith and credit clause and statute.⁸¹⁷ Regarding jurisdiction, the Wallop Act similarly provides not comprehensive regulation, but interstitial bars to the exercise of jurisdiction.⁸¹⁸

The second noteworthy general characteristic of section 1738A relates to the criteria which the Act uses to govern applicability of the principal duties it creates.⁸¹⁹ In essence those criteria have a dual nature. Each criterion is a first-in-time rule according the protection of one of the statutory duties to one judicial action or another depending upon their timing.⁸²⁰ In addition, each criterion is a set of jurisdictional standards whose violation deprives the state having temporal priority of the protection the Act would otherwise give to its proceeding.⁸²¹

There are two distinct sets of jurisdictional standards. One set limits statutory protection of the pending proceeding of a

813. See, e.g., R. CROUCH, *supra* note 70, at 83; S. KATZ, *supra* note 59, at 122; *Reform of the Federal Criminal Laws: Hearings Before the Senate Comm. on the Judiciary, Part XIV*, 96th Cong., 1st Sess. 10,627 (1980) (testimony of Russell M. Coombs). The heading of section 1738A itself refers to full faith and credit, identifying one of the congressional powers relied upon, though it does not define the scope of the provisions.

814. See, e.g., Foster & Freed, *supra* note 297, at 2, col. 1.

815. See *supra* text accompanying notes 622-28.

816. See *supra* text accompanying notes 603-19.

817. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 comment c (1971).

818. See *supra* text accompanying notes 301-02, 619-20, 629, 651-59, 674-704.

819. The discussion in *infra* text accompanying notes 819-58 refers only to the subsection (a) duties to enforce and not to modify decrees and the subsection (g) duty not to conduct simultaneous proceedings. The duty created by subsection (e), to give specified persons notice and opportunity to be heard, is of lesser importance and of a special nature, because it is applicable to all proceedings for custody determinations without regard to the satisfaction of jurisdictional criteria.

820. See 28 U.S.C.A. § 1738A(a), (g) (West Supp. 1980).

821. *Id.* § 1738A(a), (c)-(g).

state that was the first to commence a proceeding concerning the child, but that has not yet made a custody determination.⁸²² The other set restricts statutory protection of the proceeding of a state that has made a custody decision.⁸²³ They reflect two quite different approaches to implementation of the role of federal legislation because of differences between initial and modification jurisdiction in the foundation of state law upon which Congress built the Wallop Act.

With regard to initial jurisdiction, the federal standards reflect and implement some of the same value judgments that underlie the U.C.C.J.A., and they reject values implicit in competing schemes of custody jurisdiction.⁸²⁴ Thus, the standards by which section 1738A measures the appropriateness of initial jurisdiction for the purpose of preventing concurrent initial proceedings are quite similar to those that serve the same purpose in the U.C.C.J.A.⁸²⁵ The only major respect in which these standards vary from the U.C.C.J.A.—the federal provision that initial jurisdiction based on a significant connection is not consistent with section 1738A if another state would have home state jurisdiction⁸²⁶—merely makes more explicit and

822. *Id.* § 1738A(a), (c), (e)-(g).

823. *Id.* § 1738A(a), (d), (e)-(g).

824. *See generally supra* text accompanying notes 137-38, 460-76.

825. *Compare* 28 U.S.C.A. § 1738A(a)-(c), (e), (g) (West Supp. 1980) with U.C.C.J.A. §§ 2-6 (1968) (similar language). *See generally supra* text accompanying notes 91-134.

826. *See supra* text accompanying notes 380-90. The narrowness of the federal criteria for emergency jurisdiction, 28 U.S.C.A. § 1738A(c) (2) (C) (West Supp. 1980), in comparison with the similar criteria of U.C.C.J.A. § 3(a)(3) (1968) is not of major importance as a federal departure from U.C.C.J.A. standards for concurrent initial proceedings. This provision affects initial jurisdiction only by narrowing the scope of the federal prohibition against simultaneous proceedings. *See supra* text accompanying notes 301-02, 365-72. It leaves intact the similar U.C.C.J.A. prohibition. *See supra* text accompanying notes 649-726. Even under the U.C.C.J.A., initial jurisdiction wholly resting upon the emergency basis is intended to be temporary. Bodenheimer, *supra* note 361, at 225-26; *cf.* Brock v. District Court, 620 P.2d 11, 14-15 (Colo. 1980) (initial jurisdiction based upon emergency may be permanent in extreme situation). It is not a crucial departure from these features of the U.C.C.J.A. for section 1738A to leave to state law the question whether deference is due a pending proceeding based solely, for example, on the neglect branch of a state's emergency jurisdiction.

Neither is the absence from section 1738A of provisions on clean hands and inconvenient forums an important departure from U.C.C.J.A. standards for initial jurisdiction. Here, again, their absence affects initial jurisdiction only in the context of concurrent proceedings. *See supra* text accompanying notes 301-02. Even in concurrent proceedings, it leaves states free to decline to exercise jurisdiction because of inconvenience, unclean hands, or pending proceedings, although section 1738A may not require declination. *See supra* text accompanying notes 648-726. Compliance with U.C.C.J.A. sections 7 and 8, which deal

mandatory a feature that the U.C.C.J.A. was clearly intended,⁸²⁷ and generally has been interpreted,⁸²⁸ to possess⁸²⁹ in the context of initial proceedings. This federal acceptance of the U.C.C.J.A. approach to initial jurisdiction seems to have been appropriate in view of the accelerating adoption of the Act by the states,⁸³⁰ and in view of the relatively high degree of uniformity and low incidence of conflict among the states' interpretations and applications of the Act concerning concurrent initial proceedings.⁸³¹

State law relating to jurisdiction to modify decrees, on the other hand, has displayed less uniformity and more conflict even in U.C.C.J.A. states. This disparity has resulted from disagreements on substantive policies, disagreements that were built into the U.C.C.J.A. and the Commissioners' Notes and therefore would not likely subside. Some courts have interpreted the U.C.C.J.A. as causing a relatively early shift of jurisdiction from a state that had made a decree to another state that had since become the child's home.⁸³² They have been able to cite language from the Commissioners' Notes⁸³³ and writings by Professor Ratner⁸³⁴ in support of their views. Other courts have read the Act as conferring continuing, exclusive jurisdiction on a state that had made a decree even after a long

with these bases for declining to exercise jurisdiction, probably was not intended as a condition of the section 6 prohibition of simultaneous proceedings. See *supra* text accompanying notes 91-134. Section 1738A thus conforms in this respect to the U.C.C.J.A.

For identification of other differences between section 1738A and the U.C.C.J.A. that do not appear to be of major importance in affecting the federal treatment of initial jurisdiction, see *supra* text accompanying notes 306-34, 348-64, 374-79.

827. U.C.C.J.A. § 3 Commissioners' Note, 9 U.L.A. 123-24 (1979).

828. See S. KATZ, *supra* note 59, at 17-18; Bodenheimer, *supra* note 361, at 205-08.

829. The point made here concerning the federal preference for home state over significant connection jurisdiction relates only to the criteria governing concurrent exercise of initial jurisdiction by the courts of two states. The criteria governing modification of custody orders, a context in which preferences between a home state and another state are more controversial, see, e.g., Leslie L.F. v. Constance F., 441 N.Y.S.2d 911, 914 n.1 (Fam. Ct. 1981); Foster & Freed, *supra* note 297, at 2, col. 2; Ratner, *supra* note 159, at 395-401, are discussed below. See *infra* text accompanying notes 832-50.

830. See *supra* text accompanying notes 59-60.

831. See authorities cited *supra* notes 135, 828.

832. See, e.g., Hegler v. Hegler, 383 So. 2d 1134 (Fla. Dist. Ct. App. 1980); Fernandez v. Rodriguez, 97 Misc. 2d 353, 411 N.Y.S.2d 134 (Sup. Ct. 1978).

833. See U.C.C.J.A. §§ 3, 14 Commissioners' Notes, 9 U.L.A. 124, 154 (1979).

834. See, e.g., Ratner, *supra* note 159, at 398-99, 412-13.

absence of the child from the state.⁸³⁵ The Commissioners' Notes⁸³⁶ and Professor Bodenheimer's writings⁸³⁷ contain language supporting those courts' positions. The result has been that states have continued to render conflicting decrees in some cases,⁸³⁸ and there has been little reason for confidence that the problem would disappear in the foreseeable future.

Congress might have responded to this situation by deciding that one view was preferable as a matter of public policy. It thus might have provided, for example, either that the state rendering a decree must retain continuing jurisdiction until it ceases to be the residence of any contestant, or that it must relinquish jurisdiction as soon as contacts between the rendering state and the child, the parties, or the evidence fall below a specified level, or the contacts of another state arise to a given level.⁸³⁹ Some of the comments of Foster and Freed on the Wallop Act seem to suggest that Congress did make such a value judgment and enacted the former position into law.⁸⁴⁰ It is true that section 1738A makes a state's continuing jurisdiction inconsistent with the statute only when the state has lost jurisdiction under its own law or has ceased to be the residence of the child or of any contestant.⁸⁴¹ Foster and Freed have described that treatment of continuing jurisdiction as "inexorable" and as curtailing the "flexibility and discretion" of continuing jurisdiction available under the U.C.C.J.A.⁸⁴² The Wallop Act, however, does not affect the discretion of a state to limit its own continuing jurisdiction. The statute only curtails the freedom of another state to modify the decree for the period of time the rendering state's jurisdiction continues under its own law. Flexibility and discretion remain, but they reside with one state rather than with two or three, in order to avoid conflict.

835. See, e.g., *Palm v. Superior Court*, 97 Cal. App. 3d 456, 158 Cal. Rptr. 786 (1979).

836. See U.C.C.J.A. § 3 Commissioners' Note, 9 U.L.A. 124 (1979) (cited in *Palm v. Superior Court*, 97 Cal. App. 3d 463 n.4, 158 Cal. Rptr. 789 n.4 (1979)).

837. See, e.g., Bodenheimer, *supra* note 7, at 1237 (quoted in *Palm v. Superior Court*, 97 Cal. App. 3d 467, 158 Cal. Rptr. 792 (1979)).

838. See, e.g., *Fernandez v. Rodriguez*, 97 Misc. 2d 353, 411 N.Y.S.2d 134 (Sup. Ct. 1978).

839. See Ratner, *supra* note 159, at 398-99, 412-13.

840. See Foster & Freed, *supra* note 297, at 2, col. 1 ("The PKPA, in effect, confers exclusive and continuing child custody jurisdiction on the home state"); *id.* at 2, col. 3 (the rule of § 1738A on continuing jurisdiction is "inexorable"). *But see id.* (even under the Wallop Act a state that has made a decree can later defer to another state).

841. 28 U.S.C.A. § 1738A(d) (West Supp. 1980).

842. Foster & Freed, *supra* note 297, at 2, cols. 2, 3.

Rather than resolving the disputed policy question concerning the duration of jurisdiction, Congress in the Wallop Act allocated control over the question to the state that had already determined custody of the child. There is no reason to suppose that any other state would be better qualified than the rendering state to decide when jurisdiction should shift from itself to another state. Allocating authority over this question to the law of the rendering state has the advantage that the rendering state is identifiable and singular. Two states might compete to supersede the rendering state's jurisdiction; a federal act making their laws dispositive, as the U.C.C.J.A. does,⁸⁴³ would have created yet another legal arena for interstate conflict. Thus, if congressional allocation of control over this matter to a state was the appropriate solution, the rendering state certainly seems to have been the right choice. Having made this choice, all that was necessary was congressional establishment of a minimal federal criterion of continuing jurisdiction to prevent a rendering state from maintaining continuing jurisdiction even beyond the most extreme position the U.C.C.J.A. can be interpreted to support. The provision for "residence of the child or of any contestant" serves that purpose.⁸⁴⁴

The issue remains whether it would have been advisable for Congress to have taken a position on the policy question. Although the subjects of the legislation are jurisdiction and judgments, the policies that have led states and commentators to differing views on the appropriate extent of continuing jurisdiction are not wholly the product of concerns for the convenience of adult litigants, the territorial limitations on states in our federal system, and the promotion of respect for judicial proceedings. Those latter concerns are often appropriate for federal response, but it is thought that more substantive policies should also influence the law of child custody jurisdiction and judgments.⁸⁴⁵ Underlying the various U.C.C.J.A. interpretations on continuing jurisdiction are differences of opinion on the relative importance of certain substantive considerations for jurisdictional purposes. These substantive considerations include preventing kidnaping by parents and "the harm done to children by shifting them from state to state to relitigate custody,"⁸⁴⁶ "discourag[ing] continuing controversies over child

843. U.C.C.J.A. § 14(a) (1968); see *supra* text accompanying note 579.

844. See U.C.C.J.A. § 14 Commissioners' Note, 9 U.L.A. 154 (1979); Bodenheimer, *supra* note 7, at 1237.

845. See, e.g., authorities cited *infra* notes 846-49.

846. Bodenheimer, *supra* note 361, at 213-14; see U.C.C.J.A. § 1(5) (1968); *id.*

custody in the interest of greater stability of home environment and of secure family relationships for the child,"⁸⁴⁷ promoting negotiated settlement of custody disputes,⁸⁴⁸ and facilitating visitation between a child and his other noncustodial parent.⁸⁴⁹

In the face of this diversity of law and views on the implications of such substantive matters, and in light of the primary responsibility of the states in our federal system for controlling substantive aspects of domestic relations,⁸⁵⁰ Congress took the most appropriate action. It confined itself to the essential federal role of providing a rule to resolve conflicts between states. It chose for that purpose a rule that primarily consists of an allocation of authority among states, subject only to a minimal standard below which virtually no U.C.C.J.A. state would seek to go. It also stated the allocation of authority and the minimal standard in relatively clear and objective terms. As a result of this legislation, each state that renders a decree can establish and apply its own policies on continuing jurisdiction. Congress quite firmly performed the necessary function of the federal government to resolve interstate conflicts, while avoiding unnecessary federal intrusion into state policy making.

This view of the federal legislation provides the basis for the evaluation of the feature of section 1738A(g) discussed above.⁸⁵¹ Subsection (g) makes a "race to the courthouse" dispositive when the first action commenced occurs in a state satisfying the Wallop Act criteria, with the result that the second state must not exercise jurisdiction during the pendency of the prior action.⁸⁵² If, on the other hand, the first action is commenced in a state where the Wallop Act standards are not met, and the second action is commenced in a state where they are, neither state wins at that point. The race to the courthouse becomes immaterial, and the Act requires deference by one state to the other only after one state enters an order consistent with section 1738A. The Wallop Act in this respect conforms to the U.C.C.J.A. It seems anomalous for the uniform Act, though purporting to regulate custody jurisdiction comprehensively, to have allowed states to conduct simultaneous proceedings. Pol-

Commissioners' Prefatory Note, 9 U.L.A. 111-12 (1979); Ratner, *supra* note 159, at 390, 398.

847. U.C.C.J.A. § 1(4) (1968); Bodenheimer, *supra* note 7, at 1208-12, 1236-38.

848. See Ratner, *supra* note 159, at 399; Ratner, *supra* note 37, at 810.

849. See Ratner, *supra* note 37, at 810.

850. See *supra* text accompanying note 713.

851. See *supra* text accompanying notes 430-40.

852. See *supra* text accompanying note 440.

icy considerations can, however, support priority for either state in this type of case.⁸⁵³ Given the silence of the U.C.C.J.A. on this point, Congress had either to adopt an original resolution of the conflicting policies in the Wallop Act, departing from the narrow role it otherwise played in this legislation, or to maintain a silence on the point similar to the uniform Act, and to leave deference between states prior to any award to the discretion of state courts in such cases. The latter course seems to have been the wiser one, because it is more consistent with the self-restraint Congress exercised in other provisions of the Wallop Act.

The extent to which state courts and legislatures similarly exercise self-restraint in the amendment, interpretation, and application of the U.C.C.J.A. will largely determine the degree to which the various federal and state purposes of child custody law will be served in coming years. Foster and Freed have warned that the Wallop Act creates a "strong incentive . . . to assert a continuing jurisdiction."⁸⁵⁴ The same general argument could, of course, be made regarding the Act's treatment of concurrent initial jurisdiction—conceivably each state in which the U.C.C.J.A. has been interpreted as requiring more self-denial and comity of the courts than the Act requires will dilute its law and sink to the lowest common denominator of parochial self-indulgence. There is little reason, however, to expect any widespread reaction of this kind.

Legislative amendment of the U.C.C.J.A. to claim, for example, broader continuing jurisdiction is not likely to be politically worthwhile or even attractive on the merits in most states.⁸⁵⁵ Most of the legislatures have enacted the U.C.C.J.A. within the past five years.⁸⁵⁶ They did not pass this legislation primarily to earn respect for their own custody jurisdiction and proceedings in other U.C.C.J.A. states; such respect is not conditioned on reciprocal enactments.⁸⁵⁷ Instead, they adopted the Act to require local deference to the jurisdiction and proceedings of other states in a spirit of self-restraint and comity. When there has been more time for study of the Wallop Act, and reflection

853. See U.C.C.J.A. § 1(a)(1) (1968); *id.* § 6 Commissioners' Note, 9 U.L.A. 135 (1979).

854. Foster & Freed, *supra* note 297, at 2, col. 3.

855. Illinois has recently enacted such a statute. Act of Aug. 14, 1981, 1981 Ill. Laws ch. 82, § 190. The new law does not, however, preclude Illinois courts from declining to exercise continuing jurisdiction. See generally ILL. ANN. STAT. ch. 40, § 2108 (Smith-Hurd 1980).

856. See *supra* notes 59-60 and accompanying text.

857. U.C.C.J.A. § 1 Commissioners' Note, 9 U.L.A. 114 (1979).

upon the limitations of its provisions and purposes, most legislators will probably realize that its enactment has neither eliminated the occasion for comity and self-restraint on the part of states nor reduced their importance.

Future judicial behavior, on the other hand, can be expected to vary from chauvinism to statesmanship, however, as it has under each successive system of jurisdiction in the past.⁸⁵⁸ Under the Wallop Act, however, there is at last a floor below which no state court can go. Furthermore, the probable response of most courts, perhaps after a period of becoming acquainted with the new laws, will be to view the broader effectiveness that the statute gives to a proper custody proceeding as an additional reason for responsible decision making when questions of jurisdiction arise.

This analysis of the nature of the criteria governing application of the Wallop Act duties and of the reasons why it was appropriate for Congress to select criteria of that nature assists in evaluating the wisdom of the congressional decision to impose certain duties and not to impose others. The duties included in the Act relate to successive proceedings in two or more states, and thus deal not with potential, but with actual, interstate conflicts; the need for federal legislation seems particularly great in that context. For actual conflicts, it was feasible for Congress to impose sensible restrictions upon one state's assumption of jurisdiction after another state had done so, without either intruding into substantive areas of state policy making or destroying state flexibility to accommodate various policies. These federal restrictions, since they are applicable to a state only when the case had earlier been in a court of another state, can employ the politically neutral rule of first-in-time. It was necessary that some jurisdictional requirements qualify the first-in-time rule, but the U.C.C.J.A. provided a nearly uniform set of requirements for initial jurisdiction and a minimal requirement for modification. These are the factors that permitted the devising of a federal statute that would be effective, yet not substantive or mischievous.

It might not have been possible to place neutral and wise limits on a congressional attempt to establish specific requirements for a state's initial jurisdiction applicable even in the absence of a proceeding in another state, or to specify the extent of required interstate claim and issue preclusion in custody cases. Legislating in the former area would have meant impos-

858. See *supra* notes 42-54, 79-80, 135-38, 473-76 and accompanying text.

ing U.C.C.J.A. standards on a non-U.C.C.J.A. state, even when no proceeding in another state evidenced an actual conflict between parties or states over the location of the forum. As to the latter area, the uncertainty of current state and federal law on claim and issue preclusion would have rendered hazardous an attempt either to limit or strictly to require its interstate application. It seems that the pitfalls in creating further federal statutory requirements would have been considerable. Congress wisely confined its recent effort to establishing interstitial restrictions on the exercise of jurisdiction and to requiring enforcement of decrees.

The Wallop Act may be an exception proving the rule, established by the experience of two centuries, that the congressional full faith and credit power is of limited utility. Section 1738A is a useful and harmless addition to child custody law precisely because it narrowly treats a few aspects of conflicts in a single type of litigation. Perhaps, then, its enactment illustrates reasons why there has not been more sweeping congressional reform of the conflict of laws.

Discussions of proposed reforms in conflict of laws have touched such varied facets of conflicts as choice of law,⁸⁵⁹ recognition of state court civil process,⁸⁶⁰ recognition of foreign child support⁸⁶¹ and divorce⁸⁶² judgments, and the execution of judgments.⁸⁶³ In at least some areas, unclear or restrictive constitutional law might hamper the formulation of legislation. For example, legislating on divorce recognition would be difficult in light of certain Supreme Court cases,⁸⁶⁴ and the precedents on due process would place uncertain limits on legislation giving extraterritorial effects to state process.⁸⁶⁵ Furthermore, some subjects eligible for possible congressional reform are governed

859. See, e.g., B. CURRIE, *supra* note 808, at 281; Stimson, *Simplifying the Conflict of Laws: A Bill Proposed for Enactment by the Congress*, 36 A.B.A. J. 1003, 1003 (1950).

860. See Jackson, *supra* note 1, at 22.

861. See *Yarborough v. Yarborough*, 290 U.S. 202, 215 n.2 (1933) (Stone J., dissenting).

862. See Corwin, *The "Full Faith and Credit" Clause*, 81 U. PA. L. REV. 371, 388 (1933).

863. See, e.g., Jackson, *supra* note 1, at 21.

864. See *Williams v. North Carolina*, 325 U.S. 226, 229 (1945) (divorce decree rendered in one state may be collaterally impeached in another by proof that court which rendered decree had no jurisdiction, even though the record of the proceedings purports to show jurisdiction); *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (when a court of one state grants a divorce decree to a *bona fide* domiciliary, even though spouse is absent, that decree is binding upon courts of other states).

865. See Hazard, *Revisiting the Second Restatement of Judgments: Issue*

by state laws of jurisdiction, judgments, and conflicts involving substantive legal and policy considerations which are not essentially uniform among states. This is true of choice of law⁸⁶⁶ and preclusion of issues of law;⁸⁶⁷ it is arguably true of divorce jurisdiction as well.⁸⁶⁸ In areas such as jurisdiction and choice of law in divorce cases,⁸⁶⁹ congressional action would therefore necessarily involve further federal intrusion into a primarily state policy making function. Although there are subjects for which substantive, national policies and rules would be appropriate, there may be no nationwide consensus on the direction of these policies and rules.⁸⁷⁰ Federal legislation on such topics would tend to impede states' experimentation in the formulation and implementation of substantive as well as conflicts policies, sometimes a better mode of law reform than the congressional one.

Present constitutional and state law thus may present few opportunities for Congress to resolve interstate conflicts without unduly federalizing or hampering the development and refinement of substantive policies. Congress could undoubtedly improve the law of some subjects other than custody through its use of the full faith and credit power. Still, if the Wallop Act illustrates the utility of this power, it probably equally illustrates the need for Congress's careful selection of the goals which such legislation would serve and the means which it would employ to attain those goals.

2. *Application of the Fundamental Approach of the Act to an Issue of Interpretation*

This Article resolves most of the substantial questions of interpretation of section 1738A in preparation for this evalua-

Preclusion and Related Problems, 66 CORNELL L. REV. 564, 572 (1981); Jackson, *supra* note 1, at 22.

866. See R. LEFLAR, *supra* note 480, at 116-20.

867. See RESTATEMENT (SECOND) OF JUDGMENTS § 68.1 comment b, reporter's note, at 43-44 (Tent. Draft No. 4, 1977).

868. See Freed & Foster, *supra* note 217, at 232, 257-58; Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 527 (1980).

869. See generally Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329 (1972); Garfield, *supra* note 868, at 535-39.

870. An example is choice of law in commercial litigation. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS ch. 8, introductory note (1971) (contract issues are governed by law of state with most significant relationship to the transaction and the parties). See also Martin, *Personal Jurisdiction and Choice of Law*, 78 MICH. L. REV. 872, 881 (1980).

tion of the Act as a whole, because answers to these questions could be discerned, although with some difficulty, in the language and legislative history of the Act. One issue was, however, deferred to this part of the Article, because it is necessary to draw upon the general considerations regarding the role of congressional legislation in the interstate child custody area to reach a satisfactory resolution of the issue. The requirement of section 1738A(e) that notice and opportunity to be heard be given to one who "claims a right to custody or visitation" needs interpretation to determine whether it requires state *B* to give notice and opportunity to be heard to a person who would have standing to assert his or her claim under the law of state *B*, but lacks such standing under *A*'s law.⁸⁷¹ Courts could have explored a very similar question as a matter of interpretation of parallel U.C.C.J.A. provisions,⁸⁷² but the question has been ignored⁸⁷³ in the U.C.C.J.A. context and, in any event, would be subject to different resolutions by various states. As a question of interpretation of the federal statute, however, it is of sufficient importance to require discussion and is, of course, susceptible to authoritative judicial resolution with nationwide effect.

The Wallop Act and its legislative history are silent on this question. Included, however, among the stated purposes of the Act are to "facilitate the enforcement" of decrees interstate, to "discourage continuing interstate controversies over child custody," and to "avoid jurisdictional competition and conflict between State courts."⁸⁷⁴ The practices of affording notice and opportunity to be heard to every potential party to custody proceedings will affect the extent to which section 1738A serves those purposes. Assume, for example, that state *A* awarded custody of a child to the father without giving notice or an opportunity to be heard to the child's cousin, who under the law of *A* lacked standing to seek custody. If the cousin later detained the child in state *B*, where the law gave the cousin standing, and began a proceeding in state *B* to obtain custody or visitation rights, the father might wish to invoke the requirement of section 1738A(a), that every state enforce and not modify the state *A* decree.

The statute does not expressly prescribe against whom en-

871. See *supra* text accompanying notes 332-34.

872. See U.C.C.J.A. §§ 4, 5, 10 (1968).

873. See, e.g., S. KATZ, *supra* note 59, at 28-30.

874. Parental Kidnaping Prevention Act of 1980, Pub. L. No. 96-611, § 7(c)(3)-(5), 94 Stat. 3566, 3569.

forcement is required or in favor of whom modification is prohibited. Enforcement against a person who is not notified of the prior proceeding or given an opportunity to be heard in it, such as the cousin, would probably violate that person's due process rights.⁸⁷⁵ The courts, therefore, should not hold that the Act requires enforcement under these conditions. It is possible that application of the bar on modification would violate the cousin's due process rights, even assuming that the Constitution subjects the cousin to the territorial jurisdiction of *A*. The cousin can sue for modification in *A*, and obtain an adjudication according to procedural due process requirements. The adjudication on the merits, however, will be of little value to the cousin; the court of *A* will presumably apply *A*'s law, as courts almost invariably do in custody cases, and the cousin lacks substantive custody rights and standing to claim such rights.⁸⁷⁶ Nevertheless, the cousin's opportunity to litigate in *A* the question of whether or not *A* has and should exercise jurisdiction is an important right,⁸⁷⁷ and the application of the bar on modification against the cousin does not impair this right. The cousin's access to the courts of *B*, however, is impaired, an access which the cousin may have enjoyed until a judicial proceeding, in which the cousin was given neither notice nor an opportunity to be heard, eliminated it. Thus, even the bar on modification seems to present a substantial question of due process if applied to a person denied notice of the prior proceeding. Section 1738A should probably be interpreted as not even presenting this constitutional question, but as creating duties applicable only against persons given the notice and opportunity to be heard required by subsection (e).

The result of any failure to accord the rights to notification and a hearing to a contestant limits the operation of section 1738A and the effectiveness with which its purposes are served. If the cousin does sue in *A*, then two proceedings have been used to accomplish what could have been done in one if *A* had initially given the cousin notice and an opportunity to be heard. If the cousin is content not to sue and to remain in *B* with the child, then the father and his state must depend for vindication of their interests not upon the federal requirements of enforce-

875. *Priscilla S. v. Albert B.*, 102 Misc. 2d 650, 424 N.Y.S.2d 613, 618 (Fam. Ct. 1980).

876. 1 A. EHRENZWEIG, *supra* note 237, at 122.

877. *Cf. In re Rebecca B.*, 68 Cal. App. 3d 193, 199-200, 137 Cal. Rptr. 100, 104 (Ct. App. 1977) (unmarried natural father entitled to notice and opportunity to be heard).

ment and nonmodification but, as before passage of the Wallop Act, primarily on the law and courts of *B*. These consequences can, of course, simply occur by failure to comply with the statutory requirement of notice, for example, to a parent. The likelihood of these consequences occurring with respect to remote relatives and other persons having standing in some states but not in others will be reduced, however, if the courts interpret subsection (e) to require the provision of notice to such persons even by states in which they lack standing.

The unadorned word "claims" in subsection (e)'s requirement of notice provides no indication regarding the propriety of this interpretation. Courts should interpret claims to exclude assertions lacking any legal foundation.⁸⁷⁸ The subsequent issue is whether the term can be further interpreted as including, for instance, claims cognizable under the law of any state that under the circumstances could foreseeably become a forum for litigation concerning the child. Such an interpretation would, in a sense, serve the Act's general purposes by requiring a procedural step that may be essential to application of the Act in certain cases. The purposes of the Act, however, given the restraint exercised by Congress in selecting the duties and criteria with which it would promote those purposes, suggest the opposite and more defensible interpretation. No provision of section 1738A purports to require a state to give its proceedings broader interstate effect than the law and the policies of the state indicate. Though subsection (g) requires deference to a prior, pending proceeding, the court in which it is pending can relinquish its jurisdiction to the state where proceedings were later commenced. The Act similarly requires deference to the jurisdiction of a state that has made a decree, but never longer than the state claims jurisdiction. It would be inconsistent with the pattern of section 1738A to construe subsection (e) as requiring a state to take steps to bind a person by its proceedings although no state law or policy required it to do so. In this respect the courts should treat subsection (e) as consistent with the remainder of the statute. Congress designed the requirement of notice and opportunity to be heard only to assure that those purportedly bound by a proceeding are notified of it, and to condition application of the statutory duties to the proceeding, just as those duties are only designed to resolve actual conflicts. The notice requirement is no more intended to force a

878. See *supra* text accompanying notes 325-30.

broad assertion of state power than the statutory duties are designed to precipitate conflicts.

B. NEEDED INTERPRETATIONS AND AMENDMENTS

Adding this new federal statute to the previous mixture of state and federal law thus seems appropriate. Nevertheless, current law must receive certain interpretations and applications if it is to function as this Article maintains it should.

First, it is important that the due process limitations on territorial jurisdiction in custody cases be defined in a manner that appropriately accommodates the interests of defendants as well as other individual and institutional interests.⁸⁷⁹ So long as a requirement of personal jurisdiction over defendants appears to be required in some cases, either by due process or as a condition of full faith and credit,⁸⁸⁰ it is also desirable that state law permit joining in a single proceeding each contestant with whom the state has the constitutionally necessary relationship. If the U.C.C.J.A. is not a satisfactory equivalent to a long-arm statute,⁸⁸¹ many states will have to enact legislation for this purpose.⁸⁸²

Second, Supreme Court resolution of the question of the full faith and credit clause and statute's application to custody proceedings is now necessary, appropriate, and more important than ever.⁸⁸³ The Court should at least hold that it generally requires preclusion of issues of fact.⁸⁸⁴

Third, the courts must faithfully interpret section 1738A according to its language, its legislative history, and the spirit of federalism that shaped it. The requirements it creates are few and narrow. When applicable, however, they are inflexible precisely because they only result in allocations of authority among states. Parties must not make pleas for the exercise of discretion or the recognition of exceptions by inviting a state to violate its duty of deference to a prior proceeding or decree; when parties offer such invitations, courts must refuse them. Under the Act, the parties must instead address those pleas to the prior court, so that there can be judicial discretion without interstate conflict.

879. *See supra* text accompanying notes 141-284.

880. *See supra* text accompanying notes 141-52.

881. *See supra* text accompanying notes 161-63.

882. *See supra* text accompanying notes 154-56.

883. *See supra* text accompanying notes 601-02.

884. *See supra* text accompanying notes 603-18.

The only context in which reliance upon the prior court may present a serious problem is that of an emergency concerning a child present in a state other than the one to which the Act requires deference. Section 1738A makes no exception for emergency cases, for substantial reasons. There is a risk that litigants, and even some courts, would abuse a statutory provision exempting emergencies from the federal duties. "The 'emergency' may be real or contrived; the facts may be bitterly disputed; the decision may be based upon affidavits or papers of a most self-serving kind; the emergency exception is a 'natural' for lawyers to claim and for judges to find for other reasons."⁸⁸⁵ Nevertheless, there will be instances of real emergency in which the court must take prompt, temporary action to remove an endangered child from the custody of one to whom a court had initially given custody or to place an abandoned child in another's custody.

The solution is not to read an exception into section 1738A as some courts have done to the U.C.C.J.A.⁸⁸⁶ Such a judicially created exception is necessarily general and flexible, and therefore especially susceptible to abuse.⁸⁸⁷ Instead, judges should endeavor to deal cooperatively with courts of other states in emergency cases. The judge or another officer of the state where the child is present should telephone the judge of the prior state to seek a temporary order for change of custody, or perhaps a temporary declination to exercise jurisdiction.⁸⁸⁸ This approach would permit protection of the child while further proceedings occur in the prior state or, if the prior state's judge agrees, in the state where the emergency arose. If this proposed cooperation is inadequate in practice, then amendment of section 1738A will be necessary. Any such amendment will necessarily define in general terms the circumstances in

885. Foster & Freed, *supra* note 297, at 2, col. 3.

886. See, e.g., Breneman v. Breneman, 92 Mich. App. 336, 342, 284 N.W.2d 804, 807 (Ct. App. 1979); R. CROUCH, *supra* note 70, at 34-36; Bodenheimer, *supra* note 361, at 225-26.

887. See, e.g., Mondy v. Mondy, 395 So. 2d 193, 196 (Fla. Dist. Ct. App. 1981).

888. It is not clear that under the Wallop Act or the U.C.C.J.A. a court with continuing jurisdiction can, by declining only for a stated period of time to exercise jurisdiction, permit another state temporarily to deny enforcement to or to modify a prior decree, and yet retain control over the decision for later proceedings concerning a permanent decree. See 28 U.S.C.A. § 1738A(a), (b)(3), (b)(5), (c), (f)(2), (g) (West Supp. 1980); U.C.C.J.A. §§ 3, 6(a), 13, 14(a) (1968). An interpretation of section 1738A as giving the intended effects to a limited declination of jurisdiction would not be clearly inconsistent with the language, legislative history, or general scheme of section 1738A, and would offer a usually workable solution to the problem of emergencies.

which it is applicable. It should, however, specifically make relief from the statutory duties temporary, and allow the state that is protected by the Act's basic duties to determine whether a permanent shift of jurisdiction will occur.

Finally, of course, it is desirable that all the states enact the U.C.C.J.A., and that courts interpreting and applying the uniform statute exercise self-restraint and seek to achieve uniformity. With all the federal statutory and constitutional law on the subject of interstate child custody litigation, it still remains, and should remain, primarily a matter of state law. If the issues of due process and full faith and credit are resolved as this Article urges and if the courts properly interpret section 1738A, federal law will have done about all it should in an area as clearly a function of the states as child custody litigation. Federal law will provide substantial assurance that a state lacking a minimal connection with a custody case cannot bind other states by deciding it, and at the same time will present substantial barriers to different states making conflicting decisions and orders. Within those limits, however, it is state law and discretion that will determine the wisdom with which the judiciary employs its power. The success of the law in regulating custody jurisdiction and the effects of decrees will continue to depend mainly on the wisdom with which judges interpret and apply state law.