

## FORD v. FORD: FULL FAITH AND CREDIT TO CHILD CUSTODY DECREES?\*

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."<sup>1</sup> The application of this constitutional mandate becomes relevant when a party to a judicial proceeding seeks to rely upon a foreign<sup>2</sup> judgment or statute. The absolute language of the full faith and credit clause masks a difficult interpretive task involving accommodation among conflicting principles: interests in national unity, interstate comity, and finality of litigation support a broad application of the clause, while interests of states in devising and enforcing their own social policies militate against such a literal application.<sup>3</sup>

When a court is presented with a foreign decree awarding custody of a child, the difficult problem of striking an appropriate balance between these interests is complicated by uncertainty as to finality and modifiability of such decrees in the granting state,<sup>4</sup> by the introduction of technical issues of jurisdiction and conflict of laws,<sup>5</sup> and by an overriding concern for the welfare of

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\*Ford v. Ford, 371 U.S. 187 (1962).

1. U.S. CONST. art. IV, § 1. For a general background on the origin and history of the clause, see Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. 1 (1944); Corwin, *The "Full Faith and Credit" Clause*, 81 U. PA. L. REV. 371 (1933); Costigan, *The History of the Adoption of § 1 of Art. IV of the United States Constitution*, 4 COLUM. L. REV. 470 (1904).

2. The term "foreign" will be used throughout this Note to describe judgments or laws of states other than the state of the present forum.

3. These conflicting principles have been sifted by the Court in several areas of the law where full faith and credit is a problem. See discussion of the Court's interpretation of the clause in workmen's compensation, divorce, and alimony cases, accompanying notes 60-68 *infra*. For conflicting views on how the issue should be resolved with respect to child custody decrees, see text at notes 48-57 *infra*.

4. Courts universally regard custody decrees as modifiable when a "change of circumstances" has occurred. *E.g.*, Note, *The Changed Circumstances Rule in Child Custody Modification Proceedings*, 47 NW. U.L. REV. 543 (1952). See discussion of the use of the "changed circumstances" doctrine, notes 54-55 *infra*, and accompanying text. *Cf.* RESTATEMENT, CONFLICT OF LAWS § 148 (1st ed. 1934).

5. Traditional conflict of laws doctrine bases custody jurisdiction on the domicile of the child—a technical concept generally restricting jurisdiction to the state where the father of the child is "domiciled." See RESTATEMENT, CONFLICT OF LAWS §§ 9, 30, 117, 144, 145 (1st ed. 1934). Such decrees shall be enforced by other states. *Id.* § 147.

The modern trend, emphasizing the child's own stake in the custody decree, is toward basing jurisdiction on the residence of the child. See Stumberg, *The Status of Children in the Conflict of Laws*, 8 U. CHI. L. REV. 42, 55 (1940), and cases cited; Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 823 (1944), and cases cited; see also EHRENZWEIG, CONFLICT OF LAWS 277 (1959). An early and important statement of this principle was by Judge Cardozo in *Finlay v. Finlay*, 240 N.Y. 429, 431, 148 N.E. 624, 625 (1925).

The technical structure of the Restatement, ironically, is undermined by its allowance that "any state into which the child comes" may refuse recognition to a foreign custody decree "upon proof that the custodian . . . is unfit to have control of the child," though subse-

the child.<sup>6</sup> Obviously reluctant to involve itself in these difficulties, the Supreme Court has avoided deciding the fundamental question of the applicability of the full faith and credit clause to custody decrees. In *New York ex rel. Halvey v. Halvey*,<sup>7</sup> the Court, reserving decision on this question, held that even if the full faith and credit clause applied in custody situations, it would not require a second state to honor the terms of the original custody decree where, under the circumstances—in this case the availability of new evidence—reopening of the decree would have been permitted in the original state.<sup>8</sup> Later, in *May v. Anderson*,<sup>9</sup> the Court held that credit need not have been given to a foreign decree awarding custody of children to the father where the mother had not been within the jurisdiction of the rendering court; it is not clear, however, whether the decision rests solely upon an interpretation of the appropriate scope of the full faith and credit clause, or upon due process grounds as well.<sup>10</sup> The case thus does not clarify the impact of the full faith and credit clause on child custody decrees. In *Kovacs v. Brewer*,<sup>11</sup> the Court reviewed, on certiorari, an explicit refusal by North Carolina to give credit to a New York custody decree which the North Carolina court said was contrary to the best interests of the child. The North Carolina court had not indicated the extent to which its conclusion was based on evidence of changed circumstances, which would have justified reopening of the decree

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quent states into which the child may come need not recognize this change of custody unless the state which made the change was also the state of the child's domicile, RESTATEMENT, CONFLICT OF LAWS § 148 (1st ed. 1934).

6. Mr. Justice Frankfurter's views represent a translation of this concern into a federal policy overriding the full faith and credit clause. See *Kovacs v. Brewer*, 356 U.S. 604, 609 (1958) (dissenting opinion); *May v. Anderson*, 345 U.S. 528, 535 (1953) (concurring opinion). And see note 52 *infra*, and accompanying text.

7. 330 U.S. 610 (1947).

8. So far as the Full Faith and Credit Clause is concerned, what Florida could do in modifying the decree, New York may do. . . . [A] judgment has no constitutional claim to a more conclusive or final effect in the State of the forum than in the State where rendered.

330 U.S. at 614.

9. 345 U.S. 528 (1953).

10. Mr. Justice Frankfurter, whose concurring vote was necessary for reversal, declared that the decision was based solely on an application of the full faith and credit clause to the particular facts of the case. *Id.* at 535-36 (concurring opinion). But Mr. Justice Burton's ambiguous opinion for the Court appears to rest, though not explicitly, on due process deficiencies of the original decree (deprivation of the rights of the absent mother in her children), operative in this instance through the full faith and credit clause. *Id.* at 533-34. Compare *Pennoyer v. Neff*, 95 U.S. 714 (1877), on the requirement of personal jurisdiction in judgments affecting personal rights.

The confusion in *May* was aggravated by the unusual emphasis on parental rights by the majority. For an excellent and sharp critique of both the Burton and Frankfurter opinions, and a discussion of their prospective impact, see Hazard, *May v. Anderson: Pre-ambles to Family Law Chaos*, 45 VA. L. REV. 379 (1959). For a somewhat milder, though far from completely favorable, view, see Currie, *Justice Traynor and the Conflict of Laws*, 13 STAN. L. REV. 719, 766-70 (1961).

11. 356 U.S. 604 (1958).

under New York law. In the Supreme Court, Mr. Justice Black stated that "the case obviously raises difficult and important questions of constitutional law, questions which we should postpone deciding as long as a reasonable alternative exists."<sup>12</sup> The case was remanded for clarification and a possible determination whether circumstances had changed, so that the *Halvey* rule would permit North Carolina's modification.<sup>13</sup>

In the recent case of *Ford v. Ford*,<sup>14</sup> the Court went to unusual lengths to avoid deciding the constitutional issue. Mrs. Ford brought an action in South Carolina against her estranged husband for custody of their three children. The year before, a Virginia court had dismissed his action against her for custody of the children on the basis of an agreement between them, which was represented to, but not examined by, the court. The Virginia "dismissed agreed" judgment granted custody to the husband during the school year and to the wife during vacation periods. In the wife's subsequent South Carolina suit, the court awarded full custody to her despite both the absence of allegation of a change in circumstances to justify modification and vigorous insistence by the husband on the applicability of the full faith and credit clause to the Virginia decree. On appeal, the South Carolina Court of Common Pleas modified the trial court's award, but similarly refused to give res judicata effect to the Virginia decree. The South Carolina Supreme Court reversed both courts, however, on the ground that under Virginia law, the "dismissed agreed" order would be res judicata, and, in the absence of allegation or proof of a change of circumstances, entitled to full faith and credit in South Carolina.<sup>15</sup>

The Supreme Court reversed the South Carolina Supreme Court in a unanimous opinion written by Mr. Justice Black, who avoided the constitutional question by taking issue with the South Carolina court's interpretation of Virginia law.<sup>16</sup> Investigating the Virginia precedents independently, the Court found that Virginia would not consider a "dismissed agreed" order to be res judicata in a child custody case. Thus South Carolina would not be required to give credit to the Virginia decree in *Ford* even if the full faith and credit clause were generally applicable to custody decrees.

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12. *Id.* at 607.

13. *Id.* at 608. The decision provoked an unusually passionate dissent from Mr. Justice Frankfurter, who complained that the Court, despite its express disclaimer, had impliedly decided that full faith and credit must be granted in the absence of a showing of changed circumstances. Justice Frankfurter made a vigorous plea for liberating states from the full faith and credit clause to enable them to act forthrightly in the interests of the child. *Id.* at 609.

14. 371 U.S. 187 (1962).

15. *Ford v. Ford*, 239 S.C. 305, 123 S.E.2d 33 (1961). Mr. Justice Oxner dissented, *id.* at 318, 123 S.E.2d at 39, on the ground that there had been no litigation of the question of the welfare of the child in Virginia, and thus no exercise of the judicial function by the Virginia court so as to entitle its decree to full faith and credit. While Mr. Justice Black's opinion for the Supreme Court was also tinged with strong policy overtones of a similar nature, his reasoning proceeded on a less drastic course. See text at notes 16-20 *infra*.

16. *Ford v. Ford*, 371 U.S. 187, 190-94 (1962).

Although the Court acted within its power in reinterpreting the law of one state to relieve another state of a putative obligation to honor the first state's decree, and to relieve itself of the necessity to decide a difficult question of federal law,<sup>17</sup> the reinterpretation which enabled it to do so may be questioned. Virginia cases, construing the effect of "dismissed agreed" orders in a variety of situations, hold uniformly that such judgments are *res judicata*.<sup>18</sup> These cases were distinguished by the Court in *Ford* on the ground that they "involved purely private controversies which private litigants can settle, and none involved the custody of children where the public interest is strong."<sup>19</sup> The Court then cited Virginia cases to the effect that in child custody awards the

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17. The Court's method of adjudication in disposing of the full faith and credit question itself rests on a firm constitutional foundation. First, a federal question was presented by the allegation that full faith and credit was unnecessarily granted, thus giving the Court jurisdiction to decide the case. The statutory provision for certiorari jurisdiction, 28 U.S.C. § 1257 (3) (1958), does not require that the federal right claimed shall have been *denied* by the state court. ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 15, 16, 59 (2d ed. Wolfson & Kurland 1951); STERN & GRESSMAN, SUPREME COURT PRACTICE §§ 3-5, at 70 (3d ed. 1962). The Court in interpreting the full faith and credit clause acts as an arbiter of the federal system; and arguably the function of that system is disturbed as seriously by an overapplication as by an underapplication of the clause.

In this connection, an interesting interpretive argument has been advanced: the Congressional statute enacted pursuant to the full faith and credit clause provides that judgments, records and acts of any state "shall have *the same* full faith and credit in every court . . . as they have . . . in the courts of such State . . . from which they are taken." 28 U.S.C. § 1738 (1958) (emphasis added). The words "the same," it is suggested, indicate that too much as well as too little full faith and credit can present a federal question, under the statute if not under the constitutional provision. See Abbott, *Res Judicata as a Federal Question*, 25 HARV. L. REV. 443, 444-45 (1912).

In practice, the Court has sometimes decided cases where the question was an overapplication of full faith and credit. *E.g.*, *May v. Anderson*, 345 U.S. 528 (1953); *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947). An early holding, in *Lynde v. Lynde*, 181 U.S. 183 (1901), that an unnecessary granting of full faith and credit does not present a federal question, has been consistently ignored. It is doubtful that giving credit to a foreign judgment on general comity grounds would present a question for Supreme Court review. But it is clear that where a court grants credit—as the South Carolina court did in *Ford*—only because it feels constrained to do so by the Constitution a federal question is presented.

There is equally clear authority for the Court reinterpreting South Carolina's reading of Virginia law. The Court will generally defer to a state court's interpretation of that state's own law. See, *e.g.*, *Aero Mayflower Transit Co. v. Board of R.R. Comm'rs*, 332 U.S. 495, 499-500 (1947); *Hillsborough v. Cromwell*, 326 U.S. 620, 630 (1946); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); *cf. Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). But it has been repeatedly held that no such deference is necessary to a state court's interpretation of foreign law. This principle was forcefully espoused by Mr. Justice Stone in *Barber v. Barber*, 323 U.S. 77, 81 (1944). And see *United States v. Pink*, 315 U.S. 203, 217-18 (1942); *Titus v. Wallick*, 306 U.S. 282, 287-88 (1939); *Adam v. Saenger*, 303 U.S. 59, 64 (1938).

18. *Murden v. Wilbert*, 189 Va. 358, 361, 53 S.E.2d 42, 43 (1949); *Hinton v. Norfolk & Western Ry.*, 137 Va. 605, 609, 120 S.E. 135, 136 (1923); *Bardach Iron & Steel Co. v. Tenenbaum*, 136 Va. 163, 171, 118 S.E. 502, 504-05 (1923); *Hoover v. Mitchell*, 66 Va. 387 (1874).

19. *Ford v. Ford*, 371 U.S. 187, 192 (1962).

best interests of the child, as contrasted to the wishes of the parents, must be the primary consideration. In view of this overriding policy, the Court reasoned, Virginia courts would not regard as final this "dismissed agreed" judgment, in which the trial court investigated neither the interests of the children nor the terms of the agreement.<sup>20</sup>

Since Virginia courts had never given any indication that they would place a public interest limit on the res judicata effect of "dismissed agreed" decrees, the Court's reading of Virginia law can fairly be identified as the more imaginative one. The distinction upon which the Court based this reading—between private controversies and those affected with a public interest—is certainly arguable in terms of Virginia's expressed aim of providing for the welfare of children in custody decrees. Rather than merely expostulating state law and policy, however, the Court seemed to be expounding an independent federal policy respecting procedural standards for child custody awards,<sup>21</sup> arising from its own substantive view that consent decrees are an inadequate means of resolving child custody questions.<sup>22</sup> Although the Court in *Ford* refrained from forthrightly taking the position that full faith and credit need not be granted to custody decrees which fail to meet certain procedural or substantive standards, such a rationale seems implicit in the Court's decision.

Procedural considerations in child custody dispositions are perhaps more than usually intertwined with substantive standards. The generally proclaimed standard for disposition, the "best interests of the child,"<sup>23</sup> suggests that:

the minimum nexus between the court and child that must exist before the court's award of the child's custody should carry any authority is that the court should have been in a position adequately to inform itself regarding the needs and desires of the child, of what is in the child's best interests. And the very least that should be expected in order that the investigation be responsibly thorough and enlightening is that the child be physically within the jurisdiction of the court and so available as a source for arriving at Solomon's judgment.<sup>24</sup>

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20. *Id.* at 192-93.

21. For previous views by members of the Court pointing to the development of such a policy on child custody, see Mr. Justice Frankfurter's opinions, *supra* note 6, and for a sharply different attitude, *May v. Anderson*, 345 U.S. 528, 536 (1953) (Jackson, J., dissenting).

22. The Court stated:

Unfortunately, experience has shown that the question of custody, so vital to a child's happiness and well-being frequently cannot be left to the discretion of parents. This is particularly true where, as here, the estrangement of husband and wife beclouds parental judgment with emotion and prejudice.

*Ford v. Ford*, 371 U.S. 187, 193 (1962).

23. The "best interest" standard came into prominence as early as 1881, in a famous Kansas decision written by Judge (later Mr. Justice) Brewer. *Chapsky v. Wood*, 26 Kan. 650 (1881). It gradually became the dominant standard in the custody field. See, e.g., *Sayre, Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 676-77 (1942); *Brown, The Custody of Children*, 2 IND. L.J. 325 (1926). For a compendium of cases subscribing to "best interests" as the controlling factor in custody awards, see 27B C.J.S. *Divorce* § 309(2) (1959).

24. *Kovacs v. Brewer*, 356 U.S. 604, 613-14 (1958) (Frankfurter, J., dissenting).

If child custody procedures were uniformly of high caliber, a thorough investigation of the best interest of the child through utilization of psychological and social work personnel and data might be ensured in virtually every case.<sup>25</sup> Under those circumstances, an argument in favor of using the full faith and credit clause to protect the child from relitigation of the custody award might well be persuasive.<sup>26</sup> Assuming the original award to have been made in his best interests, to enforce full faith and credit would appear to enhance the child's welfare by stabilizing the child-custodian relationship.<sup>27</sup> But the inadequacy of state procedures is notorious.<sup>28</sup> This being the case, application of a flexible rule, enabling inquiry by the courts of any state in which jurisdiction may be obtained, may at least have the advantage of encouraging more thorough consideration of the child's interests. Overall, it might appear that the Supreme Court could contribute substantially to fulfilling the promise of the "best interests of the child" test by hinging the applicability of the full faith and credit clause to custody dispositions on the extent to which state procedural requirements encourage realistic inquiries into the child's welfare.

But investigation into the procedural sufficiency of custody dispositions is difficult to justify as a proper or feasible course for the Court. Custody procedures vary greatly among the states and are the subject of much controversy.<sup>29</sup> The differences in practice and belief often rest upon irreconcilable

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25. See Comment, *Use of Extra-Record Information in Custody Cases*, 24 U. CHI. L. REV. 349 (1957); Chute, *Divorce and the Family Court*, 18 LAW & CONTEMP. PROB. 49 (1953). There has been a remarkable absence of commentary on the use of psychological data in custody cases. For a recent decision based largely on psychiatric testimony, see *Root v. Allen*, 377 P.2d 117 (Colo. 1962), noted *infra* at 151. But see Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807, 817 (1944), for a suggestion (from a psychiatrist) that the judge is best qualified to make a "common sense" decision as to the child's best interests.

26. This argument is made, of course, even in the context of the generally low quality of custody procedures now prevalent. See, e.g., *May v. Anderson*, 345 U.S. 528, 541-42 (1953) (Jackson, J., dissenting); Note, *Effect of Custody Decree in a State Other Than Where Rendered*, 81 U. PA. L. REV. 970 (1933).

27. Even were custody procedures uniformly good, this argument is not without its problems. States may still have different *policy* goals regarding the upbringing of children; the state where the child resides might want to affect that child's life in a different way or for a different purpose than the state which first awarded custody. Furthermore, if procedures were uniformly good, and the best interests of the child everywhere investigated, it could be assumed that courts permitted to re-examine foreign custody decrees would consider, as a constituent of the welfare which they were seeking to ensure, the interest of the child in stability and security of environment, *i.e.*, in the continuation of the original award.

28. Only nineteen states, for instance, authorize or require a social worker's investigation. Comment, *Use of Extra-Record Information in Custody Cases*, *supra* note 25 at 357-58 n. 49. The child's interests are not given party representation, and the presence of the child is seldom required. KEEZER, MARRIAGE AND DIVORCE § 715 (3d ed., 1946). Such resources as there are are often drastically overworked. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY ch. 12 (1954).

29. Statutes in the field generally leave a wide discretion to courts. See VERNIER, AMERICAN FAMILY LAWS § 95 (1932). In practice, procedures differ greatly, and there is widespread controversy. See, e.g., Comment, *Use of Extra-Record Information in Custody Cases*, *supra* note 25. Compare Chute, *supra* note 25, and Lemkin, *Orphans of Living*

views of the nature of the substantive interests to be accounted for—parental rights,<sup>30</sup> the child's own rights, and the appropriate role of the state as *parens patriae*. These fundamental policy disagreements may be reflected in differences in the treatment of: the possibility of award to someone other than a parent;<sup>31</sup> the function of professional personnel in deciding the custody issue, and the kinds of data which might be used;<sup>32</sup> the extent of participation by the child in the custody proceedings and the way his interests are to be represented;<sup>33</sup> and the suitability of adversary proceedings for the resolution of conflicts over custody.<sup>34</sup> It is difficult to believe that there is a "right answer" concerning most of the controversies regarding child custody procedures. For example, the differences concerning the use of psychological data in the determination of custody reflect basic conflicts as to the role of "experts" in evaluating subjective human experience.<sup>35</sup>

The resolution of these policy conflicts seems preeminently suited for the kind of state experimentation essential to the functioning of the federal system;<sup>36</sup> the Court would be misconceiving its role as arbiter of the federal

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*Parents: A Comparative Legal and Sociological View*, 10 LAW & CONTEMP. PROB. 834, 846-47, with Plant, *supra* note 25.

30. Some states expressly give effect to parental rights in the form of presumptions—in favor of the mother when the child is of a "tender age," or in favor of the natural parent as against a third party. See Comment, *Custody of Children: Best Interests of Child vs. Rights of Parents*, 33 CALIF. L. REV. 306 (1945); Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEMP. PROB. 721, 729 (1944) ("Human experience has demonstrated that children ordinarily will be best cared for by those who are bound to them by ties of nature."). While the universally proclaimed standard of courts in awarding custody is the "best interests of the child," the adversary system inevitably distorts this goal, and emphasizes the "rights" and interests of the parents. See, e.g., Dembitz, *Ferment and Experiment in New York: Juvenile Cases in the New Family Court*, 48 CORNELL L.Q. 499, 518 (1963).

31. Alternatives may include awards to other parties, or placement in a foster home or social agency.

32. See note 25 *supra*.

33. The presence of the child, whose "best interests" are being adjudicated, before the court, is generally not required. KEEZER, *op. cit. supra* note 28. The argument can be made, moreover, that participation by the child would in fact be detrimental to his interests.

For a suggestion that the child's interest be represented in court, and a comparison of European procedures, see Lemkin, *supra* note 29. For a discussion of the role of Michigan's "Friend of the Court" in custody cases, see Pokorny, *Observations by a "Friend of the Court,"* 10 LAW & CONTEMP. PROB. 778 (1944).

34. The development of a family court system providing services besides adjudication has been suggested. See, e.g., Chute, *supra* note 25. For a colorful attack on the adversary system in divorce cases, see Alexander, *Let's Get the Embattled Spouses Out of the Trenches*, 18 LAW & CONTEMP. PROB. 98 (1953). On the other hand, Ehrenzweig's "clean hands" doctrine, discussed *infra* at note 55, seems to rest, implicitly, on an affirmation of the adversary system.

35. See note 25 *supra*, especially Plant's interesting expression of confidence in the trial judge.

36. For the classic statement of the idea that states must be allowed to experiment in areas of social policy, see *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting). And see *Truax v. Corrigan*, 257 U.S. 312, 344 (1921) (Holmes, J., dissenting). Compare *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

system if it attempted to resolve these controversies by using the full faith and credit clause to promote those procedures of which it approves.<sup>37</sup> The Court might, as it does with respect to state criminal procedures under the due process clause of the fourteenth amendment, lay down certain minimal procedural safeguards. But the Court's role in supervising custody procedures cannot be fully analogized to its role in supervising state criminal procedure. In criminal matters the Court can draw on the accumulated experience of centuries of Anglo-American criminal law in addition to its own experience in the administration of federal criminal procedure.<sup>38</sup> In the relatively new and developing field of family law, on the other hand, there is neither present consensus, useful tradition,<sup>39</sup> nor independent Supreme Court experience or expertise from which to draw standards. Since the "best interests" standard—and, therefore, inquiry into the welfare of the child—is not a constitutionally compelled one, procedures appropriate to that standard could only be impressed upon the states if the standard were adopted as a federal common-law policy binding upon them; such policy adoption in itself restricts state experimentation, and seems inconsistent with the Court's usual view of its role in the federal system.<sup>40</sup>

Even were the area a legitimate one for federal concern, an attempt by the Court to lay down standards might tend to be self-defeating. Because of the wide variance in state practice,<sup>41</sup> and the difficulty of choosing among the manifold procedural complexities, the Court might be led to establish a low minimum standard to which state procedures must comply. The Court's legitimation of such a low norm could frustrate efforts within the states toward reform and improvement of child custody procedures.<sup>42</sup>

While it might seem that in such an extreme case as *Ford* the Court could properly condemn the procedure in the first state as insufficient, such a decision would be no less an imposition of the Court's own substantive policy choices than, say, an insistence that psychiatric testimony be the basis of custody awards. It is not inconceivable that a state might adopt a policy of encouraging consent decrees as a means of settling custody disputes. It might

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37. Compare *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), where the Court denied itself a role in shaping common law in diversity cases.

38. An early decision emphasizing the historical background of due process was *Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 277 (1856). For an expostulation of the Court's role in supervising federal criminal procedure, see *McNabb v. United States*, 318 U.S. 332, 340 (1943). See generally Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956); Boskey & Pickering, *Federal Restrictions on State Criminal Procedure*, 13 U. CHI. L. REV. 266 (1946).

39. The common law "tradition" in child custody is bound up with such hoary concepts as exclusive custody rights in the father. See, e.g., Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672, 676 (1942); Brown, *The Custody of Children*, 2 IND. L.J. 325 (1926).

40. See notes 36-37 *supra*.

41. See note 29 *supra*.

42. For a discussion of the role of the Supreme Court in "legitimizing" laws and practices, see BLACK, *THE PEOPLE AND THE COURT* 56-86 (1960); BICKEL, *THE LEAST DANGEROUS BRANCH* 29-33 (1962).

do so to promote responsible attitudes on the part of separating parents, or to reflect a feeling that a child's welfare is best served by leaving determination of his custody to his parents, or to save the child the trauma of a courtroom battle, or to conserve limited judicial resources for use in situations where resolution by the parties themselves proves impossible. There is no apparent constitutional reason why such choices could not be made, or why they could not be expressed through inconsistencies between state procedural and substantive standards, as seemed to appear in the *Ford* case.<sup>43</sup> If the Court finds sufficient strength in a federal policy of child interest protection to preclude such a choice or mode of choice by a state, it must still face the problem of appearing to legitimate other procedures—only slightly less objectionable from some perspectives—about which it cannot be as certain. To avoid the problems outlined, the Court should refrain from following out the analysis implicit in its opinion in *Ford v. Ford*.

Aside from its troubling suggestion regarding Court supervision of state procedural standards, *Ford* gives conflicting hints as to how the Court will decide the still open question of the effect foreign custody decrees must be given under the full faith and credit clause. The Court obviously wanted to reverse the South Carolina court's holding that the Virginia decree must be given credit.<sup>44</sup> Yet it could not avoid the decision by remanding, as it had in *Kovacs v. Brewer*;<sup>45</sup> the South Carolina courts had specifically found that there had been no change of circumstances.<sup>46</sup> By its use of a strikingly original interpretation of state law to avoid the constitutional issue, the Court may have been intimating a feeling that, in general, full faith and credit would have to be enforced in custody cases, if the issue were faced. On the other hand, the Court's discussion of Virginia law, with its approving emphasis on the idea that the best interests of the child should be the paramount and controlling factor in custody awards, suggests that the Court may be moving toward the position espoused by Mr. Justice Frankfurter,<sup>47</sup> that in child custody, the policy behind full faith and credit is outweighed by the interest of each state in providing for the welfare of children within its borders, so that credit need never be granted.

There has been considerable debate, and strong arguments have been advanced, on both sides of the custody-full faith and credit question. The proponents of full faith and credit point to the literal mandate of the constitutional provision and the enacting statute,<sup>48</sup> and suggest that the only proper judicial

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43. *Ford v. Ford*, 371 U.S. 187, 193-94 (1962). That the procedures by which a best interests test is administered are adapted to substantive standards more consonant with parental right doctrines is, in itself, an expression of state policy.

44. See text at notes 7-13 *supra*.

45. 356 U.S. 604, 608 (1958). See text at notes 11-13 *supra*.

46. *Ford v. Ford*, 239 S.C. 305, 318, 123 S.E.2d 33, 39 (1961).

47. *Kovacs v. Brewer*, 356 U.S. 604, 609 (1958) (dissenting opinion); *May v. Anderson*, 345 U.S. 528, 535 (1953) (concurring opinion). *But see* *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 616 (1947) (concurring opinion).

48. 28 U.S.C. § 1738 (1958).

role is an unyielding enforcement of that mandate.<sup>49</sup> On a policy level, the argument is made that certainty and finality are very important to all parties concerned in child custody cases, especially the child; a stable, relatively stress-free and affectionate relationship with an adult custodian is said to be of utmost importance to the child's successful personality development.<sup>50</sup> It is alleged, further, that a failure to require full faith and credit will encourage "kidnapping" of children by parents unsuccessful in custody battles, who hope to obtain a modification of the decree in another state.<sup>51</sup> The image of the child as a ping-pong ball in a custody tournament between his parents is a favorite.

In reply, it is argued that if the welfare of the child is the primary concern, foreign custody decrees should always be modifiable when the child's welfare so requires.<sup>52</sup> It is pointed out that courts may always modify decrees if a change in circumstances has occurred;<sup>53</sup> while most states pay lip service to full faith and credit in custody cases, they very rarely give credit to a decree of which they disapprove<sup>54</sup> (the South Carolina Supreme Court decision in *Ford v. Ford* is an exception). A "change in circumstances" will readily be found by a court interested in modifying a decree.<sup>55</sup> Thus, requiring full faith and credit would not, in the first place, necessarily reduce the frequency of "kidnappings"; since full faith and credit is not a realistic bar, losing parties desperate enough to advance upon such a course would still do so. Secondly, it is pointed out, courts, even when they are not bound by full faith and credit, tend to look with disfavor upon "kidnappers" seeking custody decree modifi-

49. See, e.g., *May v. Anderson*, 345 U.S. 528, 536 (1953) (Jackson, J., dissenting); Jackson, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 24-30 (1945); Goodrich, *Custody of Children in Divorce Suits*, 7 CORNELL L.Q. 1, 6-7 (1921); Note, *Effect of a Custody Decree in a State Other Than Where Rendered*, 81 U. PA. L. REV. 970 (1933).

50. See generally Erikson, *Growth and Crisis of the "Healthy Personality,"* in KLUCKHOHN, MURRAY & SCHNEIDER, *PERSONALITY IN NATURE, SOCIETY AND CULTURE* 185-225 (1955), stressing the importance of the firm establishment and maintenance of an "affection-relationship" between the child and a parent-figure.

51. See, e.g., *May v. Anderson*, 345 U.S. 528, 541-42 (1953) (Jackson, J., dissenting); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610, 619 (1947) (Rutledge, J., concurring).

52. See Mr. Justice Frankfurter's opinions, note 47 *supra*; Stansbury, *Custody and Maintenance Law Across State Lines*, 10 LAW & CONTEMP. PROB. 819, 828-32 (1944); Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 357 (1953); 1 EHRENZWEIG, *CONFLICT OF LAWS* 277 (1959); Note, *Recognition of Sister State Child Custody Decrees: Application of the Clean Hands Doctrine*, 47 CALIF. L. REV. 750 (1959).

53. See Note, *The Changed Circumstances Rule in Child Custody Modification Proceedings*, 47 NW. U.L. REV. 543 (1952).

54. Stansbury, *supra* note 52, at 829; Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 348 (1953).

55. This was recognized half a century ago by the Connecticut Supreme Court of Errors:

As a finding of changed conditions is one easily made when a court is so inclined, and plausible grounds therefor can quite generally be found, it follows that the recognition extraterritorially which custody orders will receive or can command is liable to be more theoretical than of great practical consequence.

*Morrill v. Morrill*, 83 Conn. 479, 492-93, 77 Atl. 1, 6 (1910). See also STUMBERG, *CONFLICT OF LAWS* 328 (2d ed. 1951).

cations.<sup>56</sup> And in any event, the opponents of the clause argue, there is no reason to expect that courts freed from the full faith and credit mandate, but seeking to award custody in the best interests of the child, would not continue to give considerable weight, in the interests of continuity and stability in the child's development, to foreign custody decrees which have considered the welfare of the child. Giving the states a free hand, it is urged, would not result in a decline in the respect actually afforded foreign custody decrees; it would, rather, enable courts to make forthright decisions, in the best interests of the child, without having to resort to the presently misused and distorted doctrine of change in circumstances.<sup>57</sup>

Most of the debate on the issue seems to take the view that the problem is soluble only by the adoption of one or the other alternative. Such a stark choice may not provide the framework out of which a happy solution can come. There is no reason why a balance cannot be struck between the two extreme positions, taking into account the often strong interest of a state in a particular problem or policy.<sup>58</sup> The Court, in interpreting the full faith and credit clause in other areas of the law, has indicated the criteria which will cause the balance—whether or not full faith and credit must be granted—to swing one way or the other in a particular case.<sup>59</sup> These uses of balancing technique may prove adaptable to the child custody problem.

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56. Professor Ehrenzweig has emphasized this fact in calling for judicial recognition of a "clean hands" doctrine as a basis for refusing to disturb foreign custody decrees. See Ehrenzweig, *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345, 358-60 (1953); and 1 EHRENZWEIG, *CONFLICT OF LAWS* 286-90 (1959).

57. Stansbury, *supra* note 52, at 831.

58. The idea that the full faith and credit clause is not always an absolute mandate was first fully articulated in an oft-cited opinion by Mr. Justice Stone in *Yarborough v. Yarborough*, 290 U.S. 202, 213 (1933) (dissenting opinion). In dissenting from a majority holding that the clause required South Carolina to give credit to a child-support provision of a Georgia divorce decree, Stone advanced the proposition that

there are many judgments . . . though valid in the state where rendered, to which the full faith and credit clause gives no force elsewhere. . . . There comes a point beyond which the imposition of the will of one state beyond its own borders involves a forbidden infringement of some legitimate interest of the other.

*Id.* at 214-15. Justice Stone subsequently became the leading spokesman for the Court on full faith and credit, and the balancing test became a standard ingredient of, and framework for, analyses of problems arising under the clause.

Stone wrote for the Court in *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935); *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935); *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939); *Pink v. A.A.A. Highway Express, Inc.*, 314 U.S. 201 (1941); *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943). See Cheatham, *Stone on Conflict of Laws*, 46 COLUM. L. REV. 719 (1946).

59. In addition to cases cited in note 58 *supra*, see *Carroll v. Lanza*, 349 U.S. 408 (1955); *Watson v. Employers Liab. Assur. Corp.*, 348 U.S. 66 (1954); *Hughes v. Fetter*, 341 U.S. 609 (1951); *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

For a particularly unhappy result from a failure to balance state policy against the full faith and credit clause, see *Fauntleroy v. Lum*, 210 U.S. 230 (1908), where the clause was held to require Mississippi to enforce a Missouri judgment based on a gambling debt incurred in Mississippi, even though such debts were considered void and unenforceable as against public policy in Mississippi.

Workmen's compensation cases have been most frequently the subject of Supreme Court balancing between the demands of the full faith and credit clause and the demands of state policy. The Court has held that the state where the injury occurs has a sufficient interest to make an award according to its own laws, and need not grant credit either to statutes or to compensation awards or judgments from any other state (whose interest is based, say, on the employee's residence or on the fact that the employment contract was entered into there).<sup>60</sup> The literal words of the clause are subordinated to the interest of a state in enforcing its own policies.

More immediately relevant to the custody issue is the Court's use of balancing technique in resolving the emotionally charged issue of full faith and credit to foreign divorce decrees. While it is admitted by all that the state of "marital domicile" has a substantial and legitimate interest in regulating the marital status, a majority of the Court since *Williams v. North Carolina*<sup>61</sup> has felt that, in general, this interest is insufficient to outweigh the policies of national unity and certainty of status that the full faith and credit clause represents in this area. *Williams I* reversed a North Carolina bigamy conviction based on a refusal to recognize the validity of a divorce which the defendant had secured, *ex parte*, in Nevada; the decision promotes geographic and social mobility by removing uncertainty as to whether one is married or not, and to whom.<sup>62</sup> In the second *Williams* decision,<sup>63</sup> however, a bitterly divided Court affirmed a second bigamy conviction, holding that North Carolina was not precluded from inquiring into the authenticity of the complaining party's alleged Nevada domicile—an element necessary for jurisdiction of the Nevada court which awarded the *ex parte* divorce. In effect, the terms of the *Williams I* balance were altered. The "need for certainty" theme was not carried to its logical extreme, and North Carolina's interest in the *Williams* marriage was given some effect. Furthermore, the Court discounted any weight to be given to the interest of the divorce-rendering state where it was not, in the eyes of another state, the genuine domicile of at least one of the parties. In *Sherrer v. Sherrer*,<sup>64</sup> involving an attack on the validity of a foreign divorce by a recanting spouse who had taken part in the proceedings, the Court qualified *Wil-*

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60. See *Carroll v. Lanza*, 349 U.S. 408 (1955); *Industrial Comm'n v. McCartin*, 330 U.S. 622 (1947); *Pacific Employers Ins. Co. v. Industrial Acc. Comm'n*, 306 U.S. 493 (1939); *Alaska Packers Ass'n v. Industrial Acc. Comm'n*, 294 U.S. 532 (1935).

In the controversial *Magnolia* decision, however, the Court refused to make a similar exception to the full faith and credit mandate to allow the state of the employee's residence to disregard (actually, to supplement) an award made by a workmen's compensation commission in the state where the injury occurred. *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 430 (1943). See Cheatham, *Res Judicata and the Full Faith and Credit Clause: Magnolia Petroleum Co. v. Hunt*, 44 COLUM. L. REV. 330 (1944).

61. 317 U.S. 287 (1942) [hereinafter referred to as *Williams I* to distinguish it from *Williams v. North Carolina*, 325 U.S. 226 (1945)].

62. 317 U.S. at 299-305, esp. at 303: "society . . . has an interest in the avoidance of polygamous marriages."

63. 325 U.S. 226 (1945) [hereinafter referred to as *Williams II*].

64. 334 U.S. 343 (1948).

*Williams II* by holding that collateral attacks on the jurisdiction of the decree-issuing state were to be limited to cases in which the decree was issued in *ex parte* proceedings. Whether this decision, which seemed to rely on doctrines of estoppel, would bar a *Williams*-type bigamy prosecution by a state is not clear. *Sherrer* provoked an impassioned dissent by Justices Frankfurter and Murphy,<sup>65</sup> demonstrating that the basic balancing rationale of *Williams I*, which had been reaffirmed by the *Sherrer* majority, had not yet won universal acceptance, even on the Court. The dissent clearly accepts balancing as the dispositive method, however; it merely argues that the Court's decisions had subordinated legitimate state interests in the marriage field to the whimsical divorce policies of "bargain-counter" states like Nevada.<sup>66</sup>

The *Williams* line of cases, standing alone, might suggest that, in general, the interests of national unity demand that one state's regulation of the incidents of the marriage status must be given credit in all other states. But this is too broad and simplistic a reading of *Williams I*. A state's interest in making divorces difficult to obtain may reflect varied policies: *e.g.*, that the family is important as an institution ensuring mutual support for husband and wife, channeling each into performing certain highly valued social roles; and that the family provides the best setting for rearing children and inculcating social values. Under *Williams I*—as qualified by *Williams II*—a state will not ordinarily be permitted to effectuate these various policies by preserving the marriage status through a bigamy prosecution. If the state's only technique for expressing its interest is as harsh and as remotely supportive of state interests as a bigamy prosecution, the state interest will not be seen as overriding the certainty of status and mobility interests—which the full faith and credit clause protects.

Nevertheless, where the need for certainty and finality is not so poignant, where the prospective result is not so severe, and where state action will directly effectuate state interests, the state of marital domicile may be permitted to assert its interest in a particular aspect of the terminated marital status in spite of the existence of a foreign judgment, through a division of the divorce decree. Thus the Court has held in *Vanderbilt v. Vanderbilt*<sup>67</sup> that an alimony decree appurtenant to an *ex parte* divorce decree is not entitled to full faith and credit, even though the divorce decree is so entitled. A state's interest in regulating the amount of alimony paid to a resident spouse is directly related to its interest in the economic welfare of that spouse. This assistance had been provided for during the duration of the marriage and the state may wish to preserve it.<sup>68</sup> Here the state's interest outweighs the policy of national unity and finality of litigation embodied in the full faith and credit clause.

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65. *Id.* at 356.

66. *Id.* at 366-70, 377. See generally 2 LAW & CONTEMP. PROB. 289-400 (1935), for a group of articles on the problem of "migratory divorces" in the United States.

67. 354 U.S. 416 (1957). The concept of "divisible divorce" was explicitly recognized in *Estin v. Estin*, 334 U.S. 541, 549 (1948), which involved a pre-existent New York support award allegedly superseded by a Nevada divorce decree. See generally, Note, *Divisible Divorce*, 76 HARV. L. REV. 1233 (1963).

68. See *Estin v. Estin*, 334 U.S. 541, 547 (1948).

Custody of children, as related to their moral, emotional and economic welfare, also is a particular concern of the state in regulating the family as an institution. The state interest in child custody is at least as substantial as the interest in ensuring adequate alimony awards; the interest in custody is perhaps more substantial because of the peculiarly vulnerable position, psychologically and economically, of the child whose parents are divorced,<sup>69</sup> and the state's special responsibility as guardian of children.<sup>70</sup> And, like the alimony decree, a custody award is divisible from the divorce decree for full faith and credit purposes.<sup>71</sup> Thus, it appears that, for at least some states, a degree of freedom from the effect of the full faith and credit clause is justified.

Any attempt to formulate what degree of freedom from full faith and credit is advisable should consider the functional utility of giving *res judicata* effect to custody decrees. The benefits of finality in child custody situations are a matter of dispute, and may vary considerably with the thoroughness with which the plan of family reorganization imposed by the decree has been considered by the court. The dominant view is that the need for finality is of slight importance.<sup>72</sup> This view is reflected in the Supreme Court's hesitation to decide the full faith and credit issue, and may be based in community sympathies for parents deprived of their children and a belief that the changing needs of a growing child merit frequent reexamination of the custody awards. The view is further buttressed by the change in circumstances rule, the constant pressures of parents for relitigation, and judicial disapprobation of the frequently primitive procedures by which the "best interests" of the child have been considered by another court. The opposing view, that finality is to be encouraged in the interests of the child, draws support from psychiatric opinion that the child who has been subjected to the trauma of a disintegrated home needs, above all else, a stable and secure relationship to an adult family authority figure for successful psychological development.<sup>73</sup> If the need for stability leads to adoption of finality as a goal, the Court must also recognize that the formulation it chooses to reflect this must account for the impact on finality of a non-regulated change-in-circumstances rule. Finality can only be meaningful if circumvention of its effect by means of a liberally applied change of cir-

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69. See generally Davis, *Sociological and Statistical Analysis*, 10 LAW & CONTEMP. PROB. 700 (1944); Plant, *The Psychiatrist Views Children of Divorced Parents*, 10 LAW & CONTEMP. PROB. 807 (1944); JACOBS & GOEBEL, DOMESTIC RELATIONS 881 (1961). And economically, of course, the child is likely to be in a helpless position.

70. "[T]he Court has an independent interest in the welfare of the children of a marriage when the parents request a divorce." Bronson, *Custody on Appeal*, 10 LAW & CONTEMP. PROB. 737, 739-40 (1944). And see Weinman, *The Trial Judge Awards Custody*, 10 LAW & CONTEMP. PROB. 721, 722-23 (1944).

71. *May v. Anderson*, 345 U.S. 528, 531 (1953).

72. See note 52 *supra*.

73. See note 50 *supra*. But it is only where the granting court has been thorough in its consideration of custody alternatives that later courts are likely to be willing to respect its choice, rather than to engage in an independent investigation based upon a permissive attitude toward "changed circumstances."

cumstance test is either unlikely, because of low state interest in the child, or readily detected and combatted.

As has been seen,<sup>74</sup> it seems unwise for the Supreme Court to set the degree of freedom from full faith and credit by supervision of child custody procedures or by the adoption as a federal policy of any one of the competing standards and theories for custody disposition. But by employing a balancing test approach, analogous to the approach in the alimony area, the Court may be able to establish some impulse toward the desired results of improved procedures and responsible reconsideration of custody decrees.<sup>75</sup> Such a test should balance the interests in the child of the first and second states, awarding full faith and credit to the decree of the first state only if it has the superior interest and denying full faith and credit to decrees from states with the inferior interest. The obvious basis of this selection is that the state with the more substantial interest in the child would be more likely to give the fullest consideration to the child's welfare, feel the greatest right to determine the child's future, and be the most likely to evade application of full faith and credit when it felt this was necessary. The application of the test would render some states free to modify custody awards, without reference to the full faith and credit clause, while others with subordinate interests would be strictly limited in their power to modify by the test's effect.

The state where the child permanently resides—at the time of the decree or of the collateral challenge to it—would appear to have the most substantial interest in the welfare and development of that child.<sup>76</sup> As long as government is given a role in educating children and regulating their behavior and environment, the state of the child's residence is in the best position to make an effective and meaningful custody award, and has the strongest claim to do so. The judges and legislators of that state will reflect this interest in a high degree of concern for the many aspects of his welfare. This interest should be given recognition, not only through the protection of the full faith and credit clause, but also by requiring that states with an inferior interest do not utilize a "change of circumstances" test to avoid giving credit unless substantial evidence of a change has been presented.

Where the original custody decree was rendered by a state which was not the child's permanent residence, the question of what constitutes permanent residence would appear to be of little practical importance. The question of whether the state in which the decree is sought to be reopened is the state of permanent residence would usually be irrelevant; in view of the lack of a sub-

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74. See text at notes 29-43 *supra*.

75. A full faith and credit test can also require states to respect the experimental procedures of their sister states, for the same reasons that it has been urged the Court must. See note 36 *supra* and accompanying text.

76. The child's residency as a basis of custody jurisdiction has become more frequently used. See note 5 *supra*. Residency, of course, is not a self-defining concept and, in practice, may be the subject of considerable confusion. The *Williams* litigation, discussed at notes 61-63 *supra*, points up this problem in the divorce area. And see *Baker v. Keck*, 13 F. Supp. 486 (E.D. Ill. 1936).

stantial interest in the child on the part of the first state, inferred from the fact that the child was not a permanent resident, it would be rare that the second state's interest would be inferior. But where the original custody decree has been rendered by a state of the child's residence (most likely, the state of the old marital domicile), and a party seeks modification in another state, claiming that that second state is now the child's residence, the determination of the question becomes crucial; it would, under the suggested test, directly govern the applicability of the full faith and credit clause. In the usual situation, where the child moves with his custodian to another state, the problem is not so serious: any challenge asserting a change in the child's residence can be defended by the custodian, who can try to demonstrate that he has no intention of permanently remaining in the second state; the adversary system can be relied upon here to air fully and resolve the residency issue. Where, however, the child's residence in the second state is claimed by a party who has himself brought the child there for purposes of challenging an original decree issued by a state of permanent residence, real possibility for abuse of the residency standard exists. In an effort to discourage such artificial creations of residency in another state by a "kidnapping" party who lost in a custody battle in a state of permanent residence, the Court could insist that the claimed new residence of the child be shown to have been established *bona fides*, *i.e.*, legally with respect to the already existent custody decree. To further discourage relitigation where a permanent residence state has already awarded custody, the Court might, along the same lines, exclude other bases of residency asserted to show sufficient state interest, such as summer vacation residency, frequently present in divided custody awards. However, where each parent is awarded custody for a substantial period of time, there may be strong reason to consider both states of parental residence, if there be two, as the permanent residence of the child.

Applying the proposed test to *Ford*, two factors suggest that the South Carolina courts need not have given full faith and credit to the Virginia decree. First, Virginia could not have been considered the state of the child's permanent residence at the time its decree was rendered. At the commencement of the Virginia action, the Ford children had been in the state only one day, having been brought by their mother to the home of their grandparents. Mrs. Ford moved to South Carolina shortly after the Virginia decree was entered, and the Ford children apparently returned to North Carolina with their father.<sup>77</sup> In retrospect, Virginia's interest in the children would seem to have been minimal; recognition of the transiency of Virginia's interest may well have contributed to the trial judge's perfunctory treatment of the custody issue. Second, even if Virginia had satisfied a permanent residence test, it could be argued that South Carolina's interest in the children under the divided custody award effected by the Virginia decree was sufficient to qualify it as well as North Carolina (which was not involved in the *Ford* case) as a state of permanent residence. Whether its contact with the children—during three

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77. *Ford v. Ford*, 239 S.C. 305, 307-08, 123 S.E.2d 33, 34 (1961).

months in the summer and several weeks at Christmas—was substantial enough to establish a claim of permanent residence, is a close question; in any event, its interest was clearly stronger than that of Virginia, which had no continuing contact with the children whatsoever.

The suggested “balancing of interests” test would liberate a state with a substantial interest in the child from the literal restriction of the full faith and credit clause, and permit it to apply its own policies to guide the development of that child. At the same time a state with no real interest in the continuing welfare of the child is precluded from disturbing a “resident state’s” custody decree, whether by denying full faith and credit or by a Procrustean use of the change in circumstances rule. This use of the full faith and credit clause protects child custody decrees from modifications based on frivolous assertions of state interests, while permitting legitimate state interests to be asserted. The proposed test adjusts the competing claims of states without requiring subterfuge and misuse of doctrine to set aside foreign custody decrees. The test, moreover, would not cast the Court in a dubious role,<sup>78</sup> but would permit it to fulfill in a meaningful and constructive way its accepted function of mediating between conflicting state interests.

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78. See text at notes 29-43 *supra*.