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# PAWNS OR PEOPLE? PROTECTING THE BEST INTERESTS OF CHILDREN IN INTERSTATE CUSTODY DISPUTES

## I. INTRODUCTION

Annually, more than one million children are the subject of custody disputes.<sup>1</sup> It is well-settled that the child's welfare is the law's paramount consideration in custody disputes between the child's biological parents.<sup>2</sup> In these cases the child is the focal point. The courts will consider a wide range of information and have broad discretion in fashioning a custody decree that is in the child's best interests.<sup>3</sup> This method of deciding custody disputes has become known as the "best interests test."<sup>4</sup> This test ensures that the child's interests in securing a stable and productive home and future are met.<sup>5</sup> In essence the needs and interests of the child are placed above those of the parents competing for custody.<sup>6</sup>

These needs and interests are not always met, however, where one of the parties to the dispute is not a natural parent—a prospective adoptive parent, for instance. In these cases most states presumptively award custody to the natural parent.<sup>7</sup> This standard has become known as the "natural parent preference."<sup>8</sup> If strictly applied, this

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1. In 1982, 1,108,000 children under the age of 18 were involved in divorce proceedings in 31 states. 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 476 n.2 (2d ed. 1987). The number of those that were the subject of custody disputes is likely to be much higher because custody actions result not only from divorce, but also from adoption proceedings, neglect and dependency cases, custody disputes between unmarried parents, and occasionally upon the death of natural parents. *Id.* at 476. Additionally, divorce has become a "growth industry." Garry Abrams, *Growth Industry of Divorce Fuels the American Economy*, L.A. TIMES, Nov. 16, 1984, § 5, at 1. During the 1980s custody disputes became a prominent aspect of divorce proceedings as more fathers began seeking custody and more mothers were willing to relinquish custody. Debra L. Wallace, *When the Child Becomes the Prize—That Child Needs a Lawyer*, BARRISTER, Spring 1982, at 16.

2. CLARK, *supra* note 1, at 527.

3. See *infra* note 30 and accompanying text.

4. See Janet Leach Richards, *The Natural Parent Preference Versus Third Parties: Expanding the Definition of Parent*, 16 NOVA L. REV. 733, 734 (1992).

5. Jennifer E. Horne, Note, *The Brady Bunch and Other Fictions: How Courts Decide Child Custody Disputes Involving Remarried Parents*, 45 STAN. L. REV. 2073, 2076 (1993) (stating "judges will ensure that children are in the best possible home").

6. Richards, *supra* note 4, at 734.

7. *Id.*

8. *Id.*

usually results in courts automatically awarding custody to the natural parent—a result that is not necessarily in the child's best interests.<sup>9</sup> Application of this standard varies from state to state.<sup>10</sup>

As this Comment will show, state laws differ as to how and when courts should apply the best interests test. For instance, Illinois applies the best interests test to all custody disputes and the natural parent preference is merely one factor the courts consider in determining the child's best interests.<sup>11</sup> Other states such as New York, Wisconsin, and Iowa apply the best interests test only if the natural parent's rights are legally terminated—by a showing of abandonment or unfitness, for instance.<sup>12</sup> Furthermore, the best interests test depends on the subjective beliefs of judges or court-appointed psychologists.<sup>13</sup> Under this standard states have varying perceptions of what is best for a child and often reach inconsistent results.<sup>14</sup>

These differing approaches to resolving custody disputes create some alarming problems. First and foremost, many children are being denied the opportunity to enjoy the stable and productive homelife that they deserve. Second, inconsistent application of the best interests test leads to interstate conflicts over child custody that give rise to problems such as parental kidnapping<sup>15</sup> and prolonged custody battles. These conflicts often result in states issuing conflicting custody decrees.<sup>16</sup>

The solution to this dilemma is twofold. First, we need to establish a national, uniform method of determining all child custody cases.

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9. *Id.*

10. Compare *In re* B.G.C., 496 N.W.2d 239, 245 (Iowa 1992) (stating best interests of child are not at issue unless natural parent's rights have been legally terminated) with *Rose v. Potts*, 577 N.E.2d 811, 814 (Ill. App. Ct. 1991) (holding court may award custody to nonparent without showing natural parent is unfit if doing so is in best interests of child).

11. *Rose*, 577 N.E.2d at 814.

12. E.g., *In re* B.G.C., 496 N.W.2d at 245; *Alfredo S. v. Nassau County Dep't of Social Servs.*, 568 N.Y.S.2d 123, 124-25 (N.Y. App. Div. 1991); Note, *Child Custody*, 23 J. FAM. L. 442 (1984-1985) (citing *Barstad v. Frazier*, 348 N.W.2d 479 (Wis. 1984)).

13. *Horne*, *supra* note 5, at 2076.

14. See Anne B. Goldstein, *The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnaping Prevention Act*, 25 U.C. DAVIS L. REV. 845, 856 n.31 (1992).

15. Parental kidnapping is a situation where a parent who is unhappy with a custody order will take the child from the custodial parent and flee to a more sympathetic jurisdiction. See generally *id.* at 847-67 (discussing causes of parental kidnapping and defining "interstate child").

16. See, e.g., *Esser v. Roach*, 829 F. Supp. 171 (E.D. Va. 1993); *P.C. v. C.C. (In re A.E.H.)*, 468 N.W.2d 190 (Wis.), *cert. denied*, 112 S. Ct. 338 (1991).

Second, that uniform standard must establish that the needs and interests of the child are paramount.

Part II of this Comment explains the development of the best interests test and analyzes the laws governing interstate custody disputes. Part III discusses different ways to achieve a uniform application of the best interests test under current custody laws. Part IV argues that children have a constitutional interest in their own upbringing, and this right underlies the need for uniform application of a best interests test whenever a child's placement is at issue. Finally, Part V offers possible solutions for the future that will protect the best interests of children by establishing that their needs and interests are paramount.

## II. CURRENT LAW

### A. *The Best Interests Test and Its Application*

The method by which courts have resolved custody disputes has changed dramatically through the years as child custody law has evolved from gender-based presumptions into today's best interests of the child standard.<sup>17</sup> These changes reflect a shift in attitude—the law no longer views children as property but now sees them as individual beings with their own interests.<sup>18</sup>

During the early nineteenth century, courts recognized a rebuttable presumption that fathers had an absolute right to custody of their children unless they were found to be unfit as parents.<sup>19</sup> This paternal presumption started to give way in the 1840s as courts began to recognize that the child's welfare was the "paramount consideration" in custody disputes.<sup>20</sup> At the same time, state lawmakers began passing legislation that gave courts discretion in custody matters, removed gender presumptions, and instructed courts to consider only the welfare of the child.<sup>21</sup>

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17. See generally *Ex parte Devine*, 398 So. 2d 686, 688-95 (Ala. 1981) (discussing common-law development of child custody).

18. Horne, *supra* note 5, at 2078.

19. See Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, in *LAW, SOCIETY, AND DOMESTIC RELATIONS: MAJOR HISTORICAL INTERPRETATIONS* 651, 675-76 (Kermit L. Hall ed., 1987); see also *Devine*, 398 So. 2d at 688-89 (stating father had "absolute" right to custody of his children and that mother "was without any rights to the care and custody of her minor children").

20. Zainaldin, *supra* note 19, at 682-83.

21. *Id.* at 683.

Courts in the mid-nineteenth century formulated new perceptions and new gender-based presumptions regarding custody based on child welfare and natural law.<sup>22</sup> These included a "tender years" or "maternal" presumption that assumed the mother was better equipped to care for young children due to their special needs.<sup>23</sup> Also, courts presumed that older boys should be in the custody of their father, who was considered better suited to supervise boys' development and education.<sup>24</sup> At the same time, courts also began to recognize children's emotional attachments and wishes concerning their placement.<sup>25</sup>

During the twentieth century, most states did away with all gender-based presumptions.<sup>26</sup> Today it is well-settled that in divorce custody proceedings or other custody disputes involving a child's natural parents, the best interests of the child is the law's paramount consideration.<sup>27</sup> Many states have enacted statutes requiring courts to consider the best interests of the child in divorce custody proceedings.<sup>28</sup> Other states follow this approach as a matter of common law.<sup>29</sup> The best interests test, however, is open-ended and, even where criteria are statutorily established, the judge has discretion to consider a wide range of facts and make a subjective assessment of the child's best interests.<sup>30</sup> Additionally, many jurisdictions only apply the best interests test to custody disputes between the natural parents. They do not apply the test to disputes between a natural parent and a third party

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22. *Id.* at 685.

23. *Id.* at 685-86. "Tender age" was defined as infancy through the eleventh or twelfth birthday. *Id.* at 685 n.151.

24. *Id.* at 686.

25. *Id.* at 686-87.

26. However, at least two states still appear to apply the tender years doctrine. Linda D. Elrod, *Summary of the Year in Family Law*, 27 *FAM. L.Q.* 485, 502 (1994) (citing *Wheeler v. Gill*, 413 S.E.2d 860 (S.C. Ct. App. 1992) and *Malone v. Malone*, 842 S.W.2d 621, 623 (Tenn. Ct. App. 1992)).

27. *See, e.g., Rester v. Manuel*, 619 So. 2d 655, 658 (La. Ct. App. 1993); *Brauch v. Shaw*, 432 A.2d 1, 5 (N.H. 1981); *Hopkins v. Hopkins*, 853 S.W.2d 134 (Tex. Ct. App. 1993); *State ex rel. Kiger v. Hancock*, 168 S.E.2d 798, 799 (W. Va. 1969); 2 *CLARK, supra* note 1, at 479.

28. *See, e.g., CAL. FAM. CODE* §§ 3021, 3040 (West 1994); *ILL. ANN. STAT.* ch. 750, para. 5/602 (Smith-Hurd Supp. 1994); *LA. CIV. CODE ANN.* art. 131 (West Supp. 1994); *MONT. CODE ANN.* § 40-4-212(2) (1993); *TEX. FAM. CODE ANN.* § 14.07 (West 1986 & Supp. 1994).

29. *See, e.g., In re Marriage of Urban*, 359 N.W.2d 420, 424 (Iowa 1984); *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 1993); *S.M. v. S.J.*, 363 A.2d 353, 355 (N.J. Super. Ct. Ch. Div. 1976); *Finlay v. Finlay*, 148 N.E. 624, 626 (N.Y. 1925); *Commonwealth ex rel. Robinson v. Robinson*, 478 A.2d 800, 804 (Pa. 1984).

30. For example, Uniform Marriage and Divorce Act § 402 provides that:

absent a showing that the natural parent is unfit or has abandoned the child.<sup>31</sup>

Courts applying the natural parent preference assume that placing the child with its natural parents is in the child's best interests.<sup>32</sup> This result, however, often is not in the best interests of the child.<sup>33</sup> For instance, the presumption mandates that many children must be removed from stable, loving environments with third parties to be

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The court shall determine custody in accordance with the best interest of the child. The court shall consider all relevant factors including:

- (1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school, and community; and
- (5) the mental and physical health of all individuals involved.

The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

UNIF. MARRIAGE AND DIVORCE ACT § 402, 9A U.L.A. 147, 561 (1988).

31. See, e.g., *Stamps v. Rawlins*, 761 S.W.2d 933, 935 (Ark. 1988) (“[O]ur case law specifically establishes a preference for natural parents in custody matters, and provides that the preference must prevail unless it is established that the natural parent is unfit.”); *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992) (stating adoptive parent must show natural parent's rights have been legally terminated before court will consider best interests of child); *Alfredo S. v. Nassau County Dep't of Social Servs.*, 568 N.Y.S.2d 123, 124-25 (N.Y. App. Div. 1991) (holding question of child's best interests does not arise without threshold showing of abandonment or unfitness). *But see* *Rose v. Potts*, 577 N.E.2d 811, 813-14 (Ill. App. Ct. 1991) (holding court may award custody to nonparent without showing natural parent is unfit if in best interests of child).

At least one commentator has suggested expanding the natural parent preference to a third party who has acted as a parent toward the child in order to protect the best interests of the child. Richards, *supra* note 4, at 736.

32. Richards, *supra* note 4, at 736.

“This rule is based logically upon the experience of mankind that blood is thicker than water and that a natural parent will normally expend greater effort and sacrifice on behalf of a child than will a stranger or a third party, especially when the going gets rough in times of economic, medical or other difficulty.”

*Id.* (quoting *In re Custody of Hampton*, 5 ADAMS CO. L.J. 84, 91 (Pa. C.P. 1963)); see also Brooke Ashlee Gershon, *Throwing out the Baby with the Bath Water: Adoption of Kelsey S. Raises the Rights of Unwed Fathers Above the Best Interests of the Child*, 28 LOY. L.A. L. REV. 741, 746 (1995) (stating that each jurisdiction applies “‘parental presumption’—that placement of a child with his or her biological parents is generally in the best interests of that child” (quoting John L. Hill, *What Does It Mean to Be a “Parent”? The Claims of Biology as the Basis of Parental Rights*, 66 N.Y.U. L. REV. 353, 364 (1991))). Should courts really make this assumption? See David Van Biema, *Parents Who Kill*, TIME, Nov. 14, 1994, at 50.

33. Richards, *supra* note 4, at 734.

placed in the custody of natural parents with whom these children have had virtually no contact.<sup>34</sup>

Another shortcoming in the natural parent preference lies in its name. Who is the "natural" parent? Medical advances such as surrogate motherhood make this distinction unclear.<sup>35</sup> Such technological breakthroughs pose new problems in child custody law by making it increasingly difficult to define a natural parent.<sup>36</sup> Who will the presumption favor in these cases?

In sum the best justification for the natural parent preference is that it fosters judicial economy, predictability, and consistency.<sup>37</sup> Unfortunately, these interests are not always consistent with those of the child.<sup>38</sup>

As this Comment has discussed, custody law varies from state to state. Differing policies have resulted in conflicts among the states as to the applicability of the best interests test and the weight to be afforded children's best interests.

### B. Laws Governing Interstate Custody Disputes

Currently there are two laws governing interstate custody disputes, the Uniform Child Custody Jurisdiction Act (UCCJA)<sup>39</sup> and the Parental Kidnaping Prevention Act (PKPA).<sup>40</sup> The PKPA is a fed-

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34. *Id.*; see *infra* notes 101, 121 and accompanying text; see also Gershon, *supra* note 32, at 746 (stating that when child is denied opportunity to develop close bonds early in life, child will have difficulty forming close relationships later in life).

35. A surrogate arrangement is an agreement in which a woman—the surrogate—agrees by contract to be impregnated by artificial insemination and to carry the child to term. Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 2 (1988). She then turns the child over to the other contracting party, the biological father for instance, and surrenders all of her parental rights. *Id.*

36. See, e.g., *Johnson v. Calvert*, 5 Cal. 4th 84, 851 P.2d 776, 19 Cal. Rptr. 2d 494 (1993). In *Calvert* a surrogate mother was impregnated by an embryo created by the sperm and egg of a married couple. *Id.* at 87, 851 P.2d at 778, 19 Cal. Rptr. 2d at 496. Prior to the birth of the child, the surrogate refused to relinquish custody. *Id.* at 88, 851 P.2d at 778, 19 Cal. Rptr. 2d at 496. The couple and the surrogate each filed separate actions to be declared the legal parents of the unborn child. *Id.* Under California law all three persons are the child's natural parents—the surrogate because she gave birth to the child and the couple because they are genetically related to the child. *Id.* at 89-90, 851 P.2d at 779-80, 19 Cal. Rptr. 2d at 497-98. The court ruled that the surrogate was not the legal mother based on the intentions manifested in the surrogacy agreement. *Id.* at 93, 851 P.2d at 782, 19 Cal. Rptr. 2d at 500. See generally Vicki C. Jackson, *Baby M and the Question of Parenthood*, 76 GEO. L.J. 1811 (1988) (discussing which party is parent in surrogacy arrangements).

37. Richards, *supra* note 4, at 760.

38. *Id.*

39. 9 U.L.A. pt. 1, at 115 (1988).

40. Pub. L. No. 96-611, §§ 6-10, 94 Stat. 3566, 3568-3574 (1980) (codified at 28 U.S.C. § 1738A (1988) and in scattered sections of 42 U.S.C.).

eral act and the UCCJA is a uniform act that has been adopted by all fifty states.<sup>41</sup> These acts set guidelines that states must meet in order to assume jurisdiction in child custody cases.<sup>42</sup> They also require states to recognize and enforce prior custody orders issued by other states that had properly exercised jurisdiction under the acts.<sup>43</sup> However, the acts only address jurisdiction and enforcement of custody orders. They do not require a state that meets the jurisdictional requirements to decide custody matters in the best interests of the child.<sup>44</sup> This is ironic, considering that a key motivating factor in the implementation of this legislation was the welfare and interests of the children who are caught in the middle of these disputes.<sup>45</sup>

### 1. UCCJA

In 1968 the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the UCCJA in response to the problems associated with interstate custody disputes.<sup>46</sup> It has since been adopted by all fifty states and the District of Columbia.<sup>47</sup> The UCCJA was drafted to solidify the prior "quicksand foundation" of interstate custody law that had often led to states issuing conflicting custody decrees.<sup>48</sup> The UCCJA accomplishes this goal by establishing greater certainty concerning which state can exercise jurisdiction over an interstate custody dispute and ensuring that a custody decree issued by one state is entitled to enforcement in another.<sup>49</sup>

The problems surrounding interstate custody disputes arose because custody matters were left to "autonomous state tribunals," each with differing policies regarding jurisdiction and differing substantive rules for adjudicating child custody.<sup>50</sup> This often encouraged parties that were denied custody to take the child, relocate, and relitigate custody cases in different states, where they could seek either a new cus-

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41. 9 U.L.A. pt. 1, at 20, 20-21 (Supp. 1994) (table of jurisdictions adopting UCCJA).

42. 28 U.S.C. § 1738A(c) (1988); UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. pt. 1, at 143-44.

43. 28 U.S.C. § 1738A(a); UNIF. CHILD CUSTODY JURISDICTION ACT § 13, 9 U.L.A. pt. 1, at 276.

44. See *infra* note 111 and accompanying text.

45. See *infra* notes 61-65, 79 and accompanying text.

46. UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. pt. 1, at 116.

47. 9 U.L.A. pt. 1, at 20, 20-21 (Supp. 1994) (table of jurisdictions adopting UCCJA).

48. UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. pt. 1, at 116.

49. *Id.*

50. Goldstein, *supra* note 14, at 853-54.

tody decree or a modification of the prior one.<sup>51</sup> Compounding this problem, child custody orders are not considered "final" judgments because they are subject to modification until the child reaches maturity; thus, custody decrees are not subject to the Full Faith and Credit Clause.<sup>52</sup>

Attempting to bring stability to interstate custody disputes, the UCCJA attacks these problems by establishing guidelines to define which state may exercise jurisdiction over a matter.<sup>53</sup> Also, the UCCJA requires states, except in limited circumstances, to enforce a prior decree issued by another state and to refrain from making its own custody determination.<sup>54</sup>

The UCCJA establishes four grounds upon which a state may assume jurisdiction to make an initial custody determination: (1) the forum is the child's "home" state; (2) the child and at least one contestant have a "significant connection" with the forum; (3) the child is physically present in the forum and an emergency requires the court to make a custody determination; or (4) no other state has jurisdiction under the UCCJA.<sup>55</sup> Since a state must satisfy only one of the four requirements to assume jurisdiction, it is possible for more than one state to meet the UCCJA's requirements at the same time. Therefore, two states may have concurrent jurisdiction over the same matter.<sup>56</sup>

To minimize these occurrences, section six provides that a state that would otherwise have jurisdiction over a matter must abstain from exercising its jurisdiction if there is a proceeding pending in another state.<sup>57</sup> Also, the UCCJA allows a state to modify a final decree issued by another state only where: (1) it appears that the court that rendered the initial decree no longer has jurisdiction or has declined

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51. *Id.* at 847.

52. The Full Faith and Credit Clause states: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1. Since child custody orders are not final judicial determinations, the Constitution does not require that states recognize and enforce such rulings made by sister states. See Scott T. Dickens, Note, *The Parental Kidnaping Prevention Act: Application and Interpretation*, 23 J. FAM. L. 419, 419-20 (1984-1985); see also *Bennett v. Bennett*, 595 F. Supp. 366, 367 (D.D.C. 1984) ("The Supreme Court has more than once declined to require that the full faith and credit clause of the United States Constitution be applied to child custody decrees, which are by nature ever-modifiable.").

53. UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. pt. 1, at 143-44.

54. *Id.* §§ 13, 14, 9 U.L.A. pt. 1, at 276, 292.

55. *Id.* § 3, 9 U.L.A. pt. 1, at 143-44.

56. See Goldstein, *supra* note 14, at 914 ("[E]ven after the UCCJA was widely adopted, in every contested custody case the possibility that a new forum would both take jurisdiction and reach a more favorable result remained clearly present.").

57. UNIF. CHILD CUSTODY JURISDICTION ACT § 6, 9 U.L.A. pt. 1, at 219-20.

to exercise its jurisdiction; and (2) the modifying state has jurisdiction under the Act.<sup>58</sup> Additionally, since the enactment of the PKPA, some courts and commentators argue that concurrent jurisdiction is not possible because the PKPA preempts the UCCJA.<sup>59</sup> Under this theory, the child's "home state" has exclusive jurisdiction.<sup>60</sup>

The UCCJA's main focus is the welfare of the children who are the victims of interstate custody battles.<sup>61</sup> The UCCJA seeks to provide "stability of environment and continuity of affection" for the child.<sup>62</sup> It creates great flexibility in determining which state will have jurisdiction in order to ensure that the best interests of the child are protected.<sup>63</sup> Additionally, courts have held that the paramount concern underlying the UCCJA is the welfare and interests of the child.<sup>64</sup> Thus, the state that can best decide the case in the interests of the child should assume jurisdiction.<sup>65</sup>

## 2. PKPA

The PKPA, enacted in 1980, was Congress's response to the problems of interstate custody disputes.<sup>66</sup> States that had not yet adopted the UCCJA were not bound by its provisions, and many experts felt that even those states that did enact the UCCJA were not adequately following its guidelines.<sup>67</sup> The PKPA was enacted to force states that had not adopted the UCCJA to reach the same results as

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58. *Id.* § 14, 9 U.L.A. pt. 1, at 292.

59. *Atkins v. Atkins*, 823 S.W.2d 816 (Ark. 1992); *Wallace v. Superior Court*, 15 Cal. App. 4th 1182, 19 Cal. Rptr. 2d 157 (1993); Roger M. Baron, *Federal Preemption in the Resolution of Child Custody Jurisdiction Disputes*, 45 ARK. L. REV. 885, 891-92 (1993). *But see* *Esser v. Roach*, 829 F. Supp. 171, 173 (E.D. Va. 1993) (both Virginia and North Carolina courts found they had jurisdiction over same custody dispute and issued conflicting decrees).

60. *See Wallace*, 15 Cal. App. 4th at 1186, 19 Cal. Rptr. 2d at 160.

61. UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. pt. 1, at 116.

62. *Id.*

63. Henry H. Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297, 302 (1981).

64. *E.g.*, *Hopson v. Hopson*, 110 Cal. App. 3d 884, 895, 168 Cal. Rptr. 345, 353 (1980); *Marlow v. Marlow*, 471 N.Y.S.2d 201, 205 (N.Y. Sup. Ct. 1983).

65. *E.g.*, *Brown v. Brown*, 663 S.W.2d 190, 191 (Ark. Ct. App. 1984); *Counts v. Bracken*, 494 So. 2d 1275, 1276 (La. Ct. App. 1986); *Green v. Green*, 276 N.W.2d 472, 475-76 (Mich. Ct. App. 1978); *Brauch v. Shaw*, 432 A.2d 1, 6 (N.H. 1981).

66. *See* 28 U.S.C. § 1738A note (Congressional Findings and Declaration of Purpose (quoting Pub. L. No. 96-611, § 7(a), 94 Stat. 3566, 3568-69 (1980))).

67. *See Goldstein, supra* note 14, at 887-914 (explaining that courts continue to exercise concurrent jurisdiction under UCCJA).

those states that had and to "plug" what the drafters of the PKPA saw as "loopholes" in the UCCJA.<sup>68</sup>

The PKPA applies the Full Faith and Credit Clause<sup>69</sup> to custody decrees<sup>70</sup> and contains jurisdictional guidelines similar to those found in the UCCJA.<sup>71</sup> The major difference between the PKPA and the UCCJA lies in their differing approaches to the modification of custody decrees.

The PKPA provides that a state can modify a decree issued by another state only where the state that made the initial decree no longer has jurisdiction or has declined to exercise its jurisdiction.<sup>72</sup> In all other cases, the PKPA establishes continuing jurisdiction in the initial state;<sup>73</sup> once a state makes an initial custody determination, that state alone has continuing jurisdiction to modify the order. Jurisdiction continues as long as that state both has jurisdiction under its own laws and is the residence of the child or any contestant.<sup>74</sup> Thus, under the PKPA a state can modify its prior decree even if it is no longer the child's home state or does not otherwise have a significant connection

68. *Id.* at 850-51. Courts have interpreted the UCCJA as permitting concurrent jurisdiction. *Id.* at 914. This interpretation has continued to encourage parental kidnapping. *Id.*

69. *See supra* note 52.

70. 28 U.S.C. § 1738A is titled "Full faith and credit given to child custody determinations."

71. The PKPA states:

A child custody determination made by a court of a State is consistent with the provisions of this section only if—

- (1) such court has jurisdiction under the law of such state; and
- (2) one of the following conditions is met:

(A) such State (i) is the home State of the child . . . , or (ii) had been the child's home State within six months before the date of the commencement of the proceeding . . . ;

(B)(i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) . . . the child and at least one contestant, have a significant connection with such State . . . , and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse;

(D)(i) it appears that no other State would have jurisdiction . . . , or another State has declined to exercise jurisdiction . . . , and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction . . . .

28 U.S.C. § 1738A(c).

72. *Id.* § 1738A(f).

73. *Id.* § 1738A(d).

74. *Id.*

to the child as long as that state still has jurisdiction under its own laws and is the residence of "any contestant."<sup>75</sup>

By contrast, the UCCJA compels a state to apply the same jurisdictional test to modification proceedings as it would to an initial custody determination.<sup>76</sup> This requires any state, including the state that issued the initial decree, to have "home state," "significant connection," or "emergency" jurisdiction to modify a decree unless no other state has jurisdiction and it is in the child's best interests to do so.<sup>77</sup> The UCCJA does not recognize strict continuing jurisdiction in the home state. Thus, the UCCJA appears to be more conscious of children's interests than the PKPA. This consciousness is reflected in the UCCJA's greater flexibility, which ensures that the state in the best position to consider the child's interests will have jurisdiction to issue or modify a decree.<sup>78</sup>

Despite the procedural differences between the acts, the best interests of the child was also a key motivating factor behind the enactment of the PKPA.<sup>79</sup> However, neither the PKPA nor the UCCJA requires a state to make custody determinations based on the best interests of the child. They merely set out which state will have jurisdiction when an interstate dispute arises.

### 3. Applying the PKPA and UCCJA to interstate custody disputes

While an interest in safeguarding the welfare of children inspired both acts, the PKPA and UCCJA only address matters of jurisdiction and enforcement in interstate custody disputes.<sup>80</sup> They do not require states to recognize a child's best interests in fashioning a custody decree. They only accomplish the reduction of jurisdictional battles and the increase of comity among the states.<sup>81</sup> It may be true that these

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75. *Id.* (emphasis added).

76. UNIF. CHILD CUSTODY JURISDICTION ACT § 3, 9 U.L.A. pt. 1, at 143-44; see also Goldstein, *supra* note 14, at 926 (noting PKPA adopted concept of continuing jurisdiction).

77. UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a), 9 U.L.A. pt. 1, at 143-44.

78. Foster, *supra* note 63, at 302-03.

79. *Parental Kidnaping Prevention Act of 1979: Joint Hearing on S. 105 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary and the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources United States Senate*, 96th Cong., 2d Sess. 2 (1980) [hereinafter *Hearings*] (statement of Sen. Charles McC. Mathias, Jr., acting chairman).

80. See *supra* parts II.B.1-2.

81. "The rampant jurisdictional competition common among state courts before the UCCJA and the PKPA no longer seems to occur." Barbara Ann Atwood, *Child Custody Jurisdiction and Territoriality*, 52 OHIO ST. L.J. 369, 369 (1991). But see Goldstein, *supra* note 14, at 847-50, 939 (arguing acts do not provide consistency or predictability, nor do

laws, to some extent, further the welfare of children by reducing litigation; however, they fall far short of safeguarding the best interests of children. States are still free to give whatever weight they desire to the interests of children and, in many cases, are even free to ignore those interests.<sup>82</sup> While the legislative histories of these laws stress the best interests of the child, this is nothing more than rhetoric.<sup>83</sup>

Consider the testimony of Mr. George F. Doppler<sup>84</sup> during the Senate committee hearings prior to the passage of the PKPA.<sup>85</sup> Questioning the effectiveness of the PKPA, Mr. Doppler reported the following scenario:

A four-year-old boy was held over an open, lit, gas jet by his mother burning off his nose, his eyes so badly burned the lids were gone, his mouth burned to a continuously open position, the whole face a solid mass of scar tissue. A doctor the father took the boy to said he didn't see how the child had kept from breathing so long, for had he, the heat would have burned his lungs and killed him. The judge still awarded custody to the mother along with the other children.<sup>86</sup>

This scenario demonstrates two flaws in the PKPA. First, the PKPA does not require courts to determine cases in the best interests of the child; thus, it would not prevent results such as those described by Mr. Doppler. Second, it would appear that, in a scenario such as this, the child's best interests would be served by the father removing the child to another jurisdiction to relitigate the custody issue—a result that is not allowed under the PKPA.<sup>87</sup>

The PKPA does not protect children's interests. The only way to accomplish this is by forcing courts to determine all custody disputes in the best interests of the child. The PKPA does not address this

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they discourage "self-help" child snatching; cases under UCCJA and PKPA are similar to those that preceded acts).

82. See *infra* notes 104, 111 and accompanying text.

83. See *supra* notes 61-65, 79 and accompanying text.

84. Mr. Doppler was the national coordinator of the National Council of Marriage and Divorce Law Reform and Justice Organizations. *Hearings, supra* note 79, at 87.

85. *Id.* at 92.

86. *Id.* at 94.

87. See 28 U.S.C. § 1738A note (Congressional Findings and Declaration of Purpose (quoting Pub. L. No. 96-611, § 7(c)(6), 94 Stat. 3566, 3569 (1980))) (stating purpose of Act is to deter "unilateral removals of children undertaken to obtain custody").

issue.<sup>88</sup> Was Mr. Doppler right to suggest that the PKPA is merely “‘sweep it under the rug’ type legislation?”<sup>89</sup>

This example demonstrates, as will the cases that follow in this Comment, that the real problems in child custody disputes go beyond the jurisdictional questions and find their roots in deeper substantive issues. Thus, while they do provide fairly definite jurisdictional guidelines, the PKPA and UCCJA are simply a very small step in the right direction.

### C. Problems Under the Current Scheme

Several recent cases involving interstate custody disputes expose the deficiencies in the current scheme of determining child custody.<sup>90</sup> Applying the UCCJA and PKPA, these cases demonstrate the lack of attention children’s best interests are receiving as well as the suffering and emotional instability children endure as a result.

During the summer of 1993, the nation was introduced to the fierce custody battle over the little girl known as “Baby Jessica.”<sup>91</sup> This case arose out of a custody dispute between Jessica’s prospective adoptive parents in Michigan, Roberta and Jan DeBoer, and her natural father in Iowa, Daniel Schmidt.

After Jessica was born on February 8, 1991, her mother, Cara, who was unmarried at the time, decided to give Jessica up for adoption.<sup>92</sup> She named her friend Scott as the father.<sup>93</sup> Both Cara and Scott signed a release of parental rights, and a termination hearing was held.<sup>94</sup> Cara and Scott’s parental rights were terminated and custody of Jessica was granted to the DeBoers, the prospective adoptive parents.<sup>95</sup> The DeBoers then brought Jessica to their home in Michigan.<sup>96</sup>

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88. See *infra* note 111 and accompanying text.

89. *Hearings, supra* note 79, at 94; see also Steven G. Shutter, *Parental Kidnaping Prevention Act—Panacea or Toothless Tiger?*, 55 FLA. B.J. 479, 479 (1981) (stating PKPA was enacted as “a last minute amendment” to bill providing Medicare coverage of pneumococcal vaccine).

90. See, e.g., *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992); *P.C. v. C.C. (In re A.E.H.)*, 468 N.W.2d 190 (Wis.), *cert. denied*, 112 S. Ct. 338 (1991); Eric Harrison, *Her Dream Becomes a Nightmare*, L.A. TIMES, Sept. 21, 1993, at A1.

91. See, e.g., Nancy Gibbs, *In Whose Best Interest?*, TIME, July 19, 1993, at 44.

92. *B.G.C.*, 496 N.W.2d at 240.

93. *Id.* at 241.

94. *Id.*

95. *Id.*

96. *DeBoer v. Schmidt (In re Clausen)*, 502 N.W.2d 649, 652 (Mich.), *stay denied sub nom. DeBoer v. Schmidt*, 114 S. Ct. 1 (1993) (application for stay of enforcement made to

Nine days after the termination hearing, Cara filed a motion to revoke the release of custody.<sup>97</sup> She admitted that she had lied about the identity of Jessica's father and revealed that Daniel Schmidt was the natural father.<sup>98</sup> Schmidt subsequently filed a paternity action in Iowa district court.<sup>99</sup> On December 27, 1991, the district court found that Schmidt was the biological father, that his parental rights had not been properly terminated, and that the DeBoers' petition to adopt Jessica must be denied.<sup>100</sup>

The case was litigated up to the Iowa Supreme Court. During this time—approximately one and one-half years—Jessica lived with the DeBoers in Michigan and never saw her natural father.<sup>101</sup> However, the Iowa Supreme Court affirmed the district court's decision awarding custody to the natural father.<sup>102</sup> The Iowa Supreme Court held that the father's parental rights had not been properly terminated, that the adoption proceedings were "fatally flawed," and that the DeBoers were not entitled to custody.<sup>103</sup>

In making this determination, the court never considered Jessica's best interests.<sup>104</sup> The court even recognized that Daniel Schmidt had a "poor performance record as a parent."<sup>105</sup> He had two other children—a twelve-year-old daughter and a fourteen-year-old son—whom he had "largely failed to support" and had "failed to maintain

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Justice Stevens as Circuit Justice for Sixth Circuit), and stay denied *sub nom.* DeBoer v. Schmidt, 114 S. Ct. 11 (1993) (application for stay made to Justice Blackmun referred to entire Court).

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 652-53. There was evidence that Daniel knew that he was Jessica's father prior to the birth and that he simply did nothing to protect his parental rights prior to the adoption, raising further doubt about the outcome of this case. *B.G.C.*, 496 N.W.2d at 247 (Snell, J., dissenting).

101. See *DeBoer*, 502 N.W.2d at 669 (Levin, J., dissenting).

102. *B.G.C.*, 496 N.W.2d at 241.

103. *Id.* at 244-45.

104. The Iowa district court held that a best interests analysis was not appropriate without a prior showing of abandonment. This was affirmed by the appellate courts. *Id.* at 245.

105. *Id.* Experts argue that the Schmidts have performed well as parents since receiving custody of Jessica. See Michele Ingrassia & Karen Springen, *She's Not Baby Jessica Anymore*, NEWSWEEK, Mar. 21, 1994, at 60. While this is fortunate for Jessica, the Schmidts are arguably the exception, not the norm. Since this case began the Schmidts have been under close public scrutiny and were even portrayed in a network television movie. See, e.g., Chris Willman, *Insta-Drama "Baby Jessica" Cries out for Perspective*, L.A. TIMES, Sept. 25, 1993, at F15. Given these circumstances, it only makes sense that they would make every effort to be good parents. However, other parents are not under such pressures to perform well, so the Schmidts cannot be used to justify application of the natural parent preference in place of the best interests test—the ends do not justify the means.

meaningful contact with.”<sup>106</sup> At the same time, the DeBoers had “provided exemplary care for the child [and] view[ed] themselves as the parents of th[e] child in every respect” and were the only family Jessica had known in her two years of life.<sup>107</sup> The court nevertheless concluded that while the best interests of Jessica was a “very alluring argument,” Jessica’s best interests were not at issue since her father had not legally terminated his parental rights.<sup>108</sup>

The DeBoers then petitioned the Michigan courts for an order enjoining enforcement of the Iowa judgment or, in the alternative, a new custody determination.<sup>109</sup> The Michigan Supreme Court denied their request, holding that under the UCCJA and PKPA it was required to enforce the prior judgment of the Iowa court, even if the Iowa court did not consider the child’s best interests.<sup>110</sup> The Michigan court stated that the UCCJA and PKPA are procedural statutes that do not contain a substantive requirement to apply a best interests test.<sup>111</sup> Thus, the court reasoned, each state is free to fashion its own substantive laws regarding family relations, as long as these laws are within constitutional limits, and another state is not authorized to modify or refuse to enforce the prior order based on a disagreement over substantive policy.<sup>112</sup>

The DeBoers relied primarily on the New Jersey case *E.E.B. v. D.A.*<sup>113</sup> In that case the New Jersey Supreme Court held unanimously that it was authorized under the UCCJA and PKPA to refuse to enforce a prior Ohio custody decree wherein the Ohio court failed to consider the best interests of the child.<sup>114</sup> The court reasoned that the spirit of the two acts is to ensure that the state to decide a custody dispute is “the one best positioned to make the decision based on the best interest of the child.”<sup>115</sup> The court concluded that it was not required to exercise “blind obedience to home state jurisdiction.”<sup>116</sup> Where one state fails to consider the best interests of the child, and

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106. *B.G.C.*, 496 N.W.2d at 245.

107. *Id.*

108. *Id.*

109. *DeBoer*, 502 N.W.2d at 653.

110. *Id.* at 660-61.

111. *Id.*

112. *Id.*

113. 446 A.2d 871 (N.J. 1982).

114. *Id.* at 877.

115. *Id.* at 879. “This result comports with the congressional intent that child custody decisions be made in the state best able to determine the best interest of the child.” *Id.* at 877.

116. *Id.* at 879.

where another state properly has jurisdiction under the acts, the latter state may modify or refuse to enforce the prior decree after making a best interests determination.<sup>117</sup> A majority of the Michigan court, however, specifically rejected this approach.<sup>118</sup>

Justice Levin, dissenting in *DeBoer*, argued that the majority's approach was analogous to that typically found in a case "concerning the ownership, the legal title, to a bale of hay."<sup>119</sup> However, as Justice Levin pointed out, the majority apparently failed to recognize that this was not the usual "A v. B" lawsuit.<sup>120</sup> Rather, this case involved a young child, whose life and welfare was at stake and who, following the court's ruling, would be told that "she is not Jessie, that the DeBoers are not Mommy and Daddy, that her name is Anna Lee Schmidt, and that the Schmidts, whom she has never met, are Mommy and Daddy."<sup>121</sup> But Baby Jessica had rights and interests of her own, separate from those of the named litigants. The failure to conduct a best interests hearing ignored those rights and effectively treated Jessica as a piece of property in which her biological father had a possessory-type interest.<sup>122</sup>

Justice Levin agreed with the New Jersey Supreme Court's opinion that the PKPA does not require a state to enforce a prior custody decree if that decree was entered without a best interests determination.<sup>123</sup> In defending this approach, he wrote:

The superior claim of the child to be heard in this case is grounded not just in law, but in basic human morality. Adults like the Schmidts and the DeBoers make choices in their lives, and society holds them responsible for their choices. When adults are forced to bear the consequences of their choices, however disastrous, at least their character and personality have been fully formed, and that character can provide the foundation for recovery, the will to go on.

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117. *Id.* at 877.

118. *DeBoer*, 502 N.W.2d at 660.

119. *Id.* at 668 (Levin, J., dissenting).

120. *Id.* (Levin, J., dissenting).

121. *Id.* at 669 (Levin, J., dissenting) (citations omitted).

122. *Id.* at 670 (Levin, J., dissenting).

"The parental right doctrine has acquired rigidity from the dubious and amorphous principle that the natural parent has some sort of constitutional 'right' to the custody of his child. This principle comes dangerously close to treating the child in some sense as the property of his parent, an unhappy analogy . . ."

*Id.* (Levin, J., dissenting) (quoting 2 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 532 (2d ed. 1987)).

123. *Id.* at 672 (Levin, J., dissenting).

The character and personality of a child two and one-half years old is just beginning to take shape. To visit the consequences of adult choices upon the child during the formative years of her life . . . is unnecessarily harsh and without legal justification. The PKPA does not require this result.

The PKPA was enacted to protect the child. This [c]ourt, by ignoring obvious issues concerning the welfare of the child and by focusing exclusively on the concerns of competing adults, as if this were a dispute about the vesting of contingent remainders, reduces the PKPA to a robot of legal formality with results that Congress did not intend.<sup>124</sup>

Following the Michigan court's decision, the DeBoers applied to Justice Stevens in his capacity as Circuit Justice for the Sixth Circuit for a stay of enforcement.<sup>125</sup> Justice Stevens denied the application for stay on the grounds that the Court would probably not grant certiorari to hear the DeBoers' claim and, if it did so, it was not likely to reverse the lower courts' decisions.<sup>126</sup> Four days later the DeBoers applied to Justice Blackmun for a stay of enforcement.<sup>127</sup> This application was referred to the entire Court and again denied.<sup>128</sup> In a dissenting opinion, Justice Blackmun, joined by Justice O'Connor, stated:

While I am not sure where the ultimate legalities or equities lie, I am sure that I am not willing to wash my hands of this case at this stage, with the personal vulnerability of the child so much at risk, and with the Supreme Court of New Jersey and the Supreme Court of Michigan in fundamental disagreement over the duty and authority of state courts to consider the best interests of a child when rendering a custody decree.<sup>129</sup>

Thus, there remains a sharp difference of opinion among the courts over both the status of children's rights in custody cases and the question of whether the PKPA and UCCJA authorize a state to mod-

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124. *Id.* at 670-71 (Levin, J., dissenting) (citations omitted).

125. *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 1 (1993).

126. *Id.* "Neither Iowa law, Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit . . ." *Id.* at 2. This opinion reflects the Court's affirmation of the parental rights doctrine, a principle that has received much criticism for its treatment of children as property and not as the individual human beings that they are. See 2 CLARK, *supra* note 1, at 532.

127. *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 11 (1993).

128. *Id.*

129. *Id.* at 11-12.

ify a custody decree of another state if that state did not consider the best interests of the child. This question has been answered "yes" by the New Jersey Supreme Court<sup>130</sup> and "no" by the Michigan Supreme Court.<sup>131</sup> Over the dissent of Justices Blackmun and O'Connor, the United States Supreme Court refused to rule on this issue.<sup>132</sup>

Since the Supreme Court is the only judicial body with the authority to resolve this conflict,<sup>133</sup> the conflict continues. The outcome of any particular case may have completely opposite results depending upon whether the particular state is sympathetic to New Jersey's or Michigan's views regarding the duties of the state as they relate to the best interests of the child. As long as this uncertainty continues, the UCCJA's and PKPA's primary objective—protecting the welfare of children—will not be met.

### III. ACHIEVING UNIFORM APPLICATION OF THE BEST INTERESTS TEST

#### A. *The New Jersey Approach*

One method of ensuring that a child's best interests are considered is the approach taken by the New Jersey Supreme Court in *E.E.B.* and later advocated in Judge Levin's dissent in *DeBoer*.<sup>134</sup> This position received further support in Judge Kennedy's dissenting opinion in the Washington case *In re Marriage of Ieronimakis*.<sup>135</sup>

Judge Kennedy stated that a custody decree not made in the best interests of the child is not a valid custody determination and, where a state fails to recognize these interests, it may be assumed that the state has declined jurisdiction under the UCCJA.<sup>136</sup> If one state determines that another state has declined jurisdiction, then it is appropriate under both the UCCJA and PKPA for the former state to modify the

130. *E.E.B.*, 446 A.2d at 877 ("We hold that Ohio's failure to conduct a best interest hearing constitutes a refusal to exercise jurisdiction under 28 U.S.C.A. § 1738A(f)(2). Under PKPA, therefore, New Jersey is free to modify the Ohio decree.").

131. *DeBoer*, 502 N.W.2d at 660-62.

132. *See DeBoer*, 114 S. Ct. at 11.

133. *DeBoer*, 502 N.W.2d at 672 (Levin, J., dissenting).

134. *See supra* notes 113-17, 123-24 and accompanying text.

135. 831 P.2d 172, 180-96 (Wash. Ct. App. 1992) (Kennedy, J., dissenting).

136. *Id.* at 190 (Kennedy, J., dissenting).

An equally compelling argument can be made that a decree which is not based on the best interest of the child is not a "custody determination." Further, . . . if there will be no "best interest" determination in the home state, that state may be deemed to have declined jurisdiction under the act.

*Id.* (Kennedy, J., dissenting).

prior decree.<sup>137</sup> In an earlier case the Maryland Court of Special Appeals, applying a different analysis, reached the same result. That court held that Maryland could properly exercise "significant connection" jurisdiction over a matter even though Delaware would have "home state" jurisdiction because such action was in the best interests of the child.<sup>138</sup>

These opinions are based on the belief that the main concern of the UCCJA and PKPA is the best interests of the child and that this concern overrides the other purposes of the acts.<sup>139</sup> This echoes the sentiments of Justice Frankfurter, who wrote, long before the PKPA was enacted:

Children have a very special place in life which [the] law should reflect. . . . But the child's welfare in a custody case has such a claim upon the State that its responsibility is obviously not to be foreclosed by a prior adjudication reflecting another State's discharge of its responsibility at another time.<sup>140</sup>

The major problem with the New Jersey approach is that it would, in many cases, encourage parental kidnapping in order to secure a forum that will hear arguments concerning the child's best interests. For instance, the DeBoers could have defied the Michigan and Iowa orders and taken Jessica to New Jersey, where a best interests hearing would occur.<sup>141</sup> Presumably, such a hearing would result in a favorable ruling for them.<sup>142</sup> In order to have that decree enforced and retain custody of Jessica, however, they would most likely be required to remain in New Jersey, as it is doubtful that Michigan would be willing to condone such action by enforcing the New Jersey

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137. This assumes that the state meets the jurisdictional requirements of the acts. 28 U.S.C. § 1738A(f) (1988); UNIF. CHILD CUSTODY JURISDICTION ACT § 14, 9 U.L.A. pt. 1, at 115, 292 (1988).

138. *Etter v. Etter*, 405 A.2d 760, 763 (Md. Ct. Spec. App. 1979); *see also* UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(2), 9 U.L.A. pt. 1, at 143 (stating court may exercise jurisdiction if "it is in the best interest of the child . . . because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State").

139. *See Foster*, *supra* note 63, at 302-03; *Goldstein*, *supra* note 14, at 909; *supra* notes 65, 115 and accompanying text.

140. *May v. Anderson*, 345 U.S. 528, 536 (1953) (Frankfurter, J., concurring).

141. *See E.E.B. v. D.A.*, 446 A.2d 871 (N.J. 1982).

142. New Jersey, unlike Iowa, applies the best interests test to adoption and other proceedings between the natural parents and a third party. *See id.* at 877; *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992).

decree.<sup>143</sup> A similar situation would also exist where all parties lived in the same state and the child's best interests were ignored.

Additionally, there are many cases where the New Jersey approach would be inadequate to address the best interests of the child. For instance, consider the case of Tammy Thomas. Tammy moved to Los Angeles from Mississippi with her two children in 1988 to escape the troubles of a bad marriage.<sup>144</sup> In 1989 Tammy's divorce became final and Tammy was awarded custody of the children.<sup>145</sup> Tammy then became involved in a relationship with Jake Brown, an African-American man who she eventually married.<sup>146</sup>

During the summer of 1990, Tammy sent her children to Meridian, Mississippi, to visit their paternal grandparents.<sup>147</sup> When the grandparents learned about Tammy's new relationship, they filed a custody action in Mississippi court.<sup>148</sup> The court found that it had emergency jurisdiction under the UCCJA<sup>149</sup> and awarded the grandparents temporary custody of the children, holding that it would be mental abuse to subject the children to an interracial lifestyle.<sup>150</sup> Two months later, after Tammy married Jake, the court determined it could make a permanent ruling awarding custody to the grandparents.<sup>151</sup> The Mississippi Supreme Court rejected Tammy's appeal.<sup>152</sup> Tammy has since been able to see the children only on very limited occasions under the direct supervision of the grandparents.<sup>153</sup> At one time Tammy attempted to take the children back to California. She was confronted by their grandmother, who threatened Tammy with a pistol.<sup>154</sup>

Even if California followed the New Jersey approach, and assuming Tammy would be able to file an action based on a best interests

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143. "[E]ach state's courts are sovereign within state boundaries and powerless outside them. Therefore, any state's judgment will have extraterritorial effect only if another independent sovereign gives it that effect." Goldstein, *supra* note 14, at 855.

144. Harrison, *supra* note 90, at A1.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at A20.

149. A state has jurisdiction over a custody matter if "it is necessary in an emergency to protect the child because he has been subjected to or threatened with mistreatment or abuse . . ." UNIF. CHILD CUSTODY JURISDICTION ACT § 3(a)(3)(ii), 9 U.L.A. pt. 1, at 144.

150. Harrison, *supra* note 90, at A20.

151. *Id.*

152. Brown v. Thomas, No. 91-CA-0044, 1992 Miss. LEXIS 437 (Miss. July 22, 1992); Harrison, *supra* note 90, at A21.

153. Harrison, *supra* note 90, at A21.

154. *Id.*

theory, such an action would be futile because she is unable to get the children back to California. A custody decree issued by the California court would not be enforced by the Mississippi authorities.<sup>155</sup>

Tammy's only recourse now appears to be an appeal to the United States Supreme Court based on Mississippi's violation of her right to equal protection under the Fourteenth Amendment.<sup>156</sup> Based on the Court's prior ruling in *Palmore*, it appears Tammy will eventually regain custody of her children. But when? She has already been separated from her children for three years, a very long time in the life of a child.

Another alternative to ensure that the best interests of children are properly considered is to open the federal courts to hear these cases. This would eliminate the incentive to kidnap children to other states by providing an alternate forum within the child's home state to adjudicate the child's interests.

## B. Federal Jurisdiction

### 1. Diversity jurisdiction

Litigants who attempt to adjudicate interstate custody disputes in federal court based on diversity jurisdiction<sup>157</sup> face at least two barriers. First, claimants in these cases would often fail to meet the statutory diversity requirements, such as the amount in controversy requirement.<sup>158</sup> Second, federal courts have routinely declined to exercise diversity jurisdiction in domestic relations cases. This abstention has become known as the "domestic relations exception."<sup>159</sup> Courts have offered several justifications to support this exception.

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155. See *supra* note 143.

156. See *Palmore v. Sidoti*, 466 U.S. 429 (1984). In *Palmore*, the Supreme Court held that denying a mother custody of her children because she is involved in an interracial relationship violates the Equal Protection Clause. *Id.* at 432-34. In Tammy's case, she would be able to appeal to the United States Supreme Court under 28 U.S.C. § 1257 (1988), which grants the Court discretionary authority to hear appeals from state courts that turn on a federal question. Here, based on *Palmore*, Tammy would claim that the Mississippi court's ruling violates the Equal Protection Clause.

157. Federal district courts have original jurisdiction in cases between citizens of different states. 28 U.S.C. § 1332 (1988).

158. The amount in controversy must exceed \$50,000 in order for the federal courts to have diversity jurisdiction over a matter. *Id.* In child custody cases, this requirement would most likely not be met because, in pure custody disputes, there is no "amount" in controversy, and the court could not exercise jurisdiction even if it chose not to invoke the domestic relations exception. See Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824, 1848 (1983).

159. The United States Supreme Court has held that federal courts may not exercise jurisdiction in these cases. *In re Burrus*, 136 U.S. 586, 593-94 (1890). The Court stated,

First, courts have stated that domestic cases are best determined at the local level because they involve matters of special local interest.<sup>160</sup> This argument has received much criticism. For instance, the federal government, as well as the states, has an interest in many domestic relations matters because issues of federal concern often appear in these cases.<sup>161</sup> Also, the presence of a significant state interest in a matter has not precluded the federal courts from hearing claims in other areas of the law.<sup>162</sup>

Second, federal courts fear that hearing domestic relations cases will create a "flood of litigation."<sup>163</sup> However, while domestic relations cases would add to the federal case load, this would be limited by the fact that parties to custody cases are not typically of diverse citizenship. For example, in divorce cases, which comprise a large number of custody actions,<sup>164</sup> the spouses usually reside in the same state and do not usually relocate to separate states.<sup>165</sup>

Federal courts also justify the exception by pointing out that these cases require continuing judicial supervision to reevaluate them in light of changed circumstances.<sup>166</sup> The Supreme Court has recognized, however, that in some cases such continued monitoring is appropriate and within the equity power of the federal courts.<sup>167</sup>

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"[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id.* See generally *Solomon v. Solomon*, 516 F.2d 1018, 1021-24 (3d Cir. 1975) (explaining development of domestic relations exception). For examples of application of the exception, see *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir.), *cert. denied*, 459 U.S. 1014 (1982); *Csibi v. Fustos*, 670 F.2d 134 (9th Cir. 1982).

160. See, e.g., *Csibi*, 670 F.2d at 136-37; *Dickens*, *supra* note 52, at 429-30; *Ullman*, *supra* note 158, at 1846.

161. See, e.g., *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that awarding custody to father because mother engaged in interracial relationship violates Equal Protection Clause); *Kirchberg v. Feenstra*, 450 U.S. 455 (1981) (holding that granting husband unilateral right to dispose of community property violates Equal Protection Clause); *Ullman*, *supra* note 158, at 1846-47.

162. For an example of eminent domain cases where a substantial state interest did not preclude federal courts from exercising jurisdiction see *Ullman*, *supra* note 158, at 1847 n.141.

163. *Id.* at 1847. This concern was also raised in the Senate hearings prior to the passage of the PKPA. See *Hearings*, *supra* note 79, at 104.

164. See *supra* note 1.

165. See *Ullman*, *supra* note 158, at 1847.

166. *Id.* at 1848.

167. "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions . . ." Thus, federal courts retaining jurisdiction in domestic cases would cause no departure from the normal rule of federal equity jurisdiction." *Id.* (quoting *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932)).

Finally, federal courts claim that state courts are more competent in domestic matters than the federal courts; thus, it is not appropriate for federal courts to assume jurisdiction in these matters.<sup>168</sup> However, many federal courts have heard and competently disposed of domestic matters.<sup>169</sup> Furthermore, this argument is "circular" in that federal courts claim the exception because they lack expertise, but the only way to obtain expertise is to gain experience in handling these cases.<sup>170</sup>

In sum, the justifications behind the domestic relations exception seem shaky at best. The exception is a judicially created doctrine that "goes against the basic purpose that underlies the grant of federal diversity jurisdiction—assuring that nonresident litigants have their disputes adjudicated free from local bias."<sup>171</sup> Local bias can have a significant impact in child custody cases.<sup>172</sup> Instead of finding excuses to abstain from exercising jurisdiction, federal courts should assume their responsibility in these matters.

Unfortunately, if a litigant gets into federal court based on diversity jurisdiction, the *Erie* doctrine provides that the federal court must apply state substantive law.<sup>173</sup> Under this doctrine, whether or not a best interests determination is made depends upon the state law and, as this Comment has shown, there are often situations where state laws do not call for a best interests determination.<sup>174</sup>

## 2. Federal question jurisdiction

After the PKPA was enacted, interstate custody suits were brought in federal courts based on federal question jurisdiction.<sup>175</sup>

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168. *Csibi*, 670 F.2d at 137; Michael Finch & Jerome Kasriel, *Federal Court Correction of State Court Error: The Singular Case on Interstate Custody Disputes*, 48 OHIO ST. L.J. 927, 946-47 (1987); Ullman, *supra* note 158, at 1849.

169. For example, the Third Circuit routinely hears domestic cases appealed from the Virgin Islands and has not had difficulty in fulfilling this role. *See, e.g.*, *Francois v. Francois*, 599 F.2d 1286 (3d Cir. 1979), *cert. denied*, 444 U.S. 1021 (1980).

170. *See* Ullman, *supra* note 158, at 1849.

171. *Id.* at 1843.

172. *See, e.g.*, *Harrison*, *supra* note 90, at A1; *see also* Ullman, *supra* note 158, at 1843 (discussing fear of local bias in domestic cases).

173. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

174. *See supra* note 31 and accompanying text.

175. Federal district courts have original jurisdiction in all actions "arising under" federal law. 28 U.S.C. § 1331 (1988). Several courts concluded that federal courts had jurisdiction "to resolve inconsistent state court assertions of jurisdiction" under the PKPA. *Rogers v. Platt*, 641 F. Supp. 381, 384 (D.D.C. 1986), *rev'd*, 814 F.2d 683 (D.C. Cir. 1987); *see, e.g.*, *DiRuggiero v. Rodgers*, 743 F.2d 1009 (3d Cir. 1984); *Flood v. Braaten*, 727 F.2d 303 (3d Cir. 1984).

This door to federal court was closed, however, when the United States Supreme Court held, in *Thompson v. Thompson*,<sup>176</sup> that the PKPA does not create a federal cause of action to determine the validity of conflicting state custody decrees.<sup>177</sup>

In 1978 Susan and David Thompson filed for divorce in California and were subsequently awarded joint custody of their son, Matthew.<sup>178</sup> Later Susan decided to move to Louisiana to take a job, and the California court modified the decree, granting Susan temporary custody pending the submission of a custody report by a court investigator.<sup>179</sup> In 1980 Susan and Matthew moved to Louisiana, and Susan filed a custody petition in Louisiana state court.<sup>180</sup> The Louisiana court awarded Susan sole custody of Matthew in 1981.<sup>181</sup> After reviewing the investigator's report two months later, the California court awarded sole custody of Matthew to David.<sup>182</sup> David filed suit in the District Court for the Central District of California seeking an order declaring the Louisiana decree invalid and the California decree valid, and enjoining enforcement of the Louisiana decree.<sup>183</sup> The District Court dismissed the complaint for lack of jurisdiction and the Ninth Circuit Court of Appeals affirmed.<sup>184</sup>

Based on the legislative history of the PKPA, the Supreme Court concluded that Congress intended to extend the Full Faith and Credit Clause to custody decrees and this itself does not give rise to an implied federal cause of action.<sup>185</sup> The Court further held that Congress did not intend for the federal courts to play an enforcement role regarding conflicting state custody decrees and recognized that state courts regularly and properly enforce the Full Faith and Credit Clause themselves, without federal supervision.<sup>186</sup> The Court concluded that it would not be proper under the PKPA for a federal court to review David's claim before the Louisiana state appellate courts had an opportunity to review the Louisiana judgment.<sup>187</sup>

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176. 484 U.S. 174 (1988).

177. *Id.* at 187.

178. *Id.* at 177-78.

179. *Id.* at 178.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 182.

186. *Id.* at 183-84.

187. *Id.*

The Supreme Court's analysis does nothing to assure that the underlying motivation behind the PKPA will ever receive any attention. Specifically, the central reasons for the adoption of the PKPA were to protect the interests of children and to deter parental kidnapping.<sup>188</sup> The Supreme Court's ruling effectively renders the PKPA useless because, following this decision, state compliance with the PKPA is purely optional, leaving litigants who fall subject to conflicting decrees with no mode of enforcing the proper decree.<sup>189</sup> While Congress has made at least a limited attempt to protect the interests of children by enacting the PKPA, the Supreme Court has effectively turned these efforts into "a toothless declaration of unenforceable platitudes."<sup>190</sup>

The *Thompson* decision does not, however, bar any federal review of a claim arising under the PKPA. If there is still a jurisdictional deadlock between two states after a litigant has appealed through the highest state court, the litigant may ultimately seek review in the United States Supreme Court to resolve the federal question raised under the PKPA.<sup>191</sup> There are at least three key problems, however, with limiting federal review to those cases appealed to the Supreme Court under 28 U.S.C. § 1257.

First, it is very time consuming for a litigant to appeal up through the state courts to the United States Supreme Court.<sup>192</sup> These delays cause egregious harm to those involved in cases concerning child custody. Three years or more is a very long time in the life of a child. Not only does a young child undergo drastic physiological changes during that time,<sup>193</sup> but it has also been found that strong emotional and psychological attachments develop within a child in a very short

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188. 28 U.S.C. § 1738A note (1988) (Congressional Findings and Declaration of Purpose (quoting Pub. L. No. 96-611, § 7(c), 94 Stat. 3566, 3569 (1980))); see *infra* note 321 and accompanying text.

189. "The majority's interpretation of the PKPA would convert an act of Congress into barren rhetoric." *Thompson v. Thompson*, 798 F.2d 1547, 1560 (9th Cir. 1986) (Alarcon, J., dissenting), *aff'd*, 484 U.S. 174 (1988).

190. *Id.* at 1562 (Alarcon, J., dissenting).

191. The United States Supreme Court has discretionary authority to review decisions from a state's highest court turning on a federal issue. 28 U.S.C. § 1257 (1988). "Litigants who have exhausted their state remedies could appeal directly to the United States Supreme Court from the state supreme court that they contend has violated § 1738A." *Flood*, 727 F.2d at 312.

192. "[A]ppellate review is often too slow to be meaningful . . ." Horne, *supra* note 5, at 2075. For example, Baby Jessica's case spent approximately two years in the state courts before the application for certiorari was made in the United States Supreme Court. See *supra* notes 101, 109 and accompanying text.

193. See, e.g., PENELOPE LEACH, *YOUR BABY & CHILD: FROM BIRTH TO AGE FIVE* (1989) (explaining chronological development children undergo from birth to age five).

period of time.<sup>194</sup> Also, there can be little doubt regarding the importance of a stable environment within the family. Prolonged litigation concerning child custody, an issue that goes to the core of family life and parent-child relations, can cause nothing but uncertainty and apprehension regarding the status of the family unit. Therefore, it is within the best interests of everyone involved, especially the child, to have custody matters resolved as expeditiously as possible.<sup>195</sup>

Second, appeals can be quite costly.<sup>196</sup> Aggrieved parties may never exhaust their state remedies and reach the federal courts simply because they cannot afford to pursue their claim. Finally, even if a party does appeal through the state system and a jurisdictional conflict or other unresolved federal issue remains, there is no guarantee that the United States Supreme Court will hear the case because Supreme Court review is discretionary.<sup>197</sup>

However, even if *Thompson* were overturned, the PKPA does not address modification of custody decrees or other substantive issues in determining custody.<sup>198</sup> The PKPA only addresses jurisdiction and enforcement of decrees that are made consistent with its provisions and does not require a court to consider the best interests of the child in issuing its decree.<sup>199</sup> Thus, if a decree were made in accord-

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194. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 40-41 (1979) (stating adult who cares for needs of child under two years old "quickly" becomes potential psychological parent). Forcing a child to break such ties to early relationships can disrupt the child's ability to form close relationships in the future. Gershon, *supra* note 32, at 746. Any replacement parent will not likely be able to heal completely the child's emotional scar from losing a prior parent figure. GOLDSTEIN ET AL., *supra*, at 41.

195. The harm done to children by these experiences can hardly be overestimated. It does not require an expert in the behavioral sciences to know that a child, especially during his early years and the years of growth, needs security and stability of environment and a continuity of affection. A child . . . whose personal attachments when beginning to form are cruelly disrupted, may well be crippled for life . . . .

UNIF. CHILD CUSTODY JURISDICTION ACT prefatory note, 9 U.L.A. pt. 1, at 116.

196. Horne, *supra* note 5, at 2076.

197. The *Flood* court recognized this problem and suggested that this approach is impractical given the limited time and resources of the modern Supreme Court. *Flood*, 727 F.2d at 312.

198. "[C]onspicuously absent from this comprehensive enactment is any provision creating or recognizing a direct role for the federal courts in determining child custody." Joan M. Krauskopf, *Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards*, 45 OHIO ST. L.J. 429, 448 (1984) (quoting *Bennett v. Bennett*, 682 F.2d 1039, 1043 (D.C. Cir. 1982) (emphasis added)).

199. See 28 U.S.C. § 1738A; *supra* note 111 and accompanying text.

ance with the PKPA's procedural requirements, then it is entitled to enforcement "without regard to the merits."<sup>200</sup>

While federal jurisdiction would not presently guarantee that a child's best interests are considered, there would be some substantial benefit to having federal courts hear these claims. Namely, this would provide a more expeditious resolution of jurisdictional deadlock between states by allowing federal courts to "referee" jurisdictional disputes between states.<sup>201</sup>

The only way to guarantee that courts will consider children's best interests in the future is to establish federal substantive law, in conjunction with federal jurisdiction, requiring courts to issue custody decrees based upon the best interests of the child. There are two ways this could be accomplished. First, Congress could enact legislation to accomplish this goal.<sup>202</sup> Second, the United States Supreme Court could establish this rule via its appellate jurisdiction.<sup>203</sup> The creation of federal law is strongly supported by the theory that children have a constitutional right to be placed with parents who best suit their welfare and interests.

#### IV. CONSTITUTIONAL RIGHTS OF THE CHILD

"[F]rom Roman times to the mid-nineteenth century, [children] were treated as something akin to property and had rights which might be characterized as falling somewhere between those of slaves and those of animals."<sup>204</sup> American courts did not begin to recognize children's rights until the end of the nineteenth century.<sup>205</sup>

Today, children's rights are receiving greater attention. In 1972 Henry H. Foster, Jr. and Doris Jonas Freed proposed a "Bill of Rights for Children" including the legal right "[t]o receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult."<sup>206</sup> On November 20, 1989, the United Nations General

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200. Krauskopf, *supra* note 198, at 450.

201. See Harrison, *supra* note 90, at A1.

202. See *infra* part V.B.

203. See *infra* part V.A.

204. George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right To Be Heard*, 27 FAM. L.Q. 365, 369 (1993) (quoting Cynthia Price Cohen, *Relationships Between the Child, the Family and the State*, in PERSPECTIVES ON THE FAMILY 293, 297 (Robert C.L. Moffat et al. eds., 1990)).

205. *Id.*

206. Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L.Q. 343, 347 (1972).

Assembly unanimously adopted the Convention on the Rights of the Child.<sup>207</sup> The Convention was opened for signature on January 26, 1990.<sup>208</sup> Sixty-one countries signed it on the first day.<sup>209</sup> The Convention states that a child should have the right "to be heard in any judicial and administrative proceedings affecting the child,"<sup>210</sup> and that "[i]n all actions concerning children . . . the best interests of the child shall be a primary consideration."<sup>211</sup>

Unfortunately, the United States Supreme Court is not keeping pace in the development of children's rights. As one commentator has noted, since the United States Constitution does not specifically mention children, the Supreme Court has largely ignored their interests.<sup>212</sup> For instance, in *Michael H. v. Gerald D.*<sup>213</sup> the Court considered whether the relationship between a father and his illegitimate child is constitutionally protected.<sup>214</sup> In that case the child, Victoria, claimed that her constitutional rights were violated when she was denied the opportunity to maintain a relationship with her biological father.<sup>215</sup> The Court rejected this claim, however, stating that it had no support in the history and traditions of the United States.<sup>216</sup> In this case the child's interests had "little or nothing" to do with the Court's disposition of the constitutional issues.<sup>217</sup>

This is not to say that the Supreme Court does not recognize that children are persons with their own rights. From 1953 to 1992 the Court heard forty-seven cases concerning children's rights.<sup>218</sup> These cases can be classified into three categories: (1) children's rights versus state authority; (2) parental authority to raise children versus state authority; and (3) parents' rights versus children's rights.

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207. UNITED NATIONS CENTRE FOR HUMAN RIGHTS, GENEVA, HUMAN RIGHTS FACT SHEET NO. 10, THE RIGHTS OF THE CHILD 1 (1990).

208. *Id.* at 3.

209. *Id.* at 3-4.

210. *Id.* at 17.

211. *Id.* at 15.

212. Homer H. Clark, Jr., *Children and the Constitution*, 1992 U. ILL. L. REV. 1, 40; see also Susan Gluck Mezey, *Constitutional Adjudication of Children's Rights Claims in the United States Supreme Court, 1953-92*, 27 FAM. L.Q. 307, 321 (1993) ("[A]fter the Warren Court era, the Supreme Court increasingly resisted the child's constitutional claim.").

213. 491 U.S. 110 (1989).

214. *Id.* at 113.

215. *Id.* at 130-31.

216. *Id.* at 131.

217. Clark, *supra* note 212, at 19.

218. Mezey, *supra* note 212, at 314. This number includes cases brought on behalf of both the parent and child. *Id.* at 315.

The Court has recognized that children are discrete individuals with their own rights in cases where those rights have conflicted with state authority. In *Tinker v. Des Moines Independent Community School District*,<sup>219</sup> the Court recognized the constitutional right of secondary school children to wear armbands to protest the Vietnam War.<sup>220</sup> One commentator interpreted the Court's decision as rejecting the approach that the family is a unit with "family" constitutional rights and adopting the view that the family is made up of discrete individuals with individual constitutional rights against state authority.<sup>221</sup> Children's rights are not equivalent to those of adults, however. The Court has held that the state may restrict children's constitutional rights where necessary to fulfill the state's *parens patriae* role over children.<sup>222</sup>

In the second category of cases, the Court has held that parents have a fundamental interest "in the care, custody and management of their child."<sup>223</sup> In 1923, in *Meyer v. Nebraska*,<sup>224</sup> the Court struck down a law prohibiting teaching foreign languages to children who had not yet passed the eighth grade, holding that the law violated parents' rights "to control the education of their own."<sup>225</sup> Two years later, in *Pierce v. Society of Sisters*,<sup>226</sup> the Court held that "the liberty of parents and guardians to direct the upbringing and education of children under their control" prohibits states from requiring parents to send their children to public schools.<sup>227</sup> The Court has consistently

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219. 393 U.S. 503 (1969).

220. *Id.* at 507-08.

221. Robert A. Burt, *The Constitution of the Family, in LAW, SOCIETY, AND DOMESTIC RELATIONS* 125, 133 (Kermit L. Hall ed., 1987).

222. The Court has addressed this issue in cases arising in the public school setting. *E.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). Teachers and administrators in public schools act *in loco parentis* over their students. *T.L.O.*, 469 U.S. at 336. To allow states to fulfill this role, the Court stated that "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." *Fraser*, 478 U.S. at 682.

223. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *see also Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (referring to "liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (stating persons have liberty to "establish a home and bring up children").

224. 262 U.S. 390.

225. *Id.* at 401.

226. 268 U.S. 510.

227. *Id.* at 534-35.

reaffirmed these rights, "recognizing a 'private realm of family life which the state cannot enter.'"<sup>228</sup>

Often these parental rights conflict with children's constitutional rights.<sup>229</sup> The Supreme Court addressed this issue in 1979 in *Bellotti v. Baird*.<sup>230</sup> In *Bellotti* four Justices held that a mature minor does not need to seek a parent's consent before obtaining an abortion.<sup>231</sup> These Justices reasoned that a mature minor's exercise of a constitutional right in an area as sensitive as abortion cannot be subject to a "veto" by a third party.<sup>232</sup>

In *Parham v. J.R.*<sup>233</sup> the Court addressed the validity of a Georgia statute that allowed parents to voluntarily commit their children to state mental hospitals.<sup>234</sup> The Court stated that while children have "a substantial liberty interest in not being confined unnecessarily," "this interest is inextricably linked with the parents' interest in and obligation for the welfare and health of the child, [thus] the private interest at stake is a combination of the child's and parents' concerns."<sup>235</sup> The Court distinguished this from the abortion cases because, in *Parham*, parents did not have an absolute right to "veto" a child's ability to exercise a constitutional right.<sup>236</sup> Because the Georgia statute required each hospital "to exercise independent judgment as to the child's need for confinement," the Court held that the statute was not unconstitutional.<sup>237</sup>

Rights of parents and children often come in direct conflict in custody disputes.<sup>238</sup> When this occurs, whose rights should prevail? Most courts answer this question in favor of the parents.<sup>239</sup> There has

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228. *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1351 (1980) [hereinafter *Developments*] (quoting *Prince v. Massachusetts*, 321 U.S. 158, 171 (1944)).

229. *Id.* at 1377.

230. 443 U.S. 622 (1979).

231. *Id.* at 650. "[I]f the minor satisfies a court that she has attained sufficient maturity to make a fully informed decision, she is then entitled to make her abortion decision independently." *Id.*

232. *Id.* at 643 (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 74 (1976)).

233. 442 U.S. 584 (1979).

234. *Id.* at 587-91.

235. *Id.* at 600.

236. *Id.* at 604.

237. *Id.* at 604, 620.

238. See SUSAN MAIDMENT, CHILD CUSTODY AND DIVORCE: THE LAW IN SOCIAL CONTEXT 272 (1984); see also *Santosky*, 455 U.S. at 788 & n.13 (Rehnquist, J., dissenting) (discussing "countervailing interests" of parent and child in termination proceedings).

239. See, e.g., *DeBoer v. Schmidt*, 502 N.W.2d 649 (Mich.), *stay denied sub nom. DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 1 (application for stay of enforcement made to Justice Stevens as Circuit Justice for Sixth Circuit), and *stay denied sub nom. De Boer v.*

been, however, some support for the theory that the child's interests are superior to those of the parents.<sup>240</sup> One commentator has stated, "[t]here is no justifiable reason to assume that family relationships are any less important to the child than to a parent. Indeed, because of a child's unique vulnerability such relationships should be presumed to be of far greater significance to a child."<sup>241</sup> The problem facing children involved in custody disputes is that their interest in family life has not been defined as one of constitutional magnitude by the Supreme Court.<sup>242</sup> As a result there is no uniform, national rule to require courts to protect these interests when deciding custody cases, and parents' rights often prevail over those of the children.

Unfortunately, the Court has historically maintained the "Western civilization concepts of the family as a unit with broad parental authority over minor children."<sup>243</sup> Viewed from this perspective children are less like individual beings with rights of their own and more like property in which their parents have a constitutional interest.

This approach has received much criticism from the Court. Justice Jackson wrote:

Custody is viewed not with the idea of adjudicating rights *in* the children, as if they were chattels, but rather with the idea of making the best disposition possible for the welfare of the children. To speak of a court's "cutting off" a mother's right to custody of her children, as if it raised problems similar to those involved in "cutting off" her rights in a plot of ground, is to obliterate these obvious distinctions.<sup>244</sup>

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DeBoer v. Schmidt, 114 S. Ct. 11 (application for stay of enforcement made to Justice Blackmun referred to entire Court). "[C]hildren . . . have a due process liberty interest in their family life. However, . . . those interests are not independent of the child's parents." *Id.* at 665; *see also* Treadway v. McCoy, 429 S.E.2d 492, 495 (W. Va. 1993) ("The controlling principle . . . is the welfare of the child . . . , [but] [t]his discretion is limited by the right of the natural parent to raise his or her own child." (quoting State *ex rel.* Kiger v. Hancock, 168 S.E.2d 798, 799 (W. Va. 1969))); Mezey, *supra* note 212, at 308 ("[A]lthough courts frequently express rhetorical support for children's rights, there is little consensus over the extent to which these rights should prevail when they encroach on parental or state authority.").

240. In *In re P* the New Jersey Superior Court awarded custody to the "psychological" parents over the natural parents because the best interests of the child were paramount to the natural parents' interest in the custody of their child. *In re P*, 277 A.2d 566, 567-72 (N.J. 1971).

241. Russ, *supra* note 204, at 373.

242. *See supra* notes 215-16 and accompanying text.

243. *Parham*, 442 U.S. at 602.

244. *May v. Anderson*, 345 U.S. 528, 541 (1953) (Jackson, J., dissenting).

Furthermore, Justice Brennan pointed out that children have the same constitutional rights as their parents.<sup>245</sup> He argued that "parental authority and family autonomy cannot stand as absolute and invariable barriers to the assertion of constitutional rights by children."<sup>246</sup> He stated that "parental rights are limited by the legitimate rights and interests of their children."<sup>247</sup> Therefore, parental authority will be limited where more than a "routine child-rearing decision" results in "a break in family autonomy."<sup>248</sup>

Although both children and parents may be viewed as each having their own rights, there is little doubt that while the family unit remains intact the parents' constitutional right to the care and upbringing of their children will prevail.<sup>249</sup> When the family unit breaks down, however, especially as a result of parental choice—such as divorce or giving a child up for adoption—control over a child's future shifts to the state.<sup>250</sup> When the state assumes control over a child's future, it has the power to protect the child and act in the child's welfare.<sup>251</sup> This power is derived from a state's *parens patriae* role to protect those persons who are unable to protect themselves.<sup>252</sup> The best interests of the child standard in custody disputes is a reflection of this power.<sup>253</sup>

When states are placed in this *parens patriae* role, they should not allow the parents' interests in custody of their children to override the children's interests in their own upbringing.<sup>254</sup> Once a conflict concerning a child's placement arises, that child's own "inner situation and developmental needs" should be the paramount considerations.<sup>255</sup> Family environment is arguably the most important factor in a child's

245. *Parham*, 442 U.S. at 630-32 (Brennan, J., dissenting).

246. *Id.* at 631 (Brennan, J., dissenting).

247. *Id.* at 630 (Brennan, J., dissenting).

248. *Id.* at 631 (Brennan, J., dissenting).

249. See *Santosky*, 455 U.S. at 753; *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 399.

250. Burt, *supra* note 221, at 133.

251. 2 CLARK, *supra* note 1, at 477.

252. *Id.*

253. Sheldon G. Kirshner, *Child Custody Determination—A Better Way!*, 17 J. FAM. L. 275, 293 (1978-1979).

254. See *supra* note 124 and accompanying text.

Why the parent's "right" should be superior to the child's interest in receiving the best possible care, taking into account her need for stability and affection, is a matter the authorities seldom discuss. One might think that the constitutional priorities should be the other way around, because the [parent]'s conduct, not the child's, leads to the conflict.

Clark, *supra* note 212, at 24.

255. GOLDSTEIN ET AL., *supra* note 194, at 106.

development.<sup>256</sup> There is a strong correlation between a child's family upbringing and his or her extrafamily relations.<sup>257</sup> A recent report indicated that the strongest family predictors of juvenile delinquency are lack of parental supervision, parental rejection, and low levels of parent-child relations.<sup>258</sup> Current Chief Justice Rehnquist has stated, "[a] stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being."<sup>259</sup>

When a child's placement is at issue and a state is placed in a *parens patriae* role over the child, the state can fulfill its role by ensuring that the child is placed in the home where it will receive parental love, affection, discipline, and guidance.<sup>260</sup> This does not necessarily mean placing the child with his or her biological parents.<sup>261</sup> Third parties who have established a psychological parent-child relationship are equally capable of filling a child's parental needs.<sup>262</sup>

Although the Court has extended some constitutional protections to minor children,<sup>263</sup> the Court is still unwilling to extend constitutional rights to children in custody disputes.<sup>264</sup> This is a problem that must be corrected. As Justices Blackmun and O'Connor have pointed out, the Court can no longer ignore the rights and welfare of children

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256. ARNOLD BINDER ET AL., JUVENILE DELINQUENCY 444 (1988).

257. *Id.* at 451.

258. *Id.* at 452. Parents' roles in causing juvenile delinquency has received such recognition that some states have enacted legislation holding parents criminally liable for their children's delinquency. See generally Sharon A. Ligatorsky, Note, Williams v. Garcetti: Constitutional Defects in California's "Gang-Parent" Liability Statute, 28 LOY. L.A. L. REV. 403, 403-07 (1994) (discussing California's new statute holding parents criminally liable for their children's delinquency). These statutes have been enacted in response to the growing problems of juvenile violence. *Id.* at 404-05, 418-19.

259. *Santosky*, 455 U.S. at 788-89 (Rehnquist, J., dissenting); see also Russ, *supra* note 204, at 378 ("Nothing could be more fundamental to the happiness of a dependent minor than to live with a parent or parents that meet his or her physical, psychological, and emotional needs.").

260. See Foster & Freed, *supra* note 206, at 347.

261. *Id.* at 349; see also John Lawrence Hill, *What Does It Mean to be a "Parent"?* *The Claims of Biology as the Basis for Parental Rights*, 66 N.Y.U. L. REV. 353 (1991) (arguing genetic relationship should carry little weight in determining parental status).

262. See Foster & Freed, *supra* note 206, at 349; see also Case Comment, *Adoption: Psychological Parenthood as the Controlling Factor in Determining the Best Interests of the Child*, 26 RUTGERS L. REV. 693 (1973) (discussing psychological parenthood rather than natural parenthood as controlling factor in determining child's best interests).

263. See, e.g., *Bellotti*, 443 U.S. 622 (extending right of privacy to minors, holding mature minor does not have to seek parental consent to obtain abortion); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977) (holding law prohibiting distribution of contraceptives to minors unconstitutional); *Tinker*, 393 U.S. 503 (extending right of free speech to secondary school children); *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding implicitly that children are protected by Equal Protection Clause).

264. See, e.g., *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 1 (1993).

in the context of custody cases.<sup>265</sup> If the family is indeed a group of discrete individuals with their own constitutional rights, then the rights of children to have their best interests considered must be recognized in all custody disputes.<sup>266</sup> When these rights conflict with those of the parents, as they often do in custody proceedings, the child's rights should be the paramount consideration and placement should depend only upon the child's own emotional and developmental needs.<sup>267</sup>

At first glance this standard may seem like an unjust encroachment on the rights of some natural parents, such as Daniel Schmidt, who do not choose to terminate their parental rights and are not unfit parents. Yet, in these cases courts must balance the competing interests of the two "innocent" parties—the parent and the child. As a result, one party will suffer a loss—the parent may not gain custody and the child may be separated from a loving family. Adults are capable of handling such losses, while a young child's personality and character are still developing; thus, courts should not consider the interests of the parent over those of the child.<sup>268</sup> "The rights of all children to economic, educational, and emotional security should . . . be the prime objective of law and society whenever the courts must make a decision affecting the life and future of children."<sup>269</sup>

## V. PROPOSED SOLUTIONS

Children's best interests are not receiving the recognition that they deserve. There are at least three possible solutions to this problem. First, the United States Supreme Court could recognize, based on the discussion in Part IV of this Comment, that children's best interests are the paramount consideration in all custody disputes and that the rights and interests of children are superior to those of the

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265. See *DeBoer v. DeBoer v. Schmidt*, 114 S. Ct. 11 (1993) (Blackmun, J., dissenting).

266. Arguably, these cases do not involve routine child-rearing decisions, particularly where the dispute arises as a result of divorce or giving the child up for adoption. Because extraordinary decisions lead to breaks in family autonomy, parental authority over their children is limited. See *Parham*, 442 U.S. at 631 (Brennan, J., dissenting). Here, the shell of "family autonomy" is cracked, opening the door for states to make decisions concerning children's placement. Children's interests should be the paramount concern.

267. GOLDSTEIN ET AL., *supra* note 194, at 105-06. Some scholars would go so far as to allow the child to choose the custody arrangement outright, despite any rights the parents may otherwise have. MAIDMENT, *supra* note 238, at 274.

268. See *supra* note 124 and accompanying text.

269. Robert F. Drinan, *The Rights of Children in Modern American Family Law*, in *THE RIGHTS OF CHILDREN: EMERGENT CONCEPTS IN LAW AND SOCIETY* 37, 45 (Albert E. Wilkerson ed., 1973).

adults competing for custody. Second, Congress could enact a law establishing a uniform, substantive best interests standard in all custody disputes and create a federal cause of action where this standard is not met. Third, states could take the initiative to correct these problems by establishing an interstate compact.

### A. Judicial Action

In order to receive constitutional protection, children's rights must be defined as fundamental. In family cases the United States Supreme Court has looked to history and tradition as a basis for defining protected liberty interests.<sup>270</sup> This inquiry seeks to identify those interests that are "so rooted in the 'traditions and [collective] conscience of our people' that substantial intrusion would disturb the proper balance between liberty and the demands of organized society."<sup>271</sup> For at least one and one-half centuries, society has recognized that the paramount concern regarding child custody is the best interests of the child.<sup>272</sup> Furthermore, the Court has recognized that the family unit is deeply rooted in the history and traditions of society and entitled to constitutional protection.<sup>273</sup> The question thus becomes: How are the rights distributed within the family unit?

When child custody is at issue, courts have recognized only the parents' constitutional rights and often place those rights above the interests of the children.<sup>274</sup> These courts have held that parents' constitutional rights to the custody and care of their children supersede the children's own rights and interests in their placement.<sup>275</sup>

However, in custody disputes states assume a *parens patriae* role over children.<sup>276</sup> How can states properly fulfill this role when parents' rights are placed above those of the children? The states' goal should be to protect the rights and interests of children, not those of

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270. *Developments*, *supra* note 228, at 1177.

271. *Id.* at 1178 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 493 (1965) (Goldberg, J., concurring) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

272. Zainaldin, *supra* note 19, at 682-83.

273. See *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-20, 1414-15 (2d ed. 1988).

274. See *supra* notes 213-17, 239 and accompanying text; see also Gershon, *supra* note 32, at 746 (criticizing California Supreme Court for placing father's constitutional rights above best interests of child).

275. *E.g.*, Gershon, *supra* note 32, at 746; see *supra* note 239.

276. See *supra* notes 250-53 and accompanying text.

the adults competing for custody.<sup>277</sup> Children are usually subjected to "emotional and developmental hardships," which are losses of liberty.<sup>278</sup> Also, children's interests in custody disputes are not limited to custody per se, but rather they include the quality of their new relationships and environment.<sup>279</sup>

The United States Supreme Court should recognize this interest and require all lower courts to do the same. If the Court identifies these interests of the child as fundamental, then the children will be protected under both the Due Process and Equal Protection Clauses.

### 1. Substantive due process analysis

A state may not deprive its citizens of life, liberty, or property without due process of law.<sup>280</sup> State action that interferes with a person's fundamental liberties is subject to strict scrutiny review.<sup>281</sup> Under this analysis, state action must meet the following test: (1) the state's objective must be compelling; and (2) the state action must be narrowly tailored to achieve that objective.<sup>282</sup>

Where courts fail to consider the best interests of children in determining custody, the state is impinging on the children's liberty interest in their new family relationship.<sup>283</sup> Children not only have an interest in being placed with a family, they also have an interest in receiving parental love, affection, discipline, and guidance.<sup>284</sup> Failing to ensure that children are placed with parents—either biological or psychological—who best fulfill these needs impinges on their fundamental rights.

In custody disputes the state's compelling interest would be to promote the welfare and interests of children.<sup>285</sup> The conflicting inter-

277. See *supra* notes 124-27 and accompanying text; see also *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) (stating states have interest in "preserving and promoting the welfare of the child" in termination proceedings).

278. Kirshner, *supra* note 253, at 293.

279. *Id.* at 294.

280. U.S. CONST. amend. XIV, § 1.

281. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16-17 (1973); *TRIBE, supra* note 272, § 16-7, at 1454.

282. *Reno v. Flores*, 113 S. Ct. 1439, 1447 (1993); *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978).

283. See *supra* notes 278-79 and accompanying text.

284. See *supra* note 206 and accompanying text.

285. See *Santosky*, 455 U.S. at 766; *supra* note 123 and accompanying text. But see *Reno*, 113 S. Ct. at 1448 ("The best interests of the child" is . . . not an absolute and exclusive constitutional criterion for the government's exercise of the custodial responsibilities that it undertakes . . .").

ests of parents would be secondary.<sup>286</sup> Current custody laws are not narrowly tailored to achieve this goal. This standard requires that the state action be the least burdensome alternative to effectuate the compelling interest.<sup>287</sup> Where courts focus on parental rights and fail to consider children's best interests in making a custody determination, there is a great risk that the child will not be placed with the parent who is best suited to meet the child's emotional and developmental needs.<sup>288</sup> A less burdensome alternative would be to determine all custody disputes based upon the best interests of the child and to place the child's rights and interests above those of the adults competing for custody. Because states do not apply the least burdensome alternative, their actions violate substantive due process requirements.<sup>289</sup>

## 2. Equal protection analysis

The United States Supreme Court might also grant constitutional protection to children through the Equal Protection Clause.<sup>290</sup> The Court has held that allowing certain individuals the right to exercise a fundamental liberty while denying the same privilege to others violates the Equal Protection Clause.<sup>291</sup> This claim was made by Baby Jessica in the *DeBoer* case.<sup>292</sup> Jessica claimed she was not receiving equal protection under the laws because the Iowa courts do not consider the best interests of the child in making custody determinations in disputes between a natural parent and a third party, whereas the child's best interests are considered in disputes between the natural parents.<sup>293</sup> The state courts dismissed this claim and the United States Supreme Court denied review.

However, if children's interests in custody disputes are considered fundamental, then children in Jessica's position would have a valid claim under the Equal Protection Clause. Under this analysis state action would also be subject to strict scrutiny review.<sup>294</sup> This

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286. Clark, *supra* note 212, at 24; *see supra* notes 267-69 and accompanying text.

287. *See Zablocki*, 434 U.S. at 388 (holding state action not "closely tailored" because it "unnecessarily impinge[d]" on fundamental right).

288. *See Foster & Freed*, *supra* note 206, at 349.

289. Ligorsky, *supra* note 258, at 423.

290. U.S. CONST. amend. XIV, § 1.

291. *See, e.g., Zablocki*, 434 U.S. 374.

292. *DeBoer*, 502 N.W.2d at 665.

293. *Id.*

294. TRIBE, *supra* note 273, § 15-20, at 1454.

requires that the state action be the least discriminatory method of achieving a compelling goal.<sup>295</sup>

Again, a less discriminatory method of achieving states' interests in custody disputes would be to base all custody decisions on the best interests of the child. Under the current scheme, some children's fundamental interests in placement are not considered while other children's interests are considered via the best interests test.<sup>296</sup> Children, such as Jessica, may be denied the opportunity to enjoy their liberty interest in receiving parental love, affection, discipline, and guidance because the courts fail to consider their interests in determining their placement.<sup>297</sup> At the same time, other children—such as those subject to divorce proceedings—are not denied their interest in receiving parental love, affection, discipline, and guidance because the courts do consider their best interests in determining their placement.<sup>298</sup>

Thus, in order to survive strict scrutiny analysis all custody disputes must be made based upon the best interests of the child—the least discriminatory means of achieving the state's compelling interests in protecting the welfare and interests of children.

### B. Legislative Solution

Another suggested solution is federal legislation. There are several factors that Congress should incorporate into such legislation. First, whenever a child's placement is at issue, the child's own needs and best interests are the paramount consideration.<sup>299</sup> Second, courts should extend the natural parent preference to third parties who have acted as a parent toward the child.<sup>300</sup> Furthermore, this preference should not preclude a best interests determination; rather it should only be one factor the courts consider in determining the child's best interests.<sup>301</sup> Third, courts should appoint a guardian ad litem to represent the child's interests in a custody dispute.<sup>302</sup> Fourth, courts should

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295. Ligorsky, *supra* note 258, at 424-28.

296. *See supra* note 293 and accompanying text.

297. *See supra* notes 31-34, 104-08 and accompanying text.

298. *See supra* note 2 and accompanying text.

299. GOLDSTEIN ET AL., *supra* note 194, at 106.

300. Richards, *supra* note 4, at 735. This would both protect families from interfering third parties who happen to disapprove of the parents or their lifestyle and protect children from being removed from a loving, stable relationship with a third party who has acted as a parent toward the child. *Id.* at 736.

301. *See Rose v. Potts*, 577 N.E.2d 811, 814 (Ill. App. Ct. 1991).

302. *See Wallace, supra* note 1, at 17. Some of the benefits of providing children independent counsel are: (1) it reduces the adversary character of the proceeding; (2) it protects the child from becoming a pawn; and (3) it assists the court by bringing all rele-

consider the child's wishes concerning placement.<sup>303</sup> Finally, Congress should explicitly provide for a federal remedy where states fail to follow this enactment.

Such legislation, combined with the jurisdictional requirements of the PKPA and UCCJA, will provide children with the protection they need and deserve.

However, Congressional action does not appear likely. In the Senate hearings on the PKPA, Professor Russell M. Coombs<sup>304</sup> pointed out that federal law should not "intrude into areas of exclusive State responsibility" such as substantive rules regarding adjudication of custody disputes.<sup>305</sup> Congress apparently agreed with these sentiments because the PKPA does not include any substantive rules or federal enforcement provisions.<sup>306</sup>

### C. Interstate Compact

The aforementioned solutions both entail imposing a uniform best interests standard on the states from the federal level—a top-down approach. The states could achieve the same results without federal compulsion using their interstate compact power.<sup>307</sup> The interstate compact is used for state cooperation in solving common problems.<sup>308</sup> States must receive Congress's consent before a compact becomes effective.<sup>309</sup>

A compact would better protect children's rights than a uniform act because of the compact's enforcement provisions. States that are parties to a compact waive immunity from suit in federal court for

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vant facts to its attention. *Id.* at 18. See generally Shannan L. Wilber, *Independent Counsel for Children*, 27 FAM. L.Q. 349 (1993) (arguing appointment of separate counsel for children is necessary development).

303. See UNIF. MARRIAGE AND DIVORCE ACT § 402(2), 9A U.L.A. 147, 561 (1988). See generally Randy Frances Kandel, *Just Ask the Kid! Towards a Rule of Children's Choice in Custody Determinations*, 49 U. MIAMI L. REV. (Forthcoming 1994) (arguing children above age six should have absolute right to choose when dispute is between two fit parents).

304. Professor Coombs is a law professor at Rutgers University Law School. *Hearings*, *supra* note 79, at 143.

305. *Id.* at 146.

306. See 28 U.S.C. § 1738A (1988); *supra* parts II.B.1-2; notes 110, 178-80 and accompanying text.

307. "The Compact,' . . . 'adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations.'" THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 419 (Lester S. Jayson et al. eds., 1973) (quoting *Hinderlider v. La Plata Co.*, 304 U.S. 92, 104 (1938)).

308. *Id.* at 421.

309. *Id.* at 421-22.

actions arising under the compact.<sup>310</sup> This would provide for federal enforcement of any substantive provisions of the compact. Thus, states would maintain their autonomy in fashioning substantive family law, while providing aggrieved parties with a federal forum to compel state compliance with the state laws.

Such a compact should contain the same provisions suggested for federal legislation.<sup>311</sup> However, this solution would not be as effective as federal action. It is very unlikely that all fifty states will reach an agreement of this nature in the area of child custody where state laws are so diverse. On the other hand, this solution may be more likely than federal action in light of federal views regarding substantive family law. The federal government routinely abstains from encroaching on state power in this arena.<sup>312</sup> Thus, while less effective, it is more likely that states—at least some of them—will act themselves. Such action would be consistent with historical perceptions of federalism in the area of family law.

#### D. *Problems Associated with the Best Interests Test*

Applying the best interests test to all custody disputes admittedly has some shortcomings. First, if strictly applied, it could lead to third parties—such as neighbors—filing for custody claiming that they would make better parents than the present ones.<sup>313</sup> This could, if misapplied, create the possibility that parents who are not unfit will lose their children to third parties because they happen to be wealthier or live in a better neighborhood.<sup>314</sup> This problem could be alleviated, however, by passing a statute such as the one passed by the Washington legislature that “provides that petitions may be brought by third parties ‘if the child is not in the physical custody of one of its parents or if the petitioner alleges that neither parent is a suitable custodian.’”<sup>315</sup> Second, the best interests test is criticized for being very broad and giving judges considerable discretion in fashioning custody decrees.<sup>316</sup> This has led some judges to be overprotective while

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310. *Id.* at 423.

311. *See supra* notes 299-303 and accompanying text.

312. *See supra* parts III.B.1-2; notes 305-06 and accompanying text.

313. *See Richards, supra* note 4, at 760.

314. However, this Comment is not suggesting that the best interests standard be utilized by the state to initiate termination proceedings.

315. Richards, *supra* note 4, at 759 (quoting WASH. REV. CODE § 26.10.030(1) (Supp. 1991)).

316. *See supra* note 30 and accompanying text. *See generally* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L.

trying to safeguard children's best interests and, in a few cases, caused harm to these children.<sup>317</sup> Despite these criticisms, some discretion is necessary, particularly in custody determinations, given the diversity of situations facing the courts and the various factors that influence the quality of a child's home.<sup>318</sup>

No system is perfect. However, this cannot be used as an excuse to continue ignoring children's welfare and interests. Children are our future and when courts are placed in a position to protect their interests—in custody disputes for instance—they should do just that. A child's home is vital to the child's welfare and development.<sup>319</sup> Courts should consider children's rights and interests above all others when making decisions regarding their placement.<sup>320</sup>

## VI. CONCLUSION

A child's best interests deserve more than rhetoric. Courts and legislatures have an obligation to protect a child's interests. However, the action taken thus far has fallen short of ensuring that these interests are actually protected. Children should not be trapped within the jurisdictional and policy barriers erected by antiquated notions of federal responsibility and children's rights.

At the very least, the UCCJA and PKPA should allow a sister state to make a best interests determination where another state has failed to do so. Children are not "pawns" or property, they are people with rights and interests that need to be recognized. Jurisdictional devices of our judicial system should not prevent these interests from being heard.<sup>321</sup>

Ideally, either the United States Supreme Court or Congress should establish federal law requiring states to recognize the rights and interests of the child above all parental rights whenever a child's placement is at issue. This will create a uniform law protecting the

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REV. 2215 (1991) (discussing criticisms of discretion in best interests test, exploring possible alternatives, and striking balance between rules and discretion).

317. See *supra* notes 149-50 and accompanying text; see also Cheri L. Wood, Comment, *The Parental Alienation Syndrome: A Dangerous Aura of Reliability*, 27 LOY. L.A. L. REV. 1367, 1370-72 (1994) (noting how best interests standard leads courts to consider—to detriment of children—parental alienation syndrome when determining custody).

318. See Schneider, *supra* note 316, at 2218-19.

319. See *supra* notes 256-59 and accompanying text.

320. GOLDSTEIN ET AL., *supra* note 194, at 106.

321. "A custody dispute is more than a jurisdictional chess game in which winning depends on compliance with predetermined rules of play. A child is not a pawn." *In re Marriage of Ieronimakis*, 831 P.2d 172, 190 (Wash. Ct. App. 1992) (Kennedy, J., dissenting) (citing *E.E.B. v. D.A.*, 446 A.2d 871, 879-80 (N.J. 1982)).

welfare and interests of children. Anything short of this will leave room for states to continue denying children their liberty interests at the expense of parental rights. "[T]he cardinal principle which should guide the courts and the law and the Congress in this matter is the welfare of the children because they are the real losers in this desperate game. Their best interests should be our foremost consideration."<sup>322</sup>

*Jerry A. Behnke\**

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322. *Hearings, supra* note 79, at 2 (quoting Sen. Charles McC. Mathias, Jr.).

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