Washington and Lee Law Review

Volume 44 | Issue 2 Article 6

Spring 3-1-1987

The Fourth Circuit Review, Foreword

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THE FOURTH CIRCUIT REVIEW

FOREWARD

H. EMORY WIDENER, JR.*

From the the Fourth Circuit Review, it would appear that this has been another court year that can be described as inconsequential but extremely busy. We disposed of 2949 cases during that period. This means that, on the average, each judge, including those on senior status, was responsible for the preparation of 226 decisions. The cases reviewed in this survey suggest a lack of momentous rulings by the court during this period. Nevertheless, I will address my remarks to three of our decisions that, although unreviewed by the survey, are noteworthy. Two are cases of first impression, and the third affects one of the most deeply held human emotions, the love of parent and child. If any opinion I have expressed here diverges too much from my colleagues, I beg editorial license. I hope I may be excused from including *Riddick*, but the theme of this writing requires otherwise.

More than thirty years after the Supreme Court ordered public school desegregation in *Brown v. Board of Education*[1] and fifteen years after the Court reaffirmed Brown's teaching and approved mandatory busing as a means of achieving such desegregation in *Swann v. Charlotte-Mecklenburg Board of Education*,[2] the federal courts were and are faced with a difficult but inevitable question. How long must federal courts supervise the activities of our nation's public school systems in order to ensure their continued desegregation?

In 1986 the Fourth Circuit was called upon to decide this issue in *Riddick v. School Board of City of Norfolk*.[3] *Riddick* represented the first time a federal court of appeals ruled upon a challenge to a student assignment plan for a school district which had historically practiced *de jure* segregation but had ridded itself of all vestiges of that past racial discrimination. Based on the facts in *Riddick*, federal court supervision of that student assignment plan was ended absent a showing by the plaintiffs of an intent to discriminate on the part of the school board.[4] Later in 1986, the Tenth Circuit decided a similar case but rejected our reasoning in *Riddick*.[5] The Supreme Court denied certiorari in both cases.[6]

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1. 346 U.S. 483 (1954).
2. 402 U.S. 1 (1971).
3. 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 420 (1986).
4. *Riddick*, 784 F.2d at 534-539.
5. Dowell v. Board of Education of Oklahoma, 795 F.2d 1516 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 420 (1986).
6. 55 U.S.L.W. 3316 (1986).

The plaintiffs in *Riddick* challenged the constitutionality of a new student assignment plan for the elementary schools in the City of Norfolk, Virginia. The school board had proposed the elimination of busing of elementary school students and the return to a neighborhood school plan with a transfer provision for minority students assigned to schools where minorities constitute 70% or more of its students.[7] Plaintiffs argued that adoption of such a plan was violative of their constitutional rights under the Fourteenth Amendment to the United States Constitution.

The City of Norfolk, Virginia is not new to litigation involving racial segregation in its public school system. Prior to *Brown*, segregation of public schools in Norfolk and elsewhere in Virginia was required by state law.[8] Litigation seeking the integration of Norfolk's public schools began in 1956 and continued in the district court until 1975.[9] During this time, the Supreme Court decided in *Swann* that busing was a permissible method of remedying racial segregation in public Schools.[10] Following the *Swann* decision, cross-town busing was implemented in Norfolk's public school system which required the busing of both elementary and secondary school students to achieve integration. This court affirmed implementation of Norfolk's busing plan in 1972.[11] After reviewing three annual reports made by the school board pursuant to court order, the district court in 1975 entered an order dismissing the desegregation litigation because racial discrimination had been eliminated from the Norfolk school system and the system had become unitary.[12] No appeal was taken from that order. No further legal action was taken regarding desegregation of Norfolk's public schools until the school board proposed the neighborhood school plan for elementary school students in 1983.[13]

The issues raised in *Riddick* represent a decision as to what effect should a finding that a school system is unitary have upon a constitutional challenge to proposed changes in the student assignment plan, and what procedure governs such a challenge to a student assignment plan for a school district that historically practiced *de jure* segregation but had obtained a valid judicial order that it had ridded itself of all vestiges of that discrimination. These were

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7. *Riddick*, 784 F.2d at 526-527.

8. *Id.* at 524. Because such segregation was sanctioned by state law when *Brown* was decided, it was characterized as *de jure* racial segregation. *Id.* at 524, 534-35. Such school systems were placed on an "affirmative duty to 'effectuate a transition to a racially non-discriminatory school system.' " Keyes v. School Dist. No. 1, Denver, Col., 413 U.S. 189, 200 (1973), quoting Brown v. Board of Education, 349 U.S. 294 (1955) (*Brown II*). Such school systems are contrasted with those in which racial segregation is said to exist *de facto*. In the later case the plaintiffs challenging school board action must prove an intent to discriminate on the board's part. *Keyes*, 413 U.S. at 208-209.

9. *Riddick*, 784 F.2d at 524-525.

10. *Swann*, 402 U.S. at 28.

11. Brewer v. School Board of the City of Norfolk, 456 F.2d 943 (4th Cir. 1972), *cert. denied*, 406 U.S. 933 (1972).

12. *Riddick*, 784 F.2d at 525.

13. *Id.*

issues of first impression for the courts of appeals. We agreed with the district court that once a school system had ridded itself of the vestiges of racial discrimination and had obtained a judicial ruling that it had become unitary,[14] the plaintiff is required to prove discriminatory intent on the part of the school board in order to successfully prosecute a constitutional challenge under the Fourteenth Amendment.[15] In so ruling, we rejected plaintiffs' argument that the burden of proof remains with the school board to prove that implementation of the new plan will not perpetuate vestiges of the past *de jure* dual system.[16]

As time continues to pass since the *Brown* and *Swann* decisions, more and more courts will be asked to reexamine their continued control over school boards. In this circuit, judicial involvement will not continue indefinitely absent a showing of an intent to discriminate by the school board.[17] Further judicial action absent a showing of a constitutional violation would be creating plenary powers in the federal courts to force racial quotas upon the local school boards. We have no such powers.[18]

As early as 1971, the Supreme Court cautioned that there are limits beyond which a federal court may not go in remedying past school segregation,[19] and in Norfolk, the federal courts have reached those limits. Absent a showing of discriminatory intent, the school board may administer its schools as it sees fit. An era in the struggle for racial integration of Norfolk's public school system has come to an end, and it is not idle to speculate that, as more school systems attain the goal of racial integration, judicial intervention into their affairs will also end. Of course, what we all hope for is that the need for federal intervention will also vanish.

In at least one instance, the court took a restrained approach to constitutional matters this past year. *Falwell v. Flynt*[20] presented the Fourth Circuit with another case of first impression in this country. There, the court decided whether, in light of the *New York Times v. Sullivan*[21] line of cases, a public

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14. *Green v. County School Board*, sets out the criteria to be used in evaluating the integration achieved by a school system and in determining whether that system has been freed from past racial discrimination. Green v. County School Board, 391 U.S. 430 (1968).

15. *Riddick*, 784 F.2d at 537.

16. *Id.* at 534.

17. It appears that the Tenth Circuit would take a different approach and continue to require the school board to operate under the student assignment plan in effect when the school system was declared unitary. Plaintiff could seek to enjoin changes to that plan absent a showing of discriminatory intent. *Dowell*, 795 F.2d at 1519.

18. Pasadena City Board of Education v. Spangler, 427 U.S. 424, 433-434 (1976); *Swann*, 402 U.S. at 16, 24-25.

19. *Swann*, 402 U.S. at 28. *See Pasadena*, 427 U.S. at 434-435.

20. 797 F.2d 1270 (4th Cir. 1986), *cert. granted*, 107 S.Ct. 1601 (1987).

21. 376 U.S. 254 (1964). In that case, the Court held that, in order for a public official to recover in a defamation action, the First Amendment required that the plaintiff prove that the defendant published with knowledge of falsity or with reckless disregard for the truth. *Id.* at 279-80. This rule was extended to defamation suits brought by "public figures" in *Curtis Publishing Co. v. Butts*. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967).

figure may recover for intentional infliction of emotional distress on the basis of a publication that was found not to be libelous.

The defendant, Larry Flynt, is the publisher of Hustler magazine, which was also a defendant in the case. The plaintiff, Rev. Jerry Falwell, is a well-known Baptist minister and one who has often taken strong public stands on contemporary political issues. The November 1983 issue of Hustler contained an "ad parody" based upon an advertising campaign for Campari liqueur.[22] In the real ads, celebrities discuss their "first time," meaning their first experience with Campari, but in an obvious double-entendre with sexual connotations. The ad parody features Falwell as the celebrity, and recounts a fictional interview in which Falwell says that his first sexual encounter was with his mother in an outhouse. Falwell's mother is depicted as a drunken and promiscuous woman, and Falwell is portrayed as a hypocritical drunkard. At the bottom of the page appear the words "AD PARODY - NOT TO BE TAKEN SERIOUSLY," and the parody was listed in the table of contents as "Fiction; Ad and Personality Parody."[23]

Falwell sued Flynt and Hustler in the United States District Court for the Western District of Virginia, alleging libel, invasion of privacy, and intentional infliction of emotional distress. At the close of evidence, the district court directed a verdict for the defendants on the invasion of privacy count,[24] and the jury returned a verdict for the defendants on the libel claim, finding that no reasonable person could believe that the parody described actual facts about Falwell.[25] However, the jury awarded Falwell $200,000 on his emotional distress claim.[26]

On appeal, this court agreed with the defendants that, since Falwell was a public figure, the ad parody was entitled to the same constitutional protection against an intentional infliction of emotional distress claim as it would under an action for libel.[27] However, the court thought that the "actual malice" standard of *New York Times* could not be literally applied to an action for emotional distress. The court reasoned that while the actual malice standard does not add new elements to the tort of libel, but merely raises the degree of culpability required to be shown, the actual malice standard would add a new element to the tort of intentional infliction of emotional distress, namely, the element of truth or falsity. Therefore, the court held that the plaintiff needed only to show that the defendants acted intentionally or recklessly in

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22. The parody was republished in the March 1984 issue of Hustler.

23. *Falwell*, 797 F.2d at 1272.

24. The district court ruled that Falwell's name and likeness were not used for "purposes of trade" within the meaning of Va. Code § 8.01-40 (1984).

25. *Falwell*, 797 F.2d at 1273.

26. The jury awarded Falwell $100,000 actual damages, $50,000 punitive damages against Flynt, and $50,000 punitive damages against Hustler. *Id.*

27. "It is not the theory of liability advanced, but the status of the plaintiff, as a public figure of official and the gravamen of a tortious publication which give rise to the first amendment protection prescribed by *New York Times*." *Id.* at 1275.

causing emotional distress in order to satisfy the First Amendment.[28] Since under Virginia law the tort of intentional infliction of emotional distress already required the plaintiff to show intentional or reckless misconduct by the defendant, *New York Times* and its progeny had no effect on the operation of this state cause of action.

Upon a reading of this case, one wonders why the plaintiff did not also file a claim under Virginia's statute of insulting words, Va. Code § 8.01-45 (1986). This statute was first enacted in 1810 in response to an increasing problem the Commonwealth was having with dueling.[29] To combat this problem, the legislature declared that it would from that point on be first degree murder to kill another in a duel.[30] As a necessary supplement to this change, however, the legislature gave a cause of action to those at whom insulting words were directed.[31] Henceforth, a man whose honor was offended could have recourse against his antagonist without having to call him out. This, of course, was precisely the situation in which Falwell found himself, and it is the exact situation to which the statute is directed. Although an action under the statute is treated as an action for defamation,[32] it is not necessary for the plaintiff to show publication of the insulting words, but only that the words were conveyed to the plaintiff.[33] This is so because the purpose of the statute is not to protect the plaintiff's reputation but to avoid breaches of the peace.[34] It is common practice in Virginia to include a count under the statute of insulting words when a defamation action is brought, so I can only speculate as to a reason for its absence here. Although Falwell has prevailed up to this point, I suggest his position could not have been weakened had he recovered under the statute, for the *New York Times* privilege could not but be more difficult to sustain for the defendants under Virginia's statute, which is narrowly drawn to fit this precise fact situation.

During 1986, the Fourth Circuit turned its attention to another question of first impression in this court: construction of the Parental Kidnapping Prevention Act of 1980 (PKPA).[35] In *Hickey v. Baxter*,[36] the issue presented was whether a federal district court had subject matter jurisdiction to hear a complaint based on 28 U.S.C. § 1738A[37] to enforce one State's custody

28. *Id.*

29. See Chaffin v. Lynch, 83 Va. 106, 1 S.E. 803 (1887).

30. *See id.*

31. The complete text of the statute reads: "All words shall be actionable which from their usual construction and common acceptance are construed as insults and tend to violence and breach of the peace." Va. Code § 8.01-45 (1986).

32. See W. T. Grant Co. v. Owens, 149 Va. 906, 141 S.E. 860 (1928).

33. Davis v. Heflin, 130 Va. 169, 107 S.E. 673 (1921).

34. See Weatherford v. Birchett, 158 Va. 741, 164 S.E. 535 (1932).

35. Pub. L. No. 96-611, 94 Stat. 3568 (codified at 18 U.S.C.A. § 1207, 28 U.S.C.A. § 1738A, 42 U.S.C.A. §§ 654, 663 (1980)).

36. 800 F.2d 430 (4th Cir. 1986).

37. The text of this statute provides as follows: § 1738A. Full faith and credit given to child custody determinations

decree over a conflicting order of another State. Relying on decisions from

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(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term—

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child; and

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States.

(c) 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 on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(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 his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in 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 under subparagraph (A), (B), (C), or (E), or another State has

three other circuits,[38] this court held that such jurisdiction does exist.[39] While there is indeed some room for debate on that issue,[40] the *Hickey* case raises an even more fundamental question: the propriety of the application of the full faith and credit clause[41] to child custody matters which has not been discussed in the published opinions.

The full faith and credit clause has been recognized as one of the underlying concepts of federalism.[42] Through this constitutional provision, the framers

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declined to exercise jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State if—

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

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

28 U.S.C. § 1738A (Supp. 1987).

38. *See* McDougald v. Jenson, 786 F.2d 1465, 1480 (11th Cir. 1986); Heartfield v. Heartfield, 749 F.2d 1138, 1141 (5th Cir. 1985); Flood v. Braaten, 727 F.2d 303, 312 (3d Cir. 1984). *But see* Thompson v. Thompson, 798 F.2d 1547, 1559 (9th Cir. 1986), *cert. granted*, 107 S.Ct. 946 (1987); Rogers v. Platt, 814 F.2d 683 (D.C. Cir. 1987).

39. 800 F.2d at 431. It is noteworthy that the *Hickey* panel engaged in no analysis of the basis of this jurisdictional grant. This is particularly perplexing in light of the apparent incongruity between the decisions upon which *Hickey* is premised. *Compare Flood*, 727 F.2d at 310-12 (examining legislative history of § 1738A to determine whether Congress intended federal courts to possess jurisdiction to enforce compliance with its provisions) *with McDougald*, 786 F.2d at 1477-78 (because it was not asked to imply a grant of federal jurisdiction under § 1738A, court need not conduct an exhaustive inquiry into the intent of Congress in passing the PKPA but rather will determine if the claim falls within the federal court's "arising under" jurisdiction pursuant to 28 U.S.C. § 1331).

40. *See* Meade v. Meade, 812 F.2d 1473, 1478-83 (1987) (Boyle J., concurring) (pointing out the flawed reasoning in *Flood* and *McDougald*); *Thompson*, 798 F.2d at 1559 (rejecting the reasoning of the courts in *Flood, Heartfield*, and *McDougald*); *Rogers*, 814 F.2d at 694-95 (same). Interestingly, the District of Columbia and Seventh Circuits have expressed the view that the PKPA creates no cause of action enforceable in federal district court. See Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982); Bennett v. Bennett, 682 F.2d 1039, 1043 (D.C. Cir. 1982).

41. *See* U.S. Const. art. IV, § 1. Article IV of the United States Constitution requires that each State accord full faith and credit to the public acts, records, and judicial proceedings of other States. *Id.*

42. Milwaukee County v. M. E. White Co., 296 U.S. 268, 277-78 (1935).

sought to preserve national unity[43] by preventing dissatisfied litigants from forum shopping from State to State for a favorable ruling.[44] Rather than imposing federal substantive law on the States, the principle of full faith and credit yields to States the development of their own policies which full faith and credit ensures other States will respect,[45] for the Court has upheld application of the clause in virtually every area of the law.[46] But this has not been the case in the area of child custody decrees. Court on four separate occasions has declined to apply the full faith and credit clause to such decrees.[47]

The Court first examined the full faith and credit clause's application to child custody decrees in *New York ex rel Halvey v. Halvey*.[48] Noting that the child "custody decree was not irrevocable and unchangeable," it reasoned that the trial court possessed the power to modify the order at any time. The Supreme Court accordingly declined to require New York to grant greater full faith and credit to a Florida judgment than the Florida courts were required to extend. Consequently, the New York court's modification of the Florida order, based on the child's best interests and new evidence not considered by the Florida court, did not offend the full faith and credit clause.[49] There was simply "a failure of proof that the Florida decree received less credit in New York than it had in Florida."[50]

The Court next considered the full faith and credit implications of child custody orders in *May v. Anderson*.[51] Once again, the Supreme Court refused to apply the full faith and credit clause to a custody decree. Although an Ohio court had recognized a Wisconsin child custody order, the Supreme Court

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43. *Milwaukee*, 296 U.S. at 277-78.

44. *Id.* Sherrer v. Sherrer, 334 U.S. 343, 355 (1948); *see* Kovacs v. Brewer, 356 U.S. 604, 611 (1958), (Frankfurter, J., dissenting). *See Reese & Johnson, The Scope of the Full Faith and Credit to Judgments*, 49 Colum. L. Rev. 153 (1949) [hereinafter cited as *Reese & Johnson*] (detailed discussion of purposes behind the full faith and credit clause).

45. *Reese & Johnson, supra* note 44, at 178; *see* Johnson v. Muelberger, 340 U.S. 581, 585 (1951), (full faith and credit promotes unification by leaving each state with power over its own courts but binding litigants, wherever they may be in the nation, by prior orders of other courts with jurisdiction).

46. See *Comment, The Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act: Dual Response to Interstate Child Custody Problems*, 39 Wash. & Lee L. Rev. 149, 149 & n.3 (1982) (citing cases where Court has applied full faith and credit to uniquely state law law issues).

47. *See* Ford v. Ford, 371 U.S. 187 (1962); Kovacs v. Brewer, 356 U.S. 604 (1958); May v. Anderson, 345 U.S. 528 (1953); New York ex rel Halvey v. Halvey, 330 U.S. 610 (1947). More recently, the Court avoided the question on jurisdictional grounds. *See* Webb v. Webb, 451 U.S. 493, 495 (1981) (litigants could not raise full faith and credit question on appeal where neither party raised the constitutional issue at the state trial).

48. 330 U.S. 610 (1947).

49. *Halvey*, 330 U.S. at 613-14. The Court also underscored the fact that the New York court's modification proceeding was held with the child and both parents before it, unlike the Florida hearing where only the mother appeared.

50. *Id.* at 615.

51. 345 U.S. 528 (1953).

reversed on the ground that the Wisconsin court lacked *in personam* jurisdiction over the mother.[52]

In *Kovacs v. Brewer*,[53] the Supreme Court was asked to require North Carolina to extend full faith and credit to a modification of a New York decree by a New York court, entered at the instance of the New York mother against the custodial grandfather who, with the child, lived in North Carolina. The Court reaffirmed its holding in *Halvey* by stating "whatever the effect the Full Faith and Credit Clause may have with respect to custody decrees, it is clear . . . 'that the State of the forum has at least as much leeway to disregard the judgment, to qualify it, or to depart from it as does the State where it was rendered.' "[54] Thus, the court reasoned that a custody decree is not entitled to res judicata effect even in the State it was rendered, and much less in a sister State, where "changed circumstances call for a different arrangement to protect the child's health and welfare."[55] Based on this reasoning, the Supreme Court again declined to apply full faith and credit principles to require one State to be bound by another State's earlier child custody order. Rather, the case was remanded to the North Carolina Supreme Court for clarification of whether its earlier decision rested on the changed circumstance rule.[56] The Court had again succeeded in reconciling the full faith and credit clause with the state dominated area of child custody.

Justice Frankfurter issued a dissent that was not so concerned with reconciling any apparent conflict between full faith and credit and the state dominated province of child custody, for it was his view "when courts are confronted with the responsibility of determining the proper custody of children, a more important consideration asserts itself to which regard for curbing litigious strife is subordinated—namely, the welfare of the child."[57] Therefore, Justice Frankfurter reasoned, the policies at the base of the full faith and credit clause "militate strongly against a constitutionally enforced requirement of respect to foreign custody decrees."[58] Justice Frankfurter seemed particularly disturbed by the fact that the New York court had modified its custody order without the benefit of the personal appearance of the child or the paternal grandfather who was initially granted custody of the girl, neither of whom were even in the State.[59] He would have required a minimum nexus

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52. *Id.* at 533-35.

53. 356 U.S. 604 (1958).

54. *Id.* at 607 (quoting *Halvey*, 330 U.S. at 615).

55. *Id.* at 607-08.

56. The Court, moreover, invited the North Carolina court to base its decision on remand on the changed circumstances rule in the event it had not done so before. *Id.* at 608.

57. *Id.* at 611-12 (Frankfurter, J., dissenting); *see id.* at 611 (Frankfurter, J., dissenting) (purpose of full faith and credit clause is to preclude dissatisfied litigants from relitigating issues in one state that have been properly decided in another).

58. *Id.* at 613 (Frankfurter, J., dissenting).

59. *See id.* at 609, 613. (Frankfurter, J., dissenting). The paternal grandfather was granted custody pending the father's discharge from the Navy. *Id.* at 604-05. Their only presence at the modification hearing in New York was limited to a presentation of affidavits. *Id.* at 605.

between the New York court and the child before crediting that court's modification with any authority. This minimum nexus would require the child to at least be physically within the State's jurisdiction so that the court could responsibly carry out its duties in a child custody case. Justice Frankfurter would have affirmed the North Carolina Supreme Court's decision that refused to recognize the *in abstentia* decree. He also disapproved of the Court's remand because it implied that if there had not been a change in circumstances, then full faith and credit should have been given the New York court's modification.[60]

The last Supreme Court decision declining to hold that child custody decrees deserve full faith and credit in other states is *Ford v. Ford*.[61] There, the Court reversed a ruling by the South Carolina Supreme Court that a lower court was bound by an earlier Virginia custody decree.[62] The Virginia decree was actually reached by the parties' private agreement and therefore was not considered binding by the Supreme Court. The Court reasoned that since the Virginia trial court had not exercised its considered judgment before awarding custody, its judgment demonstrated an infidelity to the strong public policy of safeguarding the welfare and best interests of the children. The Virginia trial judge had neither ruled on nor seen the parents' private settlement and had heard no testimony to aid the court in determining what arrangement would be in the children's best interests. Therefore, the Court ruled, full faith and credit principles did not prohibit the South Carolina courts from determining what was in the best interest of the children.[63]

A common thread runs through these four decisions. The Supreme Court was vastly interested in distilling what the child's interests dictated. Even when we compare the range of disagreement between the breadth of Justice Frankfurter's belief, that the "best interests" inquiry ought to go so far as to subordinate full faith and credit principles, to the more narrow rulings in *Halvey, Kovacs*, and *Ford*, that recognized that the best interest of the child is a relevant inquiry for a court to make before applying the full faith and credit clause to another State's custody decree, it is clear that the child's best interest is a determination that must be carefully considered in this context. I think it is most significant that the Court defined the full faith and credit clause only to require a State to give another State's custody decree the same effect it would have in its originating State. Accordingly, in view of the fact that custody decrees are by their very nature subject to changes, we see that the Court provided parents lawfully residing with their children outside the jurisdiction of the State entering the initial decree the ability to modify that decree in the child's home State courts, courts that will be able to best address the child's best interests in that child's new home State. Thus, the most logical premise behind these decisions is that a State court which enters a custody

60. *Id.* at 614 (Frankfurter, J., dissenting).
61. 371 U.S. 187 (1962).
62. *Id.* at 194, *rev'g*, 239 S.C. 305 (1961), 123 S.E.2d 33 (S.C. 1961).
63. *Ford*, 371 U.S. at 194.

decree only to have the child later leave that State no longer is the most able to decide what the child's best interests require.[64]

It is against this backdrop that we must examine the Congressional decision to apply full faith and credit principles to child custody orders embodied in the PKPA. While Congress may unquestionably prescribe the manner in which judicial proceedings entitled to full faith and credit are proved,[65] I suggest there is doubt that it can substantively alter the meaning the Supreme Court has given that constitutional provision. The Supreme Court, in its role as final arbiter of our federal constitution,[66] has interpreted the full faith and credit clause, as applied in the child custody context, to require a State only to give as much faith and credit to a custody decree as it would be entitled to in the courts of the issuing State.[67] And Congress, through the PKPA, has substantively changed that interpretation by restricting a State's ability to modify another State's custody decree.[68] Whether this is impermissible legislative action is at least an open question, full of doubt, I think.

Notwithstanding the above analysis, I am not unsympathetic to the problem of child kidnapping. However, the PKPA, as it currently is interpreted by some courts, reaches custody disputes that have nothing to do with that problem.[69] In fact, if current trends are any indication, the PKPA will most often be applied in situations where parental kidnapping is not involved, such as the *Hickey* and *Meade* cases in this circuit. This is due in large part to the broad language adopted by Congress in the PKPA.

Thus, it is my opinion that it would be well if the PKPA be given a narrowing construction so that it not apply to those interstate custody disputes except those, for example, where a child has been kidnapped by a parent or other standing in like relation to a child. This would save its beneficial aspects and make the Act consistent with the Court's decisions. Although this may be more of a political question, it is the only scenario in which I believe Congress is justified in meddling in a State's child custody affairs. Other use of the PKPA, such as in garden variety custody disputes in which the statute is now applied, amounts to nothing more than tampering with Supreme Court constitutional interpretation.

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64. I find it noteworthy that the Supreme Court in *Halvey* and Justice Frankfurter's dissenting opinion in *Kovacs* both contemplated that the law of the State where the original decree was entered be applied in determining the child's best interests. See *Harvey*, 330 U.S. at 612; *Kovacs*, 356 U.S. at 612 (Frankfurter, J., dissenting).

65. The United States Constitution provides that Congress has the power "by general laws to prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. Const. art. IV, § 1. In fact, Congress has implemented the full faith and credit clause by statute, and § 1738A is merely an addendum constituting a more specific Congressional elaboration upon that prior legislation. *See* 28 U.S.C. § 1738. (Supp. 1987).

66. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

67. *Halvey*, 330 U.S. at 615; *see Kovacs*, 356 U.S. at 607.

68. See 28 U.S.C. § 1738A(a) (Supp. 1987).

69. *E.g.*, *Heartfield*, 749 F.2d at 1139 (dispute arising out of denied visitation and withholding of support payments; no child kidnapping involved).