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## Family Law Federalism: Divorce and the Constitution

Ann Laquer Estin

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# FAMILY LAW FEDERALISM: DIVORCE AND THE CONSTITUTION

Ann Laquer Estin\*

## ABSTRACT

American divorce law was transformed by the Supreme Court in a series of decisions beginning with *Williams v. North Carolina* in 1942. These constitutional full faith and credit cases resolved a long-standing federalism problem by redefining the scope of state power over marital status. With these decisions, the Court shifted from an analysis based on the competing interests of different states to an approach that highlighted the individual interests of the parties involved. This change fundamentally altered state power over the family by extending to individuals greater control of their marital status. In the process, the Court cleared a path for innovations including unilateral no-fault divorce and divorce based on mutual consent and laid the foundation for a stronger national role in domestic relations law.

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\* University of Iowa College of Law.

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## INTRODUCTION

In the American conception of federalism, families are a matter for local rather than national control. This premise was central in the popular and congressional debates before and after the Civil War on subjects such as slavery and women's emancipation,<sup>1</sup> and the same trope complicates the present debate over legal recognition for same-sex marriage. The premise appeared in Supreme Court opinions in the nineteenth century<sup>2</sup> and reemerged in the jurisprudence of the 1990s when the Court reshaped the limits of federal authority under the Commerce Clause.<sup>3</sup>

The traditional association of "family" with "local" assumes that families can be meaningfully identified with specific geographic territories for regulatory purposes. While this notion has a powerful rhetorical and emotional appeal, it was already problematic in the middle of the nineteenth century and had become largely untenable a hundred years later.<sup>4</sup> Throughout this time period, attempts to sustain state authority over the family generated enormous conflict of laws problems, particularly in the context of divorce and child custody disputes.<sup>5</sup> The federalism problem at the core of the divorce debate was ultimately truncated by the Supreme Court in a series of decisions that began in 1942.<sup>6</sup> Acting on the basis of constitutional full faith and credit principles, the Court severed the connection between state power and marital status, changing the shape of both divorce law and American federalism.

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<sup>1</sup> See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 60–64, 79–81, 99–103 (2000).

<sup>2</sup> *E.g.*, *Ex parte Burrus*, 136 U.S. 586, 593 (1890) ("The 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."); *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858) ("We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.").

<sup>3</sup> *E.g.*, *United States v. Lopez*, 514 U.S. 549, 564 (1995).

<sup>4</sup> See *infra* Part I.A.

<sup>5</sup> See *infra* Part I.B.

<sup>6</sup> *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Aldrich v. Aldrich*, 378 U.S. 540 (1964); *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Armstrong v. Armstrong*, 350 U.S. 568 (1956); *May v. Anderson*, 345 U.S. 528 (1953); *Sutton v. Leib*, 342 U.S. 402 (1952); *Cook v. Cook*, 342 U.S. 126 (1951); *Johnson v. Muelberger*, 340 U.S. 581 (1951); *Rice v. Rice*, 336 U.S. 674 (1949); *Kreiger v. Kreiger*, 334 U.S. 555 (1948); *Estin v. Estin*, 334 U.S. 541 (1948); *Coe v. Coe*, 334 U.S. 378 (1948); *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947); *Griffin v. Griffin*, 327 U.S. 220 (1946); *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U.S. 279 (1945); *Williams v. North Carolina (Williams II)*, 325 U.S. 226 (1945); *Barber v. Barber*, 323 U.S. 77 (1944); *Williams v. North Carolina (Williams I)*, 317 U.S. 287 (1942).

In the literature on the Supreme Court's transformation of federalism in the mid-twentieth century and in the literature on the history of divorce,<sup>7</sup> the intersection between divorce law and federalism has gone largely unexplored.<sup>8</sup> This Article reconnects these subjects, analyzing the ways in which the Supreme Court reframed divorce law and federalism in the 1940s and 1950s.<sup>9</sup> The Article traces the Supreme Court's important innovations into the "divorce revolution" of the 1960s and 1970s and examines the Court's transformation of constitutional full faith and credit from a federalist doctrine that centered on state interests to an individual rights discourse that highlighted the interests of ordinary citizens.<sup>10</sup> The Article argues that the divorce cases fundamentally altered state power to set the normative boundaries of family life by extending to individual citizens the ability to choose which jurisdiction would control their marital status. The construction of this individual right, in the interstices of the Full Faith and Credit Clause,<sup>11</sup> suggests an important tension between a strong theory of federalism and a strong conception of national citizenship. In this respect, these cases seem to anticipate the more extensive infusion of constitutional principles into family law that occupied the Court during the decades that followed.

Despite the survival of old rhetoric assigning the family to local authority, the constitutional model that consigned the family to local control was effectively discarded fifty years ago. Family law in America today is extensively shaped by national law, with both Congress and the Supreme Court deeply engaged in setting policies, defining norms, and harmonizing the competing laws of different states.

## I. DIVORCE LAW AND STATE AUTHORITY

### A. State Laws and the Full Faith and Credit Problem

From the earliest periods of American history, the colonies took different approaches to questions of marriage and divorce. The New England colonies treated

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<sup>7</sup> See, e.g., NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* (1962); J. HERBIE DiFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* (1997); GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* (1991); see also HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 277–82 (2000).

<sup>8</sup> But see MELVIN I. UROFSKY, *DIVISION AND DISCORD: THE SUPREME COURT UNDER STONE AND VINSON, 1941–1953*, at 129–36 (1997) (discussing the "Court's role as umpire in the federal system" and citing examples of Supreme Court divorce cases).

<sup>9</sup> See *infra* Part II.

<sup>10</sup> See *infra* Part III. On the divorce revolution, see generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE 188–90* (1989); HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 15–51* (1985).

<sup>11</sup> U.S. CONST. art. IV, § 1.

divorce as a civil matter and began granting divorces during the seventeenth century.<sup>12</sup> The southern colonies followed the ecclesiastical law pattern and generally refused to permit divorce.<sup>13</sup> This diversity and experimentation continued in the years after independence and remains an unusual feature of American divorce law.<sup>14</sup>

In the early nineteenth century, as divorce became more widely available in some states, the law in others remained conservative, with narrowly limited possibilities for divorce.<sup>15</sup> The practice of migratory divorce began during this period, and scholars have identified the patterns of interstate travel by unhappily married individuals seeking an opportunity to divorce.<sup>16</sup> New York, with especially strict divorce laws, found its citizens traveling to Vermont or Pennsylvania in the early years of the century, to Ohio, Illinois, and Indiana in the middle years, and westward to the Dakotas by the 1890s.<sup>17</sup> Divorce-seekers were drawn to those states by more liberal grounds for divorce and relatively short residency requirements that permitted individuals to file quickly.<sup>18</sup> State legislatures understood these dynamics and competed for the divorce trade.<sup>19</sup> Nevada became the leading divorce destination in the early years of the Depression when it cut its residency requirement to six weeks and legalized wide-open gambling to entertain new residents waiting for their divorces.<sup>20</sup>

Migratory divorce appeared in the Supreme Court reports with *Barber v. Barber* in 1858.<sup>21</sup> After Mrs. Barber had obtained a legal separation from her husband and an order for alimony in New York, Mr. Barber moved to Wisconsin and obtained a divorce.<sup>22</sup> When Mrs. Barber brought a diversity proceeding to collect the more than

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<sup>12</sup> See BLAKE, *supra* note 7, at 34–40; RILEY, *supra* note 7, at 9–23.

<sup>13</sup> See RILEY, *supra* note 7, at 25–29. Riley notes that while divorce was not available, formal and informal separations appear to have been widespread. *Id.*

<sup>14</sup> See *id.* at 34–61; BLAKE, *supra* note 7, at 48–63. Other federal nations treat marriage and divorce as subjects of national jurisdiction, including Canada and Australia. Justice Frankfurter noted this difference in his concurring opinion in *Williams I*, 317 U.S. 287, 304 (1945) (Frankfurter, J., concurring).

<sup>15</sup> New York's divorce law, drafted in 1787 by Alexander Hamilton, permitted divorce only on grounds of adultery until additional grounds were added in 1966. See BLAKE, *supra* note 7, at 64–79, 189–225; see also RILEY, *supra* note 7, at 156–57 (describing strict divorce policies in New York and South Carolina); *infra* note 196 and accompanying text.

<sup>16</sup> See RILEY, *supra* note 7, at 85–107 (describing so-called “divorce mills” in the American West).

<sup>17</sup> See BLAKE, *supra* note 7, at 115–29.

<sup>18</sup> See *id.*

<sup>19</sup> See *id.*

<sup>20</sup> See *id.* at 157–58; RILEY, *supra* note 7, at 135–39. Florida also made a bid for a share of the divorce tourism in 1935 when it reduced its residency requirement for divorce from one year to three months; the period was increased again to six months in 1957. BLAKE, *supra* note 7, at 167–69.

<sup>21</sup> 62 U.S. (21 How.) 582 (1858).

<sup>22</sup> *Id.* at 584.

\$4000 he owed under the New York alimony decree, the federal courts allowed her to recover.<sup>23</sup> Approving this result, the Supreme Court held that the Wisconsin divorce “certainly has no effect to release the defendant there and everywhere else from his liability” for support under the prior New York decree.<sup>24</sup>

Throughout the nineteenth century, state courts wrestled with the question of when one state should be required to recognize a divorce decree from another state. Initially, courts treated this as a matter of comity, applying principles of private international law and developing jurisdictional principles to determine when another state court’s decree was worthy of respect.<sup>25</sup> Michael O’Hear argues that these tests were “adopted and designed . . . specifically to protect the territorial integrity of substantive divorce laws.”<sup>26</sup> In 1869, the Supreme Court invoked the Full Faith and Credit Clause in *Cheever v. Wilson*,<sup>27</sup> holding that the District of Columbia was required to recognize an Indiana divorce decree.<sup>28</sup> The Court noted that Indiana had jurisdiction over the parties and the subject matter, that the decree was valid under the laws of Indiana, and that there had been no evidence offered to dispute the fact of Mrs. Cheever’s residence in Indiana.<sup>29</sup>

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<sup>23</sup> *Id.* at 586.

<sup>24</sup> *Id.* at 588. *Barber* is usually cited for the proposition that a married woman can have a domicile different from her husband’s and on the question whether a suit to enforce an alimony decree falls within the diversity jurisdiction of the federal courts. See discussion *infra* notes 34–37 and accompanying text. Although the Court affirmed an order enforcing Mrs. Barber’s alimony decree, it also issued a disclaimer of jurisdiction. See *supra* note 2.

<sup>25</sup> See Michael M. O’Hear, “Some of the Most Embarrassing Questions”: *Extraterritorial Divorces and the Problem of Jurisdiction Before Pennoyer*, 104 YALE L.J. 1507 (1995).

<sup>26</sup> *Id.* at 1510; see also Neal R. Feigenson, *Extraterritorial Recognition of Divorce Decrees in the Nineteenth Century*, 34 AM. J. LEGAL HIST. 119, 121 (1990) (“Preserving local control over marriage and divorce remained the only discernible policy behind several leading decisions.”).

<sup>27</sup> 76 U.S. (9 Wall.) 108 (1869). Prior to *Cheever*, the state courts “consistently ignored the constitutional dimension of the divorce recognition cases, which, in effect, endowed the courts with greater ability to protect state sovereignty.” O’Hear, *supra* note 25, at 1513.

<sup>28</sup> *Cheever*, 76 U.S. (9 Wall.) at 123. 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.

<sup>29</sup> *Cheever*, 76 U.S. (9 Wall.) at 123–24 (“The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offence, and the domicile of the husband are of no consequence.”). The Court also cited *Barber* for the “well settled” rule that a wife “may acquire a separate domicile whenever it is necessary or proper that she should do so.” *Id.* at 124. *Cheever* involved an Indiana divorce obtained by Mrs. Annie Cheever, who evidently traveled from Washington, D.C., to Indiana for a period of time for this purpose. Although her husband participated in the divorce proceeding, subsequent litigation in Washington raised an issue as to the validity of the Indiana divorce. *Id.* at 115–18.

After *Cheever*, state courts incorporated their jurisdictional tests into the constitutional full faith and credit analysis.<sup>30</sup> Many courts concluded that divorces should be treated as actions in rem, for which jurisdiction must be based on domicile.<sup>31</sup> This rule had the advantage of preventing married couples who wished to divorce from evading restrictive state divorce laws by consenting to jurisdiction in a state with a more liberal view of divorce. The Supreme Court endorsed this view of divorce jurisdiction when it decided *Pennoyer v. Neff*<sup>32</sup> in 1877 and then relied on this aspect of *Pennoyer* in 1888 when it upheld a legislative divorce entered without jurisdiction over the absent spouse in *Maynard v. Hill*.<sup>33</sup>

A jurisdictional principle based on domicile, however, generated particular difficulties when husband and wife resided in different states.<sup>34</sup> Under the common law of coverture, a married woman's domicile was the same as her husband's, which suggested that his domicile should control for jurisdictional purposes.<sup>35</sup> For women who had been abandoned by their husbands, this rule caused significant hardship, both because it prevented wives from bringing divorce proceedings at home and because it allowed deserting husbands to terminate their marital obligations more easily. To remedy this problem, courts held that a married woman could establish her own domicile in some circumstances, typically because her husband had deserted her or because his fault released her from the obligation to remain with him.<sup>36</sup> In both *Barber* and *Cheever*, the Supreme Court accepted the proposition that a married woman could establish an independent domicile.<sup>37</sup> While this development made it easier for state

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<sup>30</sup> State courts applied their own jurisdictional law and felt free to reexamine jurisdictional facts in particular cases. See Feigenson, *supra* note 26, at 125–27; O'Hear, *supra* note 25, at 1528.

<sup>31</sup> Feigenson, *supra* note 26, at 134. Feigenson notes that the rule was first recognized in a Maine decision in 1832 and later adopted in Joel Bishop's widely cited treatise on marriage and divorce. *Id.*; see also O'Hear, *supra* note 25, at 1529–31.

<sup>32</sup> 95 U.S. 714, 734–35 (1877) (reaffirming state authority to determine “the status of one of its citizens towards a non-resident” by granting a divorce, even if made “without service of process or personal notice to the non-resident”). Not all states agreed with this position. See O'Hear, *supra* note 25, at 1531–34 (listing states that required that the court have personal jurisdiction over the defendant as a prerequisite for recognizing a sister-state divorce).

<sup>33</sup> 125 U.S. 190, 205 (1888).

<sup>34</sup> Contemporary legal scholars found these problems “most embarrassing” and “most perplexing.” See Feigenson, *supra* note 26, at 120 (citing treatises by James Kent and Joseph Story).

<sup>35</sup> O'Hear, *supra* note 25, at 1529–30; see also, e.g., *Maynard*, 125 U.S. 190.

<sup>36</sup> Feigenson, *supra* note 26, at 127, 159. Feigenson argues that “all states, with very few exceptions, protected the property rights of their female citizens” with a variety of divorce recognition rules. *Id.* at 159; see also O'Hear, *supra* note 25, at 1529–30.

<sup>37</sup> *Cheever v. Wilson*, 76 U.S. (9 Wall.) 108, 124 (1869); *Barber v. Barber*, 63 U.S. (21 How.) 582, 597–98 (1858). While the analysis in *Barber* seems limited to wives living apart from their husbands under a judicial separation decree, the rule stated in *Cheever* is much broader: “The rule is that she may acquire a separate domicil whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues.” *Cheever*, 76 U.S. at 124.

courts to protect a left-behind spouse, it also increased the potential for conflict between states over the regulation of marriage and divorce.

A serious problem of federalism rested at the heart of these conflict of laws rules. According to Michael O'Hear, "Courts insisted that the state to which a marriage belonged had an exclusive right to apply its laws to end the marriage; divorces granted by other states (those lacking 'jurisdiction') represented a territorial overreaching by the laws of the decreeing state."<sup>38</sup> By incorporating a jurisdictional threshold into the full faith and credit analysis, the states protected their sovereignty at the expense of the contrary policies given expression in the Full Faith and Credit Clause. States with especially strict divorce laws were the least willing to respect other states' divorce decrees.<sup>39</sup> By the end of the nineteenth century, most states had come to recognize out-of-state *ex parte* divorce decrees entered by a court in the plaintiff's domicile, while a small group, including New York, Pennsylvania, North Carolina, and South Carolina, steadfastly refused to recognize *ex parte* divorces.<sup>40</sup>

The Supreme Court addressed the full faith and credit problem with four decisions in the beginning of the twentieth century involving divorces of spouses living in different states. Three of these cases were easily resolved based on evidence that neither party had a bona fide domicile in the forum state.<sup>41</sup> In the fourth, the Court held that New York was required to recognize a husband's *ex parte* Kentucky divorce decree based on the husband's domicile there and the fact that Kentucky had been the parties' last common domicile.<sup>42</sup> Although these decisions seemed to confirm the majority rule that the plaintiff's individual domicile was the key to divorce jurisdiction for full faith and credit purposes, the Court reached a different conclusion a few years later in *Haddock v. Haddock*.<sup>43</sup>

*Haddock* involved a Connecticut divorce, granted to a husband on grounds of desertion, that was challenged more than ten years later when the wife brought proceedings in New York seeking support.<sup>44</sup> While there was no dispute concerning Mr. Haddock's Connecticut domicile, the New York courts refused to give effect to the Connecticut decree on the theory that he had abandoned his wife in New York.<sup>45</sup> The Supreme Court framed the issue as "[w]hether the Connecticut court, in virtue alone of the domicil of the husband in that State, had jurisdiction to render a decree against the wife under the circumstances stated, which was entitled to be enforced

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<sup>38</sup> O'Hear, *supra* note 25, at 1510.

<sup>39</sup> See Feigenson, *supra* note 26, at 129–30.

<sup>40</sup> *Id.* at 128–29; see also O'Hear, *supra* note 25, at 1531–32.

<sup>41</sup> *Andrews v. Andrews*, 188 U.S. 14 (1903); *Streitwolf v. Streitwolf*, 181 U.S. 179 (1901); *Bell v. Bell*, 181 U.S. 175 (1901); see also *Lynde v. Lynde*, 181 U.S. 183 (1901) (concerning interstate recognition of decree for alimony); *BLAKE*, *supra* note 7, at 176–78.

<sup>42</sup> *Atherton v. Atherton*, 181 U.S. 155 (1901).

<sup>43</sup> 201 U.S. 562 (1906).

<sup>44</sup> *Id.* at 564–65.

<sup>45</sup> *Id.* at 565.



in other States."<sup>46</sup> The answer, according to the majority, depended upon whether the husband had been at fault in the parties' separation.<sup>47</sup>

The Supreme Court understood *Haddock* to present a serious federalism dilemma. On one side were the policies of states such as New York, designed to narrowly limit divorce.<sup>48</sup> On the other was the broad authority accorded to all states to regulate the marital status of state residents and the constitutional obligation of the Full Faith and Credit Clause. The competing interests seemed irreconcilable: "[I]f one government, because of its authority over its own citizens has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution."<sup>49</sup> To avoid this dilemma, the Court embraced a new jurisdictional principle based on marital fault.

Recasting its prior full faith and credit decisions in this mold, and evidently accepting the New York court's conclusion that Mr. Haddock had abandoned his wife,<sup>50</sup> the majority decided that New York was not required to give effect to the Connecticut decree. While this outcome seemed to undermine the authority of the Connecticut courts, the Court noted that Connecticut maintained "the power . . . to enforce within its own borders the decree of divorce which is here in issue."<sup>51</sup> After the *Haddock* decision, therefore, Mr. Haddock was validly divorced in Connecticut but still married in New York.<sup>52</sup>

<sup>46</sup> *Id.* at 572. The majority questioned whether to extend the rule in *Pennoyer* so that a divorce decree would be enforceable only when the court had acquired personal jurisdiction over the defendant. *Id.* at 572–73.

<sup>47</sup> *Id.* at 628 (Holmes, J., dissenting) (stating that the majority held that "when a husband sues in court of his domicil for divorce from an absent wife on the ground of her desertion, the jurisdiction of the court, if there is no personal service, depends upon the merits of the case"). Hartog characterized the majority opinion this way:

White's holding could be reduced to two complementary propositions: if a husband had wrongfully left his wife and sought a new domicile, he could not get a divorce entitled to full faith and credit; if, on the other hand, he had acquired a new domicile after her wrongful conduct, his divorce was entitled to full faith and credit.

HARTOG, *supra* note 7, at 276.

<sup>48</sup> For a history of the development of divorce law in New York, see BLAKE, *supra* note 7, at 64–79, 189–225.

<sup>49</sup> *Haddock*, 201 U.S. at 573 (majority opinion). The Court was uncomfortable with the tradition of treating a divorce as a proceeding in rem and particularly with the possibility that if the spouses had separate domiciles the marital res could exist simultaneously in two different states. *Id.* at 576–78; see also discussion *infra* notes 85–88 and accompanying text.

<sup>50</sup> The majority ignored the obvious problem that guilt or innocence could be seen differently by the courts in different states. In *Haddock*, the Connecticut decree was premised on a finding that the wife had deserted her husband, but New York disregarded this finding without considering the record of the Connecticut proceedings or requiring that the wife produce evidence to impeach the Connecticut decree. *Haddock*, 201 U.S. at 626–27 (Brown, J., dissenting).

<sup>51</sup> *Id.* at 605 (majority opinion).

<sup>52</sup> Every other state also had the power, within its own borders and as to its own citizens,

The dissenting Justices in *Haddock* complained that the majority had “virtually returned to the old doctrine of comity, which it was the very object of the full faith and credit clause of the Constitution to supersede,”<sup>53</sup> and they rejected the idea that a court’s jurisdiction over a divorce should depend on the merits of the case.<sup>54</sup> Justice Holmes wrote that the ruling was “likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage.”<sup>55</sup> The dissenters emphasized the power of each state to regulate the marital status of its citizens and pointed out that, because divorce proceedings were treated as actions in rem, there was no requirement of personal jurisdiction.<sup>56</sup>

After *Haddock*, several categories of out-of-state divorces were entitled to full faith and credit: divorces entered in a state in which both husband and wife were domiciled, divorces entered by a court in the state of plaintiff’s domicile which also had personal jurisdiction over the defendant, and divorces entered in the state of “matrimonial domicile.”<sup>57</sup> The definition of “matrimonial domicile” under *Haddock* incorporated an element of marital fault, and although the concept was eventually incorporated into the Restatement of Conflict of Laws,<sup>58</sup> it produced significant confusion. Criticisms of it grew stronger over the years as the rules and exceptions spawned by *Haddock* grew steadily more complicated.<sup>59</sup> The experts on conflicts disagreed over what the rules should provide, but there was general disapproval of principles under which a couple could be divorced in one state and still married in another.<sup>60</sup>

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to give the Connecticut decree “such efficacy as it may be entitled to in view of the public policy of that State.” *Id.* at 606.

<sup>53</sup> *Id.* at 628 (Brown, J., dissenting).

<sup>54</sup> *Id.* (Holmes, J., dissenting).

<sup>55</sup> *Id.* Holmes viewed the majority opinion as implicitly overruling *Atherton*, but *Atherton* was reaffirmed several years later in *Thompson v. Thompson*, 226 U.S. 551 (1913). See discussion *supra* note 42 and accompanying text. On the problem of reconciling *Haddock* and *Atherton*, see Henry L. McClintock, *Fault as an Element of Divorce Jurisdiction*, 37 YALE L.J. 564, 564–65 (1927).

Academic commentary generally agreed with Holmes. See, e.g., Joseph H. Beale, Jr., *Constitutional Protection of Decrees for Divorce*, 19 HARV. L. REV. 586 (1906); Herbert F. Goodrich, *Matrimonial Domicile*, 27 YALE L.J. 49 (1917).

<sup>56</sup> *Haddock*, 201 U.S. at 614–15 (Brown, J., dissenting).

<sup>57</sup> Twenty years later, Beale concluded that *Haddock* had “effectually and greatly limited the exceptional doctrines of New York, Pennsylvania, and New Jersey,” noting that with this decision “[t]he competing doctrines were at least brought closer together.” Joseph H. Beale, *Haddock Revisited*, 39 HARV. L. REV. 417, 421 (1926).

<sup>58</sup> See RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 113 (1934).

<sup>59</sup> See Beale, *Haddock Revisited*, *supra* note 57; Joseph W. Bingham, *The American Law Institute vs. The Supreme Court: In the Matter of Haddock v. Haddock*, 21 CORNELL L.Q. 393 (1936); Edward S. Corwin, *The “Full Faith and Credit” Clause*, 81 U. PA. L. REV. 371, 381–83 (1933); Harold Wright Holt, *Any More Light on Haddock v. Haddock? The Problem of Domicil in Divorce*, 39 MICH. L. REV. 689 (1940).

<sup>60</sup> See, e.g., Beale, *Haddock Revisited*, *supra* note 57, at 427–28. There were also objections

### *B. The Campaign Against Divorce*

The Supreme Court's anomalous decision in *Haddock* is more easily understood in the context of the conservative divorce critique of the time. Nineteenth-century reformers had campaigned against liberal divorce laws and secured legislation in many states making divorces—particularly migratory divorces—more difficult to obtain.<sup>61</sup> After the Civil War, divorce rates increased and the debate gained intensity, drawing a variety of national political and religious leaders to the cause of (anti) divorce reform.<sup>62</sup> Nationwide statistics on divorce, compiled and published by the Commissioner of Labor in 1889, confirmed the dramatic increase in divorce over the previous twenty years.<sup>63</sup>

To combat the perceived evils of migratory divorce, reformers considered both uniform state divorce legislation and a constitutional amendment giving Congress authority to regulate marriage and divorce.<sup>64</sup> Nelson Blake wrote:

Having altered the Federal balance through the enactment of the Thirteenth, Fourteenth, and Fifteenth amendments, many Republicans were hospitable to the idea of adding still another constitutional amendment that would permit Congress to legislate in the field of marriage and divorce. Democrats, on the other hand, tended to oppose Federal action but applauded the idea of achieving uniformity through the cooperation of the states.<sup>65</sup>

Legislation to enact a constitutional amendment was introduced in almost every session of Congress from 1884 until the late 1940s.<sup>66</sup> The proposed amendments adhered to

raised in the literature to a conflicts rule under which the wrongdoing of one or both parties became a jurisdictional issue. *See, e.g.,* McClintock, *supra* note 55, at 571–72.

<sup>61</sup> *See* BLAKE, *supra* note 7, at 80–96; HARTOG, *supra* note 7, at 244–47; WILLIAM L. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* (1967); RILEY, *supra* note 7, at 62–67.

<sup>62</sup> *See* BLAKE, *supra* note 7, at 130–51; RILEY, *supra* note 7, at 71–78, 108–29.

<sup>63</sup> U.S. DEP'T OF COMMERCE & LABOR, *REPORT ON MARRIAGE AND DIVORCE: 1867–1886* (1889); *see also* BLAKE, *supra* note 7, at 134–36; RILEY, *supra* note 7, at 78–80. Notably, the evidence suggested that migratory divorces were not a substantial portion of the total. *Id.*; *see also* BUREAU OF THE CENSUS, *MARRIAGE AND DIVORCE 1887–1906* (1908) (showing continued increase); RILEY, *supra* note 7, at 86–92.

<sup>64</sup> *See* BLAKE, *supra* note 7, at 130–51.

<sup>65</sup> *See id.* at 133.

<sup>66</sup> *Id.* at 145–50. One proposed amendment, introduced in 1892, provided: “The Congress shall have the exclusive power to regulate marriage and divorce in the several states, Territories, and the District of Columbia.” *See* O'NEILL, *supra* note 61, at 238–39. According to Blake, “None of these proposals ever came to a vote in either house, and only once were they considered important enough to require formal committee action.” BLAKE, *supra* note 7, at 145. The committee action was a negative vote by the House Judiciary Committee in 1892 that

the conservative line, and more moderate proposals drew sharp criticism.<sup>67</sup> President Theodore Roosevelt, recognizing the difficulty of enacting a constitutional amendment on marriage and divorce, called for uniform divorce legislation on several occasions in 1905 and 1906.<sup>68</sup>

Movement toward uniform divorce laws began in the 1890s, with the founding of the National Conference of Commissioners on Uniform State Laws (NCCUSL) and the National Congress on Uniform Divorce Laws.<sup>69</sup> NCCUSL promulgated a uniform divorce statute in 1907,<sup>70</sup> which embodied the views of the conservative critics and included a provision that denied recognition to any out-of-state divorce entered on grounds that would not be available in the forum state.<sup>71</sup> Despite strong support for the idea of uniform divorce legislation, only Delaware, New Jersey, and Wisconsin enacted the 1907 law.<sup>72</sup>

Scholars have considered why the movement for uniform laws or a constitutional amendment was a failure. William O'Neill argues that divorce "[c]onservatives were torn between their hatred of divorce and their fear of strong federal action, and they wanted to believe that uniformity could be achieved painlessly through voluntary

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divided largely along party lines, with the majority report reflecting the view of the Southern Democrats against an expansion of federal authority. *Id.* at 145–46 (citing *Marriage and Divorce*, H.R. REP. NO. 52-1290 (1892)).

<sup>67</sup> One proposed formulation, acceptable to conservatives, provided: "Congress shall have power to establish and enforce by appropriate legislation uniform laws as to marriage and divorce: Provided, That every State may by law exclude, as to its citizens duly domiciled therein, any or all causes for absolute divorce in such laws mentioned." BLAKE, *supra* note 7, at 148 (quoting S.J. Res. 31, 67th Cong. (1921)).

<sup>68</sup> Regarding Theodore Roosevelt's views, see *id.* at 146–47; O'NEILL, *supra* note 61, at 245–46; RILEY, *supra* note 7, at 114–15. William Howard Taft also supported uniform divorce legislation during his presidency. See O'NEILL, *supra* note 61, at 244; James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2122 (1991) (noting support of both Roosevelt and Taft).

<sup>69</sup> BLAKE, *supra* note 7, at 136–45; O'NEILL, *supra* note 61, at 240–43; RILEY, *supra* note 7, at 111–12; White, *supra* note 68, at 114–15.

<sup>70</sup> See sources cited *supra* note 69; see also Ernst Freund, *Uniform Marriage and Divorce Legislation*, 21 CASE & COMMENT 7 (1914–15).

<sup>71</sup> See BLAKE, *supra* note 7, at 144 ("Provided, That if any inhabitant of this state shall go into another state, territory or country in order to obtain a decree of divorce for a cause which occurred while the parties resided in this State, or for a cause which is not ground for divorce under the laws of this state, a decree so obtained shall be of no force or effect in this state."). Blake notes the doubts at the time regarding whether this language was compatible with the Full Faith and Credit Clause. *Id.* at 145.

<sup>72</sup> *Id.*; White, *supra* note 68, at 2107. White states that the next uniform divorce law from NCCUSL was the no-fault statute promulgated in 1973. *Id.* at 2125. *But see* MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 47 (1972) (noting NCCUSL's approval of a Divorce Jurisdiction Act in 1930 (adopted only in Vermont) and a Uniform Divorce Recognition Act in 1947 (adopted in ten states)).

cooperation.”<sup>73</sup> Although “uniformity was the single most talked-about solution to the divorce problem,” it was impossible to achieve “because different religious groups with differing ideas on divorce dominated enough state legislatures to prevent the passage of model laws.”<sup>74</sup> O’Neill suggests that conservatives rejected the idea of legislation giving authority over family law to Congress because they knew that it would be difficult to predict or control the results.<sup>75</sup>

James J. White suggests that the uniform divorce laws failed to achieve substantial passage because the righteous and moralistic tone of their advocates left little room for reasonable differing views.<sup>76</sup> As he and others have noted, there must have been many individuals who were grateful for access to divorce or who wished to divorce but could not do so.<sup>77</sup> Clearly, based on the steadily increasing incidence of divorce, many Americans found it acceptable in some circumstances. Divorce issues were particularly important for women, who were largely excluded from the uniform law process.<sup>78</sup> For many women, divorce was a solution to problems posed by desertion, spousal abuse, or the laws of coverture.<sup>79</sup> Ultimately, it proved impossible to find any middle ground between the extremely narrow laws in a few states such as New York and the more moderate approaches taken in most other states.<sup>80</sup>

Even as adoption of the uniform law was being actively debated, new statistical information cast doubt on the notion that stricter laws would stem the tide of divorces.<sup>81</sup> Lawrence Friedman has argued that by 1870 the written law and the actual practices of divorce had begun to diverge significantly, with the number of divorces

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<sup>73</sup> O’NEILL, *supra* note 61, at 246–47.

<sup>74</sup> *Id.* at 252–53. Many politicians understood that a growing percentage of voters wanted access to divorce and that the migratory divorce trade was important to businessmen and lawyers in some states. *Id.* at 253.

<sup>75</sup> *See id.*

<sup>76</sup> White, *supra* note 68, at 2126.

<sup>77</sup> *Id.* at 2126–27.

<sup>78</sup> *Id.*; RILEY, *supra* note 7, at 120–21.

<sup>79</sup> *See* LAWRENCE M. FRIEDMAN, *PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW* 32–33 (2004); RILEY, *supra* note 7, at 81–82. From the later part of the nineteenth century, women were more frequently the plaintiffs in divorce actions. *See* Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 68–75 (1976). Feminist leaders were strong advocates of liberalized divorce rules. *See* BLAKE, *supra* note 7, at 87–88, 93–115; RILEY, *supra* note 7, at 73–77, 115–16.

<sup>80</sup> *See* RILEY, *supra* note 7, at 117–18 (discussing how the conference debating a uniform divorce law “degenerated into a battle between opposing factions” that “fail[ed] to take any practical action”); White, *supra* note 68, at 2130–31 (discussing the inability of the law’s drafters to meet all of the desires of the conference’s various constituents); *see also* BLAKE, *supra* note 7, at 148 (“But more moderate students of the issue perceived that the unrealistic laws of the conservative states were at the heart of migratory divorce problem [sic]. Unless the same grounds were recognized in every state, unhappy South Carolinians would continue to seek release in Georgia and New Yorkers in Nevada.”).

<sup>81</sup> RILEY, *supra* note 7, at 118–27; White, *supra* note 68, at 2128–29.

increasing and collusive or fraudulent divorces becoming more common.<sup>82</sup> A statistical report published in 1908 confirmed the steady increase of divorce rates over forty years, despite the best efforts of conservative reformers.<sup>83</sup> By the early years of the twentieth century, sociologists regularly articulated a different view of divorce, one that viewed it as part of a larger transition in the family “produced by the industrial revolution and the emancipation of women.”<sup>84</sup>

The Supreme Court’s decision in *Haddock* came near the crest of the great wave of anti-divorce reform proposals, just before the tide turned and began to recede.<sup>85</sup> With *Haddock*, the Court embraced the conservative position, rejecting a strong view of the Full Faith and Credit Clause because of its policy implications:

Under the rule contended for it would follow that the States whose laws were the most lax as to length of residence required for domicil, as to causes for divorce and to speed of procedure concerning divorce, would in effect dominate all the other States. In other words, any person who was married in one State and who wished to violate the marital obligations would be able, by following the lines of least resistance, to go into the State whose laws were the most lax, and there avail of them for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and public policy of the other States.<sup>86</sup>

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<sup>82</sup> FRIEDMAN, *supra* note 79, at 34–35; *see also* RHEINSTEIN, *supra* note 72, at 51–105 (drawing a distinction between divorce “law of the books” and “law in action”).

<sup>83</sup> BUREAU OF THE CENSUS, MARRIAGE AND DIVORCE 1887–1906 (1908).

<sup>84</sup> O’NEILL, *supra* note 61, at 180. For a discussion of the treatment of divorce by early social scientists, *see id.* at 168–97. *See also* 3 GEORGE E. HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS (1904) (including a detailed analysis of divorce legislation in the early twentieth century); James P. Lichtenberger, *Divorce: A Study in Social Causation*, in 35 STUDIES IN HISTORY, ECONOMICS AND PUBLIC LAW (Columbia Univ. 1909); RILEY, *supra* note 7, at 121–23. In 1876, sociologist Herbert Spencer published his influential work, *Principles of Sociology*, advocating free divorce. *Id.* at 121.

<sup>85</sup> O’Neill marks the period from 1909 to 1912 as the time when public concern with divorce was most intense. O’NEILL, *supra* note 61, at 254–55. Other scholars identify notable changes in prevailing attitudes toward divorce by the 1920s. *E.g.*, DiFONZO, *supra* note 7, at 17–26 (describing social changes in the 1920s); ELAINE TYLER MAY, GREAT EXPECTATIONS: MARRIAGE AND DIVORCE IN POST-VICTORIAN AMERICA (1980).

<sup>86</sup> *Haddock v. Haddock*, 201 U.S. 562, 574 (1906). The Court rejected the argument that this would unduly restrict the right to obtain a divorce, focusing instead on the rights of the absent spouse and asserting that the “preponderance of inconvenience” should operate against a rule that allowed a party married in one state to obtain a divorce in a different state. *Id.* at 579–80. Justice Edward White, author of the majority opinion in *Haddock*, was a staunch conservative. *See* Feigenson, *supra* note 26, at 166.

In refusing to read the Full Faith and Credit Clause as a restraint on state powers over marriage and divorce, the majority opinion noted that “the Government of the United States has no delegated authority on the subject” and would therefore “be powerless to prevent the evil thus brought about by the full faith and credit clause. Thus neither the States nor the National Government would be able to exert that authority over the marriage tie possessed by every other civilized government.”<sup>87</sup> The dissenters in *Haddock* read the Full Faith and Credit Clause to require that such policy conflicts be subordinated to the overarching demand of respect for state court judgments, stating: “Undoubtedly the laws of some States are more liberal upon the subject of divorce than those of other States, but that does not affect the question.”<sup>88</sup>

Because of the impasse over national or uniform divorce legislation and the Supreme Court’s deference to the anti-divorce policies of a few states, matrimonial law through the first half of the twentieth century was a tangled and formalistic mess, largely preoccupied with conflict of laws.<sup>89</sup> When legal realists took on the question of divorce, they described it as “one of the most unsatisfactory parts of American law.”<sup>90</sup> The divergence of state laws widened during the 1930s, when New Mexico added the no-fault ground of incompatibility to its divorce laws and other states moved to allow divorce on the basis of living apart for several years.<sup>91</sup> At the other end of the spectrum, South Carolina and New York retained their restrictive divorce

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<sup>87</sup> *Haddock*, 201 U.S. at 575–76. Divorce was only one of a number of areas under the Full Faith and Credit Clause that caused difficulties for the Court in the early twentieth century. See Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 1–16 (1945) (discussing fields in which the Court had difficulty applying the Full Faith and Credit Clause); see also Walter Wheeler Cook, *The Powers of Congress Under the Full Faith and Credit Clause*, 28 YALE L.J. 421, 421–23 (1919) (noting the unsettled state of Full Faith and Credit Clause jurisprudence); Corwin, *supra* note 59 (discussing applications of the Full Faith and Credit Clause).

<sup>88</sup> *Haddock*, 201 U.S. at 615 (Brown, J., dissenting). After a long discussion of state cases on the subject, Justice Brown concluded: “The only States in which it is held that a party domiciled in another State may not obtain a divorce there by constructive service are New York, Pennsylvania, North and South Carolina.” *Id.* at 624.

Even critics of *Haddock* approved its anti-divorce stance. See, e.g., Beale, *Haddock Revisited*, *supra* note 57, at 596 (“The object of the majority was a praiseworthy one: to make objectionable divorces less easy to obtain.”).

<sup>89</sup> See sources cited *supra* note 59 and accompanying text; see also HARTOG, *supra* note 7, at 272 (“A whole discipline of academic legal study—conflicts of law—emerged out of the struggle to rationalize and to explain, a discipline that transformed divorce cases into problems in logic shorn of the human relations that had produced them.”).

<sup>90</sup> Roscoe Pound, *A Symposium in the Law of Divorce: Foreword*, 28 IOWA L. REV. 179, 179 (1943). See Karl N. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281 (1932); Karl N. Llewellyn, *Behind the Law of Divorce: II*, 33 COLUM. L. REV. 249 (1933); Max Radin, *The Common Law of the Family*, in 6 NATIONAL LAW LIBRARY LEGAL RELATIONS, PART II, at 79, 209–15 (1939) (discussing the “conscious hypocrisy” of divorce law in America).

<sup>91</sup> See DIFONZO, *supra* note 7, at 67–87.

laws, and, along with Pennsylvania and North Carolina, continued to deny recognition to out of state ex parte divorce decrees.<sup>92</sup>

When the Supreme Court returned to the divorce problem in the 1940s, both society and the Court had changed. Divorce rates had continued to increase, and prevailing attitudes toward marriage had shifted.<sup>93</sup> Both the popular and academic literature acknowledged that the “law in fact” permitted consensual divorces despite the stringent formalities of the law on the books.<sup>94</sup> The Supreme Court had been through dramatic changes, including a dramatic philosophical and doctrinal shift concerning economic regulation at the state and federal levels<sup>95</sup> and an almost complete change in its membership between August 1937 and July 1941.<sup>96</sup>

## II. REWRITING DIVORCE LAW

In 1942, the controversy over migratory divorce returned to the newspapers and law journals when the Supreme Court reversed *Haddock* in *Williams v. North Carolina (Williams I)*.<sup>97</sup> *Williams I* was an attention-grabbing case involving a Nevada tourist divorce with an extra twist. Two North Carolina residents had traveled to Nevada, procured divorces there, and then married each other.<sup>98</sup> Upon their return they were prosecuted and convicted in North Carolina for bigamous cohabitation.<sup>99</sup> In *Williams I*,

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<sup>92</sup> See generally Feigenson, *supra* note 26, at 129–44 (discussing extraterritorial recognition in those states).

<sup>93</sup> See DiFONZO, *supra* note 7, at 43–53; RILEY, *supra* note 7, at 130–45.

<sup>94</sup> See generally Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1511 (2000) (discussing the “gradual decay of the fault regime”). A two-volume empirical study of the divorce courts in Ohio and Maryland was particularly persuasive evidence. 1 LEON C. MARSHALL & GEOFFREY MAY, *THE DIVORCE COURT* (1932); 2 LEON C. MARSHALL & GEOFFREY MAY, *THE DIVORCE COURT* (1933); see also Fowler V. Harper, *The Myth of the Void Divorce*, 2 LAW & CONTEMP. PROBS. 335 (1935).

<sup>95</sup> See, e.g., *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937) (reversing course and upholding a Washington state minimum wage law). During the same period, the Court abandoned the notion of a federal common law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), began to expand constitutional protection for civil liberties in *Palko v. Connecticut*, 302 U.S. 319 (1937), and indicated the possibility of heightened protection for some civil rights in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938). See UROFSKY, *supra* note 8, at 11–12 (*Carolene Products*), 85–92 (*Palko*), and 115–16 (*Erie*).

<sup>96</sup> Hugo Black took his seat on the Court in 1937; Stanley Reed in 1938; Felix Frankfurter and William O. Douglas in 1939; Frank Murphy in 1940; and Harlan Stone, James Byrnes, and Robert Jackson in 1941. See UROFSKY, *supra* note 8, at 9–30.

<sup>97</sup> *Williams I*, 317 U.S. 287 (1942). Divorce issues had also appeared on the Court’s docket in the 1930s, when the Court applied the Full Faith and Credit Clause in several divorce cases that did not significantly change the law. See, e.g., *Davis v. Davis*, 305 U.S. 32 (1938); *Loughran v. Loughran*, 292 U.S. 216 (1934); *Yarborough v. Yarborough*, 290 U.S. 202 (1933).

<sup>98</sup> *Williams I*, 317 U.S. at 289–90.

<sup>99</sup> *Id.*



the Supreme Court reversed their conviction, establishing a new rule that required states to recognize *ex parte* divorces obtained in a state where either party had established domicile.<sup>100</sup>

The *Williams I* decision came as dramatic news to the bar and to the public.<sup>101</sup> Commentators who saw in *Williams I* a significant shift in the law were correct, but the change was not simple or straightforward. Over the next twenty years, in a long series of rulings, the Court redefined the parameters of full faith and credit, simultaneously making several notable innovations in American divorce law. By abandoning the use of marital misconduct in allocating divorce jurisdiction, the Court put divorce recognition rules on a purely no-fault basis. At the same time, by allowing either spouse to act unilaterally in establishing a domicile in another state and obtaining a divorce there, the Court moved individual interests to the center of marital status determinations. In several later cases, the Court applied *res judicata* principles to consensual migratory divorce decrees, clearing a pathway for mutual consent divorce and facilitating the move toward private resolution of divorce disputes. Finally, as the Court struggled to resolve the tension between allowing one spouse the freedom to divorce and protecting the other interests of the absent spouse, it separated the question of marital status from the other incidents of divorce. With the resulting doctrine of “divisible divorce,” the Court narrowed the reach of state control over marital status and extended it on matters of financial and custodial responsibility.

#### A. Full Faith and Credit and the Unilateral No-Fault Divorce

The dispute involved in *Williams I* began when O.B. Williams and Lillie Hendrix left their respective spouses in North Carolina after long-term marriages.<sup>102</sup> They traveled to Las Vegas and took up residence at the Alamo Auto Court, along the road to Los Angeles, on May 15, 1940.<sup>103</sup> After six weeks, they each filed a petition for divorce on grounds of extreme cruelty.<sup>104</sup> Williams received his divorce on August 26,

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<sup>100</sup> *Id.* at 303.

<sup>101</sup> See, e.g., Palmer D. Edmunds, *Williams v. North Carolina—Whither Now?*, 8 J. MARSHALL L.Q. 261 (1943) (discussing the “recent drama” of *Williams I*); Harold Wright Holt, *The Bones of Haddock v. Haddock*, 41 MICH. L. REV. 1013 (1943); *Williams v. North Carolina: Editorial Comment from the Lay Press*, 29 A.B.A. J. 78 (1943) (reviewing recent editorials in the mainstream press discussing *Williams I*); William J. Barnhard, Note, *Haddock Reversed—Harbinger of the Divisible Divorce*, 31 GEO. L.J. 210 (1943) (noting the astonished reaction of the bar).

<sup>102</sup> Herbert R. Baer, *So Your Client Wants a Divorce! Williams v. North Carolina*, 24 N.C.L. REV. 1, 2 (1946). According to Baer, “Williams was the proprietor of a store at Granite Falls . . . and had in his employ one Thomas G. Hendrix,” who was married to Lillie Hendrix. *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

and Hendrix received hers on October 4.<sup>105</sup> They were married the same day<sup>106</sup> and returned to North Carolina, where they were convicted for bigamous cohabitation.<sup>107</sup> Their claim to have been validly divorced in Nevada was rejected based on the North Carolina rule denying recognition to foreign ex parte divorces.<sup>108</sup>

In the Supreme Court, North Carolina relied on *Haddock*, arguing that the only question presented by the case was “whether a decree of divorce granted in a state which is not the state of matrimonial domicile, in which the defendant is not domiciled, and in which the defendant is not personally served with process and makes no appearance is entitled to obligatory recognition in other states.”<sup>109</sup> Williams and Hendrix challenged *Haddock*, asserting that the Nevada court had found them to be bona fide citizens of the state and arguing that North Carolina was acting in violation of the Full Faith and Credit Clause and the Privileges and Immunities Clause by refusing to respect the Nevada divorce decrees.<sup>110</sup>

Writing for the Court, Justice William O. Douglas signaled at the outset of his opinion the Court’s conclusion that *Haddock* had been wrongly decided.<sup>111</sup> Focusing on the full faith and credit issue, Douglas emphasized the constitutional requirement that state court judgments should have the same validity and effect in every other state that they have in the state where they were entered and concluded that the distinctions articulated by the majority in *Haddock* could not be justified.<sup>112</sup> The opinion held that domicile was “essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect.”<sup>113</sup> But because the Nevada divorce decrees

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *State v. Williams*, 17 S.E.2d 769, 770 (N.C. 1941). Because the North Carolina court concluded that it was not obligated to recognize the Nevada divorces under *Haddock*, it did not consider whether Williams and Hendrix had established a bona fide domicile there. *Id.* at 778.

<sup>108</sup> *Id.*

<sup>109</sup> Brief of the State of North Carolina, Respondent, Opposing Petition for Writ of Certiorari at 4, *Williams v. North Carolina*, 317 U.S. 287 (1942) (No. 29). North Carolina did not address the question of whether Williams and Hendrix had acquired a valid Nevada domicile. *Id.* at 4–6.

<sup>110</sup> Petition for Writ of Certiorari at 2, *Williams v. North Carolina*, 317 U.S. 287 (1942) (No. 29). They argued that Nevada had valid in rem jurisdiction to grant the divorce and that in personam jurisdiction should not be required, stating that “the marital relationship is a status and that status accompanies each individual wherever that individual may establish a residence and it is not necessary therefore to have both parties within the jurisdiction of the court in order to adjudicate that status.” Brief for Petitioners at 21, *Williams v. North Carolina*, 317 U.S. 287 (1942) (No. 29).

<sup>111</sup> *Williams I*, 317 U.S. 287, 293 (1942).

<sup>112</sup> *Id.* at 303–04. Defining states’ obligations under the Full Faith and Credit Clause was an ongoing problem during this era in several contexts. See Edward S. Corwin, *Out-Haddocking Haddock*, 93 U. PA. L. REV. 341 (1945); Jackson, *supra* note 87; Max Radin, *The Authenticated Full Faith and Credit Clause: Its History*, 39 ILL. L. REV. NW. U. 1 (1944).

<sup>113</sup> *Williams I*, 317 U.S. at 297.

were based on findings of domicile, and these findings had not been controverted in the North Carolina proceeding, the majority held that the decrees were entitled to respect.<sup>114</sup>

Douglas's opinion articulated the connection between domicile and various state interests:

Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent. There is no constitutional barrier if the form and nature of the substituted service . . . meet the requirements of due process.<sup>115</sup>

The Court noted the personal complications resulting from the *Haddock* approach, under which a divorce decree might be valid in one state and invalid in another: "Under the circumstances of this case, a man would have two wives, a wife two husbands. The reality of a sentence to prison proves that this is no mere play on words."<sup>116</sup> Citing Justice Holmes's dissent in *Haddock* and the academic commentary that followed it, Douglas rejected "the legalistic notion that where one spouse is wrongfully deserted he retains power over the matrimonial domicile so that the domicile of the other spouse follows him wherever he may go, while, if he is to blame, he retains no such power."<sup>117</sup>

The Court made clear in *Williams I* that fault should be irrelevant to the full faith and credit question:

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<sup>114</sup> *Id.* at 299. Urofsky writes that Douglas believed *Haddock* had to be overruled but was troubled by the question of whether *Williams* and *Hendrix* had established a legitimate residence in Nevada. Chief Justice Stone "persuaded Douglas not to deal with this issue, on the grounds that the North Carolina court had based its opinion solely on the *Haddock* precedent; overrule that case, Stone urged, and leave the domiciliary question for further proceedings in state court." UROFSKY, *supra* note 8, at 130–31 (citing Memorandum from Harlan Stone, Chief Justice, U.S. Supreme Court, to William Douglas, Justice, U.S. Supreme Court (Nov. 4, 1942) (on file with Harvard Law School Library)).

<sup>115</sup> *Williams I*, 317 U.S. at 298–99. This is an echo of the *Maynard* decision in 1888. See *supra* note 33 and accompanying text; *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

<sup>116</sup> *Williams I*, 317 U.S. at 299–300.

<sup>117</sup> *Id.* at 300.

[W]e see no reason, and none has here been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies. And it is difficult to prick out any such line of distinction in the generality of the words of the full faith and credit clause.<sup>118</sup>

Responding to the argument that, under a rule requiring respect for *ex parte* divorce decrees, “one state’s policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state,”<sup>119</sup> Douglas noted that the same objection could be made in many situations and concluded, “Such is part of the price of our federal system.”<sup>120</sup>

Justice Felix Frankfurter concurred, pointing to the longstanding debate over uniform national marriage and divorce laws and emphasizing that the Court was “not authorized nor . . . qualified to formulate a national code of domestic relations.”<sup>121</sup> He agreed with Douglas’s assertion that the Court’s proper role “does not involve a decision . . . as to which state policy on divorce is the most desirable one.”<sup>122</sup> Noting that Congress had not exercised its power under the Full Faith and Credit Clause to legislate with respect to divorce decrees, Frankfurter wrote:

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<sup>118</sup> *Id.* at 301. The opinion also notes that under *Haddock*, the fault or wrong of one spouse in leaving the other becomes . . . a jurisdictional fact on which this Court would ultimately have to pass. Whatever may be said as to the practical effect which such a rule would have in clouding divorce decrees, the question as to where the fault lies has no relevancy to the existence of state power.

*Id.* at 300.

<sup>119</sup> *Id.* at 302.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 304 (Frankfurter, J., concurring). Urofsky reports that:

Justice Roberts noted in conference that while *Haddock* was not ‘good law,’ it was ‘good morals.’ Frankfurter agreed with Roberts, but when Douglas in his draft opinion referred to the ‘sanctity of marriage,’ Frankfurter urged him to drop that phrase; the Court must not express personal views but ‘the compulsions of governing legal principles.’

UROFSKY, *supra* note 8, at 130 (citing Memorandum from Felix Frankfurter, Justice, U.S. Supreme Court, to William Douglas, Justice, U.S. Supreme Court (Nov. 19, 1942) (on file with Library of Congress)).

<sup>122</sup> *Williams I*, 317 U.S. at 303 (majority opinion). Douglas made similar points in the majority opinion:

Our own views as to the marriage institution and the avenues of escape which some states have created are immaterial. It is a Constitution which we are expounding—a Constitution which in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause.

*Id.*

[A] court is likely to lose its way if it strays outside the modest bounds of its own special competence and turns the duty of adjudicating only the legal phases of a broad social problem into an opportunity for formulating judgments of social policy quite beyond its competence as well as its authority.<sup>123</sup>

In a dissenting opinion, Justice Frank Murphy argued that an “area of flexibility” should be preserved in the application of the Full Faith and Credit Clause in order “to preserve and protect state policies in matters of vital public concern.”<sup>124</sup> He argued that “actual good faith domicile of at least one party” should be essential before a divorce decree was entitled to full faith and credit.<sup>125</sup> Both Justice Murphy and Justice Robert Jackson, who dissented separately, concluded that it was apparent on the record that Williams and Hendrix had not acquired a genuine domicile in Nevada.<sup>126</sup>

Justice Jackson wrote in dissent:

Conflict between policies, laws, and judgments of constituent states of our federal system is an old, persistent, and increasingly complex problem. . . . If we are to extend protection to the orderly exercise of the right of each state to make its own policy, we must find some way of confining each state’s authority to matters and persons that are by some standard its own.<sup>127</sup>

Jackson’s preferred solution to this problem was to develop the concept of domicile as a matter of federal law, in order to “fix[] the place where one belongs in our federal system.”<sup>128</sup>

Beyond the problem of domicile, Jackson asserted that the Nevada divorce decrees did not merit enforcement in North Carolina because they were entered without due process.<sup>129</sup> Jackson rejected as fictional the notion that divorce was a proceeding in rem, for which personal jurisdiction was not required, commenting acidly: “In other words, settled family relationships may be destroyed by a procedure that we would

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<sup>123</sup> *Id.* at 307 (Frankfurter, J., concurring).

<sup>124</sup> *Id.* at 309 (Murphy, J., dissenting).

<sup>125</sup> *Id.* at 308–09. Although Justice Murphy often voted with Douglas and Black (and later Rutledge), he parted company with them on the divorce cases on moral grounds, probably influenced by his Catholic religious views. See UROFSKY, *supra* note 8, at 131–32; see also J. WOODFORD HOWARD, JR., MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY 323–24 (1968).

<sup>126</sup> *Williams I*, 317 U.S. at 309 (Murphy, J., dissenting); *id.* at 320–21 (Jackson, J., dissenting).

<sup>127</sup> *Id.* at 315 (Jackson, J., dissenting).

<sup>128</sup> *Id.* at 322; see also Jackson, *supra* note 87, at 29–30.

<sup>129</sup> *Williams I*, 317 U.S. at 316–20 (Jackson, J., dissenting).

not recognize if the suit were one to collect a grocery bill."<sup>130</sup> Jackson did not argue that ex parte divorce decrees should be void, but he implied that they should have only a narrow effect even within the state in which they were granted,<sup>131</sup> and he concluded that personal jurisdiction over the absent spouses should be required if divorce decrees were to have any effect in other states.<sup>132</sup>

Editorial comments after *Williams I* viewed the case as a triumph for the Nevada divorce mills. The Chicago *Daily News* wrote that the decision applied "the rule of the naval convoy in reverse. The speed of the convoy is the speed of the slowest ship; but from now on, the speed of divorce will tend to be that of the fastest state."<sup>133</sup> Even academic observers read the case as an endorsement of Nevada's easy divorce laws.<sup>134</sup> A number of writers suggested that the decision was an invitation to Congress to find a remedy for the full faith and credit problem,<sup>135</sup> and the decision prompted a new attempt at securing uniform divorce legislation.<sup>136</sup>

North Carolina's response to *Williams I* was to prosecute the pair again, picking up on the Supreme Court's suggestion that the result might have been different if prosecutors had disputed the validity of the defendants' Nevada domicile.<sup>137</sup> This time the jury was instructed on the domicile question,<sup>138</sup> and Williams and Hendrix were convicted again.<sup>139</sup> The case returned to the Supreme Court, and the convictions were affirmed.<sup>140</sup> Justice Frankfurter wrote the majority opinion in *Williams II*, holding

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<sup>130</sup> *Id.* at 316.

<sup>131</sup> *Id.* at 319.

<sup>132</sup> *Id.* at 316–20. Jackson also suggested that *Maynard* had decided only "that the Territory of Washington had jurisdiction to cut off any interest of an absent spouse in land within its borders." *Id.* at 318.

<sup>133</sup> *Williams v. North Carolina: Editorial Comment from the Lay Press*, 29 A.B.A. J. 78 (1943).

<sup>134</sup> See UROFSKY, *supra* note 8, at 132 (describing exchange between Frankfurter and Erwin Griswold).

<sup>135</sup> E.g., Lewis Mayers, *Ex Parte Divorce: A Proposed Federal Remedy*, 54 COLUM. L. REV. 54, 59 (1954); see also Holt, *supra* note 101, at 1026–29; Thomas Reed Powell, *And Repent at Leisure: An Inquiry into the Unhappy Lot of Those Whom Nevada Hath Joined Together and North Carolina Hath Put Asunder*, 58 HARV. L. REV. 930, 1010–15 (1945) (suggesting the need for Congressional power to address the migratory divorce situation).

<sup>136</sup> The Uniform Divorce Recognition Act, approved by the ABA in 1948 and enacted in some form in ten states, has been described as "largely an emotional response to the first *Williams* case." See Henry H. Foster, Jr., *Recognition of Migratory Divorces: Rosenstiel v. Section 250*, 43 N.Y.U. L. REV. 429, 437–39 (1968).

<sup>137</sup> *Williams I*, 317 U.S. at 299.

<sup>138</sup> *State v. Williams*, 29 S.E.2d 744, 749 (N.C. 1944). The trial judge was Samuel J. Ervin, Jr., who was later elected as United States Senator from North Carolina.

<sup>139</sup> *Id.* at 750.

<sup>140</sup> *Williams II*, 325 U.S. 226 (1945). On the same day, the Court in *Esenwein v. Commonwealth*, 325 U.S. 279 (1945), held that an ex parte Nevada divorce decree was not effective to relieve the husband's obligations under a previously entered Pennsylvania spousal support

that North Carolina was entitled to reexamine the question of the Nevada court's jurisdiction before giving effect to the Nevada divorce decrees.<sup>141</sup> The opinion stated that "[d]omicil implies a nexus between person and place of such permanence as to control the creation of legal relations and responsibilities of the utmost significance."<sup>142</sup> Frankfurter indicated that the Nevada court's finding of domicile was "entitled to respect, and more" but concluded that North Carolina had given appropriate weight to the Nevada decrees by submitting the domicile question to the jury for its determination.<sup>143</sup>

*Williams II* reestablished one of the problems that *Williams I* had eliminated: under this reasoning, Williams and Hendrix were validly divorced in Nevada but still married to their prior spouses in North Carolina. Frankfurter dismissed the petitioners' policy arguments, observing that, by seeking

divorce outside the State in which he has theretofore maintained his marriage, a person is necessarily involved in the legal situation created by our federal system whereby one State can grant a divorce of validity in other States only if the applicant has a *bona fide* domicil in the State of the court purporting to dissolve a prior legal marriage. The petitioners therefore assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada.<sup>144</sup>

Justice Rutledge dissented, arguing at length that the Constitution had not "confided to the caprice of juries the faith and credit due the laws and judgments of sister states" and pointing out the difficulties of a standard that allowed divorces to be valid in some states and invalid in others.<sup>145</sup> Justice Hugo Black also dissented in an

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order. Justices Douglas, Black, and Rutledge concurred in *Esenwein*, with an opinion by Douglas suggesting that issues of marital status and support rights raised different considerations. *Id.* at 281–83 (Douglas, J., concurring). The Court returned to this problem in *Estin v. Estin*, 334 U.S. 541 (1948). See discussion *infra* at text accompanying notes 199–217.

<sup>141</sup> *Williams II*, 325 U.S. 226.

<sup>142</sup> *Id.* at 229.

<sup>143</sup> *Id.* at 233–34. In the second prosecution, the defendants were permitted to prove their Nevada divorces as an affirmative defense. *Id.* at 236.

<sup>144</sup> *Id.* at 238. Urofsky reports that "Frankfurter believed that the two decisions taken 'together give not only a coherent body of law with reference to decrees of divorce as between the States but also does justice to correct legal analysis without sacrificing social morality.'" UROFSKY, *supra* note 8, at 133 (citing Memorandum from Felix Frankfurter, Justice, U.S. Supreme Court, to Harlan Stone, Justice, U.S. Supreme Court (Feb. 20, 1945) (on file with Library of Congress)).

<sup>145</sup> *Williams II*, 325 U.S. at 244–45 (Rutledge, J., dissenting); see FOWLER V. HARPER, JUSTICE RUTLEDGE AND THE BRIGHT CONSTELLATION 296–98 (1965); UROFSKY, *supra* note 8, at 134.

opinion, joined by Justice Douglas, which emphasized the fact that petitioners had been subjected to criminal convictions without any evidence offered by the state to challenge the Nevada court's finding of domicile.<sup>146</sup>

In the extensive academic commentary on the *Williams* cases, the Supreme Court got mixed reviews. Scholars linked the difficulties with divorce cases to broader problems with the Court's full faith and credit and federalism jurisprudence. Some writers advocated a more assertive reading of the Full Faith and Credit Clause, suggesting that the Court's general rule allowing one state to reexamine the jurisdiction underlying another state's judgment before enforcing it was a usurpation of power.<sup>147</sup> Others were clearly committed to the opposite view, writing that jurisdiction should always be subject to reconsideration.<sup>148</sup> In a published lecture, Justice Jackson insisted that the Full Faith and Credit Clause presented technical problems that were "less involved than that of most constitutional provisions with social and political considerations,"<sup>149</sup> but it was clear from the *Williams* opinions and the commentary on them that strongly disputed questions of divorce policy could not easily be put to one side.<sup>150</sup> The scholars agreed with the Court's broad hints that Congress could improve the situation by exercising its legislative authority under the Full Faith and Credit Clause to define the terms on which one state's divorce decrees must be given effect in other states.<sup>151</sup>

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<sup>146</sup> *Williams II*, 325 U.S. at 261–65 (Black, J., dissenting) (“[N]ever before today has this Court decided a case upon the assumption that men and women validly married under the laws of one state could be sent to jail by another state for conduct which involved nothing more than living together as husband and wife.”); see UROFSKY, *supra* note 8, at 134–35. Justice Murphy wrote a concurring opinion, joined by Justice Jackson and Chief Justice Stone, which downplayed the potential adverse consequences of the ruling. *Williams II*, 325 U.S. at 239–44.

<sup>147</sup> *E.g.*, Corwin, *supra* note 112, at 344. In Corwin's view, “*Williams II* only climaxed a long course of unwarranted assumption of power by the Court—a course of decision which has gradually eroded the ‘full faith and credit’ clause and the implementing acts of Congress.” *Id.*; see also Baer, *supra* note 102, at 21–22.

<sup>148</sup> *E.g.*, Powell, *supra* note 135, at 934. Powell was especially critical of Justice Black's dissent. See *id.* at 935–38.

<sup>149</sup> Jackson, *supra* note 87, at 2. Both here and in his dissent in *Williams I*, Jackson argued for a single federal standard to define the domiciliary relationship between an individual and a state that would provide the constitutionally sufficient basis to support various exercises of state power, including but not limited to divorce jurisdiction. See *id.* at 29.

<sup>150</sup> See, *e.g.*, Corwin, *supra* note 112, at 350, 354; Jackson, *supra* note 87, at 27–29; Powell, *supra* note 135, at 990–91, 1015–16; Radin, *supra* note 112, at 33–35.

<sup>151</sup> See, *e.g.*, Jackson, *supra* note 87, at 21–24; Powell, *supra* note 135, at 1010–17; see also Corwin, *supra* note 112, at 356 (proposing that the Court treat divorce actions as in personam proceedings, enforcing the *Pennoyer* requirement of personal service on the defendant).

Legislation proposed by Senator John McCarran of Nevada in 1948 for this purpose eventually passed the Senate in 1952 and again in 1953 but was never voted on in the House of Representatives. See BLAKE, *supra* note 7, at 186–87.



*Williams II* represented a partial retreat from the ground staked out in *Williams I*, but the Court's determination to remove fault considerations from the landscape of divorce recognition disputes was largely successful. After *Williams II*, a married individual who moved alone to a new state and made a home there could be divorced in that state, without regard to the divorce law of the "matrimonial domicile" and with little concern that the divorce decree would be subject to challenge.<sup>152</sup> For those seeking a tourist divorce, however, *Williams II* reintroduced the risk of complications.<sup>153</sup>

At the time of these decisions, the official divorce laws in many states were still conservative. The most extreme were New York, which permitted divorce only for adultery, and South Carolina, which had a constitutional prohibition on divorce.<sup>154</sup> Divorce laws in every state permitted judges to deny divorces if there was evidence the parties had cooperated in obtaining the divorce or if both spouses were guilty of marital wrongs.<sup>155</sup> In practice, however, most divorces were uncontested, suggesting that the spouses were in agreement at some level over the decision to end their marriage.<sup>156</sup> The New York courts granted large numbers of annulments on increasingly lenient grounds,<sup>157</sup> routinely accepting as proof of adultery pro forma testimony from individuals hired to play the central roles in a staged melodrama.<sup>158</sup> In those states where divorce was available on the ground of cruelty, that was the preferred route, but the evidence offered was equally routine.<sup>159</sup>

Writers of the period observed the "wide deviation between law in the books and law in action"<sup>160</sup> and argued that maintaining formal laws that were practically unenforceable was bad social policy and induced disrespect for the law.<sup>161</sup> Alternatives began to emerge: by 1945, fifteen states allowed divorces to spouses who had been living separately for a defined period of time, generally from two to five years

<sup>152</sup> See, e.g., *Estin v. Estin*, 334 U.S. 541 (1948); see *infra* notes 199–217 and accompanying text.

<sup>153</sup> See Baer, *supra* note 102, at 30–31. Mr. Hendrix had obtained his own divorce in North Carolina by the time of the second prosecution, and the first Mrs. Williams was deceased. *Id.* at 17. After *Williams II* affirmed their convictions, O.B. Williams and Lillie Hendrix were permitted to marry in North Carolina, and they were released on parole without serving the jail sentences that had been imposed. *Id.* at 32. Baer also notes the couple's appearance in *Life* magazine. *Id.* at 31 n.139; see *Divorce Muddle*, LIFE, Sept. 3, 1945, at 86.

<sup>154</sup> See BLAKE, *supra* note 7, at 189–225 (regarding New York divorce laws), 234–36 (regarding change in South Carolina law in 1948).

<sup>155</sup> See HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 358–78 (1968).

<sup>156</sup> See RHEINSTEIN, *supra* note 72, at 248–51.

<sup>157</sup> See BLAKE, *supra* note 7, at 194–99; RHEINSTEIN, *supra* note 72, at 91, 96–97.

<sup>158</sup> See BLAKE, *supra* note 7, at 189–94; DIFONZO, *supra* note 7, at 89–90.

<sup>159</sup> See DIFONZO, *supra* note 7, at 95–96; RHEINSTEIN, *supra* note 72, at 101–04.

<sup>160</sup> Harper, *supra* note 94, at 342.

<sup>161</sup> E.g., Reginald Heber Smith, *Dishonest Divorce*, ATLANTIC MONTHLY, Dec. 1947, at 42; see also Harper, *supra* note 94, at 346; Radin, *supra* note 112, at 213–15.

but in some states as long as ten.<sup>162</sup> Divorces on separation grounds represented the earliest type of no-fault divorce.<sup>163</sup> Because of the long delay involved in obtaining a divorce on separation grounds, however, many individuals preferred to divorce on grounds of cruelty or adultery.<sup>164</sup> A few states added “incompatibility” to their statutes as a ground for divorce,<sup>165</sup> but the majority of states in 1945 remained firmly committed to the fault principle, and it was another twenty years before state legislatures began to enact more significant changes in their divorce statutes.<sup>166</sup>

Describing the divorce law system of the 1930s and 1940s, Lawrence Friedman writes that while it looked firm and solid from the vantage point of appellate case law and formal treatises, the actual practices revealed that it was “rotten to the core.”<sup>167</sup> Max Rheinstein, writing about the dualism of divorce law before no-fault, described the system as a democratic compromise in which “conservatives are made happy by the strictness of the law of the books,” while those seeking freedom of remarriage “are satisfied by the ease with which their desire is accommodated in practice.”<sup>168</sup>

In this context, the Court’s decisions in the *Williams* cases suggest a different path. Both *Williams I*, which cast aside the complex and fault-ridden notion of “matrimonial domicile” as unworkable, and *Williams II*, which attempted to take more seriously the principle that divorce jurisdiction should be based on the petitioner’s domicile, rejected the charades that had come to typify divorce practice. The decisions did not so much endorse easy divorce as they abandoned the formalism and fiction that had sustained the official divorce law. Within a few years, well before state legislatures began to move decisively from the fault principle, the high courts in states such as New York and California began a similar retreat.<sup>169</sup>

<sup>162</sup> See DIFONZO, *supra* note 7, at 75–87.

<sup>163</sup> See *id.* at 77; see also Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 52–53 (1966). Even this ground was interpreted by appellate courts in disputed cases so as to reintroduce fault norms. See CLARK, *supra* note 155, at 351–54.

<sup>164</sup> See DIFONZO, *supra* note 7, at 77.

<sup>165</sup> See *id.* at 69–70; Wadlington, *supra* note 163, at 44–47; see also CLARK, *supra* note 155, at 349–51.

<sup>166</sup> South Carolina amended its laws to allow for divorce on several fault grounds in 1949; New York enacted a new law expanding its grounds for divorce in 1966. The New York law allowed for divorce on grounds of adultery, cruelty, abandonment, confinement in prison, or living separately for two years. See RILEY, *supra* note 7, at 156–57.

<sup>167</sup> Friedman, *supra* note 94, at 1535–36; see also Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 666 (1984).

<sup>168</sup> RHEINSTEIN, *supra* note 72, at 254. Rheinstein went on to suggest that:

The only ones who feel troubled are those occasional academics who view with alarm the hypocrisy of the system, the light-hearted way in which perjuries are committed and condoned, and who fear for the integrity of the law and the respect in which the law and its priests should be held by the public.

*Id.*

<sup>169</sup> Two landmark cases were *De Burgh v. De Burgh*, 250 P.2d 598 (Cal. 1952), and

Most writers date the transformation of divorce law in the United States to the 1960s, when New York revised its antiquated divorce statute and California adopted the nation's first pure no-fault divorce law.<sup>170</sup> While accepting the characterization of this change as a "revolution," Herbert Jacob describes divorce reform during this period as an instance of routine policymaking, which became possible because of an altered social and economic environment, but which unfolded largely without controversy and relatively quickly.<sup>171</sup> But how did a social and legal problem that was highly controversial at the end of World War II come to be the subject of sweeping yet "routine" policy changes twenty years later? Most accounts of the divorce revolution elide the contentious national debate over divorce that occupied the preceding century and the extensive role of the Supreme Court in shifting full faith and credit law to permit a new class of unilateral no-fault divorce cases.

### *B. Res Judicata and the Mutual Consent Divorce*

In 1948, the Supreme Court returned to the subject of migratory divorce in *Sherrer v. Sherrer*.<sup>172</sup> *Sherrer* involved a Massachusetts couple who divorced in Florida in a proceeding initiated by Margaret Sherrer after she had lived there for three months.<sup>173</sup> Edward Sherrer retained counsel and made a personal appearance. The Florida court found that Margaret was a Florida resident and entered a divorce decree incorporating the parties' stipulation as to custody.<sup>174</sup> Edward took the children and returned to Massachusetts; Margaret was married several days later and returned to Massachusetts with her new husband after two months.<sup>175</sup> When Edward began a proceeding in Massachusetts to have the Florida decree set aside, the Massachusetts courts concluded that Margaret was never domiciled in Florida and held that her decree was not entitled to full faith and credit.<sup>176</sup>

Because the *Sherrer* divorce was not entered ex parte, the case raised a new question: could a defendant who had participated in divorce proceedings challenge the decree later on jurisdictional grounds? The Supreme Court concluded, on grounds of res judicata, that:

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*Rosenstiel v. Rosenstiel*, 209 N.E.2d 709 (N.Y. 1965). See CLARK, *supra* note 155, at 376–77; see also *infra* notes 193–98 and accompanying text.

<sup>170</sup> See, e.g., sources cited *supra* note 10. For the view that there was no "revolution" at all, see, for example, Grace Ganz Blumberg, *Reworking the Past, Imagining the Future: On Jacob's Silent Revolution*, 16 LAW & SOC. INQUIRY 115 (1991), and Friedman, *supra* note 94.

<sup>171</sup> JACOB, *supra* note 10, at 36.

<sup>172</sup> 334 U.S. 343 (1948). *Sherrer* was decided with a companion case, *Coe v. Coe*, 334 U.S. 378 (1948).

<sup>173</sup> *Sherrer*, 334 U.S. at 345.

<sup>174</sup> *Id.* at 345–46.

<sup>175</sup> *Id.* at 347.

<sup>176</sup> *Id.* at 347–48. Edward also sued Margaret's new husband for alienation of affections. See *Sherrer v. Sherrer*, 69 N.E.2d 801, 804 (Mass. 1946).

the requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.<sup>177</sup>

The Court rejected the argument that Massachusetts had a special interest in regulating the Sherrers' marital relationship and asserted: "In resolving the issues here presented, we do not conceive it to be a part of our function to weigh the relative merits of the policies of Florida and Massachusetts with respect to divorce and related matters."<sup>178</sup>

Justice Frankfurter and Justice Murphy dissented, arguing that Massachusetts had an important interest in this marriage:

If the marriage contract were no different from a contract to sell an automobile, the parties thereto might well be permitted to bargain away all interests involved, in or out of court. But the State has an interest in the family relations of its citizens vastly different from the interest it has in an ordinary commercial transaction. That interest cannot be bartered or bargained away by the immediate parties to the controversy by a default or an arranged contest in a proceeding for divorce in a State to which the parties are strangers.<sup>179</sup>

Frankfurter noted that even in the most liberal divorce states, husbands and wives were not permitted to "rescind their marriage at will as they might a commercial contract."<sup>180</sup> In his view, Massachusetts should not be prevented by the Full Faith and Credit Clause from vindicating its interest in the marital status of "its citizens who do not change their domicile, who do not remove to another State, but who leave the State only long enough to escape the rigors of its laws, obtain a divorce, and then scurry back."<sup>181</sup>

Frankfurter returned to the federalism problem, arguing that the Court should not attempt to resolve the longstanding problem of nonuniform divorce laws because "[t]he only way in which this Court can achieve uniformity . . . is by permitting the

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<sup>177</sup> *Sherrer*, 334 U.S. at 351–52. Chief Justice Vinson wrote the majority opinion, joined by Justices Douglas, Black, Rutledge, Reed, Jackson, and Burton.

<sup>178</sup> *Id.* at 354. In *Coe*, also on certiorari from the Massachusetts courts, the Court reached the same conclusion when a wife made a personal appearance in her husband's Nevada divorce proceeding without disputing the court's jurisdiction and then sought relief inconsistent with the Nevada divorce decree from a Massachusetts court. *Coe v. Coe*, 334 U.S. 378 (1948).

<sup>179</sup> *Sherrer*, 334 U.S. at 358 (Frankfurter, J., dissenting).

<sup>180</sup> *Id.* at 359.

<sup>181</sup> *Id.* at 362–63.

States with the laxest divorce laws to impose their policies upon all other States.”<sup>182</sup> Beyond the federalism issues, Frankfurter identified two additional problems with allowing this type of foreign divorce. One was the increased risk of fraud, perjury, or collusion between the parties.<sup>183</sup> Another was the prospect that, “[e]ven to a believer in the desirability of easier divorce,” the *Sherrer* holding “offers a way out only to that small portion of those unhappily married who are sufficiently wealthy to be able to afford a trip to Nevada or Florida, and a six-week or three-month stay there.”<sup>184</sup>

*Sherrer* made the Nevada or Florida divorce a much more reliable option for unhappily married couples in states with stringent divorce laws. The decision left open the question whether a migratory divorce binding on both spouses on res judicata grounds would also bind other parties or a state concerned with the vindication of its interests in the marriage.<sup>185</sup> The Court’s answer to this question came several years later in *Johnson v. Muelberger*,<sup>186</sup> which held that the daughter of one party to a migratory Florida divorce would be treated under Florida law as privy to the divorce proceeding, and therefore that she could not challenge the validity of the divorce in a subsequent inheritance dispute in New York.<sup>187</sup> More broadly, the Court held that “[w]hen a divorce cannot be attacked for lack of jurisdiction by parties actually before

<sup>182</sup> *Id.* at 366. Justice Frankfurter noted “that certain States make an industry of their easy divorce laws, and encourage inhabitants of other States to obtain ‘quickie’ divorces which their home States deny them. To permit such States to bind all others to their decrees would endow with constitutional sanctity a Gresham’s Law of domestic relations.” *Id.* at 366–67.

Frankfurter disputed the suggestion that a more stringent rule would unsettle the marital status of all those who had divorced and remarried across the country, noting statistics suggesting that Nevada and Florida “attract virtually all the non-resident divorce business,” yet granted only six percent of the total divorces across the country in 1940. *Id.* at 369–70.

<sup>183</sup> *See id.* at 367–69. (“[The decision’s] practical result will be to offer new inducements for conduct by parties and counsel, which, in any other type of litigation, would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it.”).

<sup>184</sup> *Id.* at 370. Moreover,

[t]he easier it is made for those who through affluence are able to exercise disproportionately large influence on legislation, to obtain migratory divorces, the less likely it is that the divorce laws of their home States will be liberalized, insofar as that is deemed desirable, so as to affect all.

*Id.* at 370 n.18.

<sup>185</sup> *See* Herbert R. Baer, *The Aftermath of Williams vs. North Carolina*, 28 N.C. L. REV. 265, 281–82 (1950).

<sup>186</sup> 340 U.S. 581 (1951).

<sup>187</sup> *Id.* The decedent, E. Bruce Johnson, had entered an appearance through counsel when his second wife obtained a Florida divorce and died a year after marrying his third wife, Genevieve. Johnson left his estate by will to his daughter, Eleanor, who challenged Genevieve’s status as Johnson’s wife. Eleanor offered clear evidence that Johnson’s second wife had not spent the necessary ninety days residing in Florida before filing her divorce action there. *Id.* at 582–83.

the court or strangers in the rendering state, it cannot be attacked by them anywhere in the Union. The Full Faith and Credit Clause forbids."<sup>188</sup>

During the first half of the twentieth century, it had become well understood that despite the stringencies of the law on the books, the law in fact offered opportunities for couples to divorce by mutual agreement.<sup>189</sup> With *Sherrer* and *Johnson*, the Supreme Court appeared to have ratified this trend. Because the cases were based on the principle of *res judicata*, they did not entirely foreclose the possibility of a jurisdictional challenge to a migratory divorce. After *Sherrer* and *Johnson*, however, this risk was largely academic.<sup>190</sup>

As Justice Frankfurter's dissents make clear, the decisions in *Sherrer* and *Johnson* marked another significant break from the prevailing official norms, which established the marital relationship as beyond the control of the parties themselves and certainly not terminable on the basis of consent.<sup>191</sup> After *Sherrer* and *Johnson*, lower courts began deciding cases in which couples had obtained divorces in the Virgin Islands or Mexico, without establishing residency there for even the minimal periods required by Florida or Nevada. These cases did not reach the Supreme Court, but they suggested that the fact of domicile might no longer be important when the parties had consented to a court's jurisdiction.<sup>192</sup> By 1965, the New York Court of Appeals gave up the effort to police consensual foreign divorces in *Rosenstiel v. Rosenstiel*, upholding the validity of a divorce granted in Juarez, Mexico, based on less than two days' residence but with the consent and participation of both parties.<sup>193</sup> Acknowledging that the grounds for the divorce were inadmissible in New York and that "the physical

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<sup>188</sup> *Id.* at 589. The sole dissenter was Justice Frankfurter, who simply cited as his reasons those given by the New York Court of Appeals in its opinion and the views he had expressed in his *Sherrer* dissent. *Id.* at 589 (Frankfurter, J., dissenting). Justice Murphy was no longer on the Court at the time *Johnson* was decided.

<sup>189</sup> See *supra* notes 154–166 and accompanying text.

<sup>190</sup> See, e.g., CLARK, *supra* note 155, at 292–94; RHEINSTEIN, *supra* note 72, at 73–76. In addition to *res judicata*, state courts employed estoppel principles to prevent subsequent challenges to a divorce brought by a party who had previously procured one and then relied on the decree. See Homer Clark, *Estoppel Against Jurisdictional Attack on Decrees of Divorce*, 70 YALE L.J. 45, 45–47 (1960).

<sup>191</sup> The legal manifestations of these norms included the extensive power afforded to the states over marital relationships, the idea that marriage was a matter of status rather than contract, the requirement of domicile for jurisdiction to grant a divorce, the notion that divorce proceedings were in *rem* rather than in *personam*, and the elaborate framework of divorce grounds and defenses.

<sup>192</sup> See *Alton v. Alton*, 207 F.2d 667 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954). *Alton* involved the divorce law of the Virgin Islands, which provided for divorce on the basis of personal jurisdiction without domicile. By a close vote, the court held that granting a divorce on this basis was a violation of the Due Process Clause. *Id.*; see CLARK, *supra* note 155, at 290. *Alton* is persuasively criticized in Max Rheinstein, *The Constitutional Bases of Jurisdiction*, 22 U. CHI. L. REV. 775 (1955).

<sup>193</sup> 209 N.E.2d 709 (N.Y. 1965).

contact with the Mexican jurisdiction was ephemeral," the court nevertheless recognized the divorce on the basis of comity.<sup>194</sup>

*Rosenstiel* marked an important turning point.<sup>195</sup> Soon after the decision, the political impasse over divorce laws in New York was broken with the passage of New York's 1966 Divorce Reform Law, which added several new grounds for divorce, including one that provided for divorce by mutual consent when the parties had lived separately for two years pursuant to a written separation agreement.<sup>196</sup> Within a few years, provisions designed to promote negotiation and settlement of disputes by the parties themselves became a standard aspect of new divorce laws, which swept aside the old defenses of collusion, connivance, condonation, and recrimination.<sup>197</sup> Within a decade, a much broader process of privatization of family law was underway.<sup>198</sup>

### C. Due Process and the Problem of Divisible Divorce

On the same day it decided *Sherrer*, the Supreme Court confronted another problematic aspect of migratory divorce in *Estin v. Estin*.<sup>199</sup> Gertrude Estin had obtained a legal separation and an alimony decree in New York against her husband Joseph.<sup>200</sup>

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<sup>194</sup> *Id.* at 711. Despite the fact that the cases from *Williams* forward had placed "a considerable emphasis . . . on domicile," the New York court concluded that this had become in practice

a mere formal gesture having no more relation to the actual situs of the marriage or to true domicile than the formality of signing the Juarez city register. . . . The State or country of true domicile has the closest real public interest in a marriage but, where a New York spouse goes elsewhere to establish a synthetic domicile to meet technical acceptance of a matrimonial suit, our public interest is not affected differently by a formality of one day than by a formality of six weeks.

*Id.* at 712.

<sup>195</sup> For example, Max Rheinstein described *Rosenstiel* as "amount[ing] to a repeal of New York's law of the books." RHEINSTEIN, *supra* note 72, at 357–58.

<sup>196</sup> N.Y. DOM. REL. LAW § 170(6) (Consol. 1990). The two-year period was shortened to one year in 1968. *See also* JACOB, *supra* note 10, at 37–42; RHEINSTEIN, *supra* note 72, at 352–56.

Although mutual consent is a no-fault ground, divorce on this ground is more difficult to achieve than under statutes which allow either party to file unilaterally for divorce after living separately in fact for the statutory period. Individuals who have no grounds for divorce or separation against their partners, and who cannot procure their partners' consent to a legal separation, have no route to a divorce under the New York law. For the recent movement toward enacting a true no-fault divorce law in New York, see Danny Hakim, *Panel Asks New York to Join the Era of No-Fault Divorce*, N.Y. TIMES, Feb. 7, 2006, at A1.

<sup>197</sup> *E.g.*, UNIF. MARRIAGE & DIVORCE ACT § 306, 9A U.L.A. 2 (1998).

<sup>198</sup> *See generally* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443 (discussing the no-fault divorce revolution and privatization of family law in general).

<sup>199</sup> 334 U.S. 541 (1948); *see also* *Kreiger v. Kreiger*, 334 U.S. 555 (1948) (the companion case).

<sup>200</sup> *Estin*, 334 U.S. at 542–43.

Joseph subsequently moved to Nevada in January 1944 and filed for divorce there in April 1945.<sup>201</sup> Gertrude was not served personally and did not appear in the Nevada proceeding.<sup>202</sup> Joseph's divorce was granted on the basis of three years of separation, and he stopped making alimony payments.<sup>203</sup> Gertrude began proceedings in New York to collect the unpaid arrearages in February 1946.<sup>204</sup> Although it was clear that Joseph had a Nevada domicile, and therefore that the decree was entitled to full faith and credit under *Williams*, the New York courts ordered him to pay the arrearages, concluding that while a divorce decree "granted by a court having jurisdiction of the persons of both parties may very well be held to override any incongruous alimony provision of an earlier domestic judgment of separation," this was a function of res judicata or estoppel principles.<sup>205</sup> Because Gertrude had not participated in the Nevada proceeding, she was not bound by res judicata.<sup>206</sup>

With *Estin*, the Supreme Court faced the conflict between full faith and credit principles and due process principles that had been simmering since the first *Williams* decision six years earlier.<sup>207</sup> Once again, Justice Douglas wrote the majority opinion, and Justices Frankfurter and Jackson wrote strong dissents. Douglas's opinion reaffirmed the principles of *Williams* but concluded that the Nevada decree, while valid, was not effective to terminate Joseph's obligations under the New York separate maintenance decree.<sup>208</sup> Douglas wrote: "[T]he fact that marital capacity was changed does not mean that every other legal incidence of the marriage was necessarily affected."<sup>209</sup> He acknowledged that this was not a conceptually tidy result:

An absolutist might quarrel with the result and demand a rule that once a divorce is granted, the whole of the marriage relation is dissolved, leaving no roots or tendrils of any kind. But there are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable. For the eternal problem of the law is one of making accommodations between

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<sup>201</sup> *Id.* at 543.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Estin v. Estin*, 73 N.E.2d 113, 115 (N.Y. 1947).

<sup>206</sup> *See id.* at 115–16. The court characterized the wife's right to accrued alimony payments as "a vested property right" and stated that Joseph had not cited any cases in which an ex parte Nevada divorce had been held to have canceled a prior alimony award. *Id.*

<sup>207</sup> *See supra* text accompanying notes 131–32; *see also* William H. Rodgers, Jr. & Linda A. Rodgers, *The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife*, 67 COLUM. L. REV. 1363 (1967).

<sup>208</sup> *Estin*, 334 U.S. at 544–45.

<sup>209</sup> *Id.* at 545. Douglas's opinion in *Estin* was foreshadowed in his concurring opinion in *Esenwein v. Commonwealth*, 325 U.S. 279 (1945), discussed *supra* at note 140. *See also* J.H.C. Morris, *Divisible Divorce*, 64 HARV. L. REV. 1287, 1290–91 (1951).



conflicting interests. This is why most legal problems end as questions of degree.<sup>210</sup>

Going on to elaborate upon the “important considerations both of law and of policy” involved, Douglas described both the interest of Nevada in the marital status of its domiciliaries and the competing interests of New York, which was “rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge” and which had evinced its concern with the marriage by entry of an alimony judgment before Nevada had any connection to the parties.<sup>211</sup> Given these competing considerations, Douglas framed the issue as “whether Nevada could under any circumstances adjudicate rights of respondent under the New York judgment when she was not personally served or did not appear in the proceeding.”<sup>212</sup>

Characterizing Mrs. Estin as a creditor, and her alimony decree as a vested property interest, the Court held that her rights under the decree could not be affected by a court without in personam jurisdiction over her.<sup>213</sup> Since Nevada had no power to adjudicate her rights under the New York judgment, “New York need not give full faith and credit to that phase of Nevada’s judgment.”<sup>214</sup> Douglas adopted new terminology to describe this result:

The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony. It accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern.<sup>215</sup>

Justice Frankfurter dissented, disputing the Court’s assertion that a separate maintenance decree created an obligation that could not be extinguished by a court without personal jurisdiction over the obligee.<sup>216</sup> Justice Jackson also dissented, suggesting that with this decision the Court was making a bad situation worse:

If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell

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<sup>210</sup> *Estin*, 334 U.S. at 545.

<sup>211</sup> *Id.* at 545, 547.

<sup>212</sup> *Id.* at 547.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 549.

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 550 (Frankfurter, J., dissenting). In his view, the Nevada court had “merely established a change in status,” and the effect of that change was a question for New York to determine under its own law. *Id.* at 551. He argued that if the Nevada decree violated the wife’s due process rights, “New York of course would not have to give effect to it. It could not do so even if it wished.” *Id.*

whether they are married and, if so, to whom. Today many people who have simply lived in more than one state do not know, and the most learned lawyer cannot advise them with any confidence. The uncertainties that result are not merely technical, nor are they trivial; they affect fundamental rights and relations such as the lawfulness of their cohabitation, their children's legitimacy, their title to property, and even whether they are law-abiding persons or criminals. In a society as mobile and nomadic as ours, such uncertainties affect large numbers of people and create a social problem of some magnitude. It is therefore important that, whatever we do, we shall not add to the confusion. I think that this decision does just that.<sup>217</sup>

Nine years later, the divisible divorce problem came back before the Court in *Vanderbilt v. Vanderbilt*.<sup>218</sup> After Cornelius and Patricia Vanderbilt separated in California, Patricia moved to New York, and Cornelius obtained an ex parte Nevada divorce.<sup>219</sup> After the divorce, Patricia brought an action in New York for a legal separation and alimony.<sup>220</sup> Cornelius argued that when the Nevada divorce terminated the marriage, it also terminated any duty of support he owed to Patricia.<sup>221</sup> The New York courts conceded that the Nevada decree was valid but concluded that it had not cut off Patricia's rights to support.<sup>222</sup>

Affirming this result, the Supreme Court applied the rule used in *Estin*.<sup>223</sup> In a short opinion, Justice Black formulated the holding in the language of due process:

Since the wife was not subject to its jurisdiction, the Nevada divorce court had no power to extinguish any right which she had

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<sup>217</sup> *Id.* at 553 (Jackson, J., dissenting). In addition, he wrote: "The Court reaches the Solomon-like conclusion that the Nevada decree is half good and half bad under the full faith and credit clause. It is good to free the husband from the marriage; it is not good to free him from its incidental obligations." *Id.* at 554.

Jackson had dissented from the ruling in *Williams I*, and in *Estin* he repeated his view that he would not apply the Full Faith and Credit Clause to "constructive service divorces obtained on short residence." *Id.* However, he argued that if the Nevada divorce was constitutionally entitled to respect, it should be effective in New York for all purposes. *Id.*

<sup>218</sup> 354 U.S. 416 (1957).

<sup>219</sup> *Id.* at 416-17.

<sup>220</sup> *Id.* at 417.

<sup>221</sup> *Id.*

<sup>222</sup> *Vanderbilt v. Vanderbilt*, 135 N.E.2d 553 (N.Y. 1956). Patricia acquired jurisdiction over Cornelius in New York by sequestering his property within the state. *Id.* at 556.

<sup>223</sup> *Vanderbilt*, 354 U.S. at 418 ("The factor which distinguishes the present case from *Estin* is that here the wife's right to support had not been reduced to judgment prior to the husband's ex parte divorce. In our opinion this difference is not material on the question before us.").

under the law of New York to financial support from her husband. It has long been the constitutional rule that a court cannot adjudicate a personal claim or obligation unless it has jurisdiction over the person of the defendant. Here, the Nevada divorce court was as powerless to cut off the wife's support right as it would have been to order the husband to pay alimony if the wife had brought the divorce action and he had not been subject to the divorce court's jurisdiction. Therefore, the Nevada decree, to the extent it purported to affect the wife's right to support, was void and the Full Faith and Credit Clause did not obligate New York to give it recognition.<sup>224</sup>

In a much longer opinion, Justice Frankfurter dissented, reviewing "the singular history of matrimonial law in this Court"<sup>225</sup> and arguing that there was no basis for treating alimony orders differently than divorce decrees under the Full Faith and Credit Clause.<sup>226</sup> Justice Harlan also dissented, suggesting that the Court should have decided only the full faith and credit issue, without addressing the due process question.<sup>227</sup>

With divisible divorce, the Court reached a compromise between the interests of the spouse seeking an *ex parte* divorce and the spouse who was absent from the proceeding. The problem of protecting the absent spouse's financial rights and interests dated back to the earliest migratory divorce cases.<sup>228</sup> *Estin* and *Vanderbilt* raised new questions, however. The cases could be read narrowly to hold only that the Full Faith and Credit Clause permits a state to enter alimony orders after a foreign *ex parte* divorce.<sup>229</sup> Under this reading, states could also reach the opposite result, concluding

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<sup>224</sup> *Id.* at 418–19 (citation omitted).

<sup>225</sup> *Id.* at 421 (Frankfurter, J., dissenting).

<sup>226</sup> *Id.* at 424 ("It cannot be assumed, by judicial notice as it were, that absent spouses value their alimony rights more highly than their marital rights. Factually, therefore, both situations involve the adjudication of valuable rights of an absent spouse, and I see no reason to split the cause of action and hold that a domiciliary State can *ex parte* terminate the marital relation, but cannot *ex parte* deny alimony. 'Divisible divorce' is just name-calling." (citation omitted)).

<sup>227</sup> *Id.* at 428–29 (Harlan, J., dissenting). In Harlan's view, the key question was whether Mrs. Vanderbilt had been domiciled in New York at the time of the divorce. *Id.* at 430. If she had, New York should not be "compelled to disregard her own law and policy in favor of the law of Nevada on the question of the survival of support rights subsequent to an *ex parte* divorce." *Id.* If she had not yet established a New York domicile, Harlan believed her support rights should be governed by the law of the state in which she was domiciled, writing: "It seems to me unfortunate that this Court should permit spouses divorced by valid decrees to comb the country, after the divorce, in search of any State where the divorcing spouse has property and which has favorable support laws, in order there to obtain alimony." *Id.* at 434.

<sup>228</sup> See *supra* notes 15–33 and accompanying text; see also *Estin v. Estin*, 334 U.S. 541, 545 (1948) (discussing *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858)).

<sup>229</sup> This reading follows one of the lines of reasoning described in Justice Frankfurter's dissent in *Estin*, discussed *supra* note 216. *Estin*, 334 U.S. at 550–51 (Frankfurter, J., dissenting).

that a spouse's rights to alimony or property orders were cut off by such a divorce.<sup>230</sup> Alternatively, the Court's language, describing the right to alimony as a personal right, suggests a much broader due process principle.<sup>231</sup> This reading would require full in personam jurisdiction before either spouse's financial interests could be affected by a decree and, therefore, would mandate that states treat alimony and property rights as surviving an *ex parte* divorce.<sup>232</sup> The question of which reading is correct has never been answered: the Supreme Court has never directly addressed the due process requirements of suits for spousal support or property division and has retreated somewhat from the *Estin* and *Vanderbilt* position in a subsequent case.<sup>233</sup> State courts, however, have generally adopted the view since *Estin* that personal jurisdiction is required to adjudicate the financial incidents of divorce.<sup>234</sup>

In several other cases during this period, the Supreme Court considered the full faith and credit implications of child custody determinations.<sup>235</sup> *May v. Anderson*, decided on reasoning largely parallel to *Estin* and *Vanderbilt*, involved a husband and wife and three children, who had lived together in Wisconsin until the couple separated and the wife moved to Ohio.<sup>236</sup> Owen Anderson obtained a divorce and a custody decree in Wisconsin; his wife Leona did not participate in the proceeding.<sup>237</sup> Several years later, when Leona retained the children in Ohio after a visit, Owen brought a habeas corpus proceeding in Ohio asking the court to enforce the Wisconsin custody orders.<sup>238</sup> After the Ohio court ordered that the children be turned over to their father, Leona appealed, arguing that the Wisconsin custody decree was unenforceable on jurisdictional grounds.<sup>239</sup>

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<sup>230</sup> See CLARK, *supra* note 155, at 317 & n.20.

<sup>231</sup> See, e.g., *id.* at 317.

<sup>232</sup> This interpretation was suggested by Justice Frankfurter's dissent in *Estin*. See *supra* text accompanying note 216; see also *Hudson v. Hudson*, 344 P.2d 295 (Cal. 1959).

<sup>233</sup> *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965). Other confusions were raised by *Aldrich v. Aldrich*, 378 U.S. 540 (1964). See generally CLARK, *supra* note 155, at 318–19 (describing the confused state of the law following these cases).

<sup>234</sup> See generally CLARK, *supra* note 155, at 314–17 (discussing personal jurisdiction and divisible divorce). The Court has considered the requirements of due process and personal jurisdiction in the context of child support proceedings. See *Kulko v. Super. Ct.*, 436 U.S. 84 (1978); see also *Burnham v. Super. Ct.*, 495 U.S. 604 (1990).

<sup>235</sup> Several of these decisions held that because custody decrees were modifiable in the state in which they were entered, they could also be modified in another state if presented for enforcement there. See *Ford v. Ford*, 371 U.S. 187 (1962); *Kovacs v. Brewer*, 356 U.S. 604 (1958); *New York ex rel. Halvey v. Halvey*, 330 U.S. 610 (1947).

<sup>236</sup> *May v. Anderson*, 345 U.S. 528, 530 (1953). See generally Geoffrey C. Hazard, Jr., *May v. Anderson: Preamble to Family Law Chaos*, 45 VA. L. REV. 379 (1959) (describing the serious implications of the *May* decision).

<sup>237</sup> *May*, 345 U.S. at 530–31.

<sup>238</sup> *Id.* at 532.

<sup>239</sup> *Anderson v. May*, 107 N.E.2d 358 (Ohio Ct. App. 1952), *appeal dismissed*, 105 N.E.2d 648 (Ohio 1952).

A closely divided Supreme Court concluded that Ohio was not bound to give full faith and credit to the Wisconsin custody decree.<sup>240</sup> Drawing the analogy to *Estin*, Justice Harold Burton's plurality opinion asserted that "[r]ights far more precious to appellant than property rights will be cut off if she is to be bound by the Wisconsin award of custody,"<sup>241</sup> and concluded that "a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony."<sup>242</sup> In place of the traditional rule, which treated a custody proceeding as a status determination in which jurisdiction was based on the child's domicile,<sup>243</sup> the Court seemed to institute a sweeping new jurisdictional approach by framing the issue as "whether a court of a state, where a mother is neither domiciled, resident nor present, may cut off her immediate right to the care, custody, management and companionship of her minor children without having jurisdiction over her in personam."<sup>244</sup>

This case also produced a range of opinions. Justice Frankfurter concurred and asserted that the Court's decision was limited to the full faith and credit question.<sup>245</sup> Justice Jackson's dissent was consistent with his view that domicile was the most appropriate test for determining the connection between individuals and the state.<sup>246</sup> Although Jackson had argued for application of due process norms in the *ex parte* divorce cases, he also articulated clearly, and with what now appears to be great

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<sup>240</sup> Justice Burton wrote the majority opinion, joined by Chief Justice Vinson, Justice Black, Justice Douglas, and Justice Frankfurter, who wrote a concurring opinion. Justice Jackson dissented, joined by Justice Reed; Justice Minton also dissented, and Justice Clark did not participate.

<sup>241</sup> *May*, U.S. 345 at 533.

<sup>242</sup> *Id.* at 534.

<sup>243</sup> See, e.g., RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 117 (1934); Herbert F. Goodrich, *Custody of Children in Divorce Suits: The Conflict of Laws Problem*, 7 CORNELL L.Q. 1 (1922).

<sup>244</sup> *May*, 345 U.S. at 533; see also Hazard, *supra* note 236, at 383–84.

<sup>245</sup> *May*, 345 U.S. at 535–36 (Frankfurter, J., concurring). In Frankfurter's view, although Ohio was not bound to recognize the Wisconsin decree, it could choose to give it effect, and this "would not offend the Due Process Clause." *Id.* Frankfurter suggested several reasons why custody decrees should be governed by different rules than those governing marital status or property rights, noting the state's special interests in the welfare of children within its borders. *Id.* at 536. Because Frankfurter's was the deciding vote, *May* "has been read as deciding what he says it decided." Hazard, *supra* note 236, at 385.

<sup>246</sup> *May*, 345 U.S. at 538–39 (Jackson, J., dissenting). Jackson wrote:

We are a mobile people, historically on the move, and perhaps the rigid concept of domicile derived by common law from feudal attachment to the land is too rigid for a society so restless as ours. But if our federal system is to maintain separate legal communities, as the Full Faith and Credit Clause evidently contemplates, there must be some test for determining to which of these a person belongs. If, for this purpose, there is a better concept than domicile, we have not yet hit upon it.

*Id.* at 539; see also *supra* text accompanying notes 127–28.

foresight, the problems attendant upon a rule that would mandate full personal jurisdiction for adjudication of child custody disputes:

The Court's decision holds that the state in which a child and one parent are domiciled and which is primarily concerned about his welfare cannot constitutionally adjudicate controversies as to his guardianship. The state's power here is defeated by the absence of the other parent for a period of two months. The convenience of a leave-taking parent is placed above the welfare of the child, but neither party is greatly aided in obtaining a decision. The Wisconsin courts cannot bind the mother, and the Ohio courts cannot bind the father. A state of the law such as this, where possession apparently is not merely nine points of the law but all of them and self-help the ultimate authority, has little to commend it in legal logic or as a principle of order in a federal system.<sup>247</sup>

Perhaps because the Supreme Court approached *Vanderbilt* and *May* as full faith and credit problems rather than as cases raising due process issues, the Justices did not look to contemporary developments in due process doctrine that might have informed these decisions. In this period, the Court had already begun to elaborate its "minimum contacts" theory of personal jurisdiction over corporations in *International Shoe Co. v. Washington*.<sup>248</sup> It was another twenty-five years, however, before the Court applied the minimum contacts principle to family law, in a case involving enforcement of child support.<sup>249</sup>

The Court's approval of divisible divorce and its adoption of a different rule governing full faith and credit for financial and custody orders highlight the radical aspects of the *Williams* doctrine. In his *Vanderbilt* dissent, Justice Frankfurter complained about the Court's distinction between marital status and other aspects of the marital relationship, writing that "[n]o explanation is vouchsafed why the dissolution of the

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<sup>247</sup> *May*, 345 U.S. at 539 (Jackson, J., dissenting). Jackson objected to the Court's equation between "the jurisdictional requirements for a custody decree [and] those for an *in personam* money judgment," pointing out that in custody cases "courts are no longer concerned primarily with the proprietary claims of the contestants for the 'res' before the court, but with the welfare of the 'res' itself." *Id.* at 540-41.

<sup>248</sup> 326 U.S. 310 (1945). On the early reading of *International Shoe* as limited to personal jurisdiction over corporations, see George Rutherglen, *International Shoe and the Legacy of Legal Realism*, 2001 SUP. CT. REV. 347. Justice Jackson came closest to noting this issue with a "cf." citation to *Milliken v. Meyer*, 311 U.S. 457 (1940). See *May*, 345 U.S. at 540 (Jackson, J., dissenting).

<sup>249</sup> See *Kulko v. Super. Ct.*, 436 U.S. 84 (1978). By this time, the law of custody jurisdiction had moved far beyond the *May* decision. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 462-94 (student ed. 1988).

marital relation is not so 'personal' as to require personal jurisdiction over an absent spouse, while the denial of alimony incident thereto is."<sup>250</sup> Describing the effects of *Vanderbilt*, Homer Clark argued that the explanation for this distinction "lies in the contemporary attitude toward divorce."<sup>251</sup> Clark suggested that, while a wife's claim to the marital relationship is personal and important, it is not one that can be protected by the law.<sup>252</sup> Accordingly, with its interpretation of the Full Faith and Credit Clause, the Court

preserves the wife's chance to contest the divorce at the point where in the modern divorce action the contest nearly always occurs, over money. It does not preserve her chance to contest the issue where a contest is in vain, over the granting of the divorce itself. . . . This illustrates that what the court is really concerned with here is the protection of the parties' interests rather than the vindication of the state's interest even assuming the latter could be defined.<sup>253</sup>

Thus *Estin*, *Vanderbilt*, and the rule of divisible divorce augur another aspect of the transformation of modern divorce law: the shift in emphasis in divorce practice from the grounds for divorce to its financial and other incidents.

The cases from *Williams I* and *II* to *Vanderbilt* made substantial changes to the divorce law of the United States, but nothing in the opinions suggests that the Supreme Court had any coherent philosophy of marriage and divorce. In doctrinal terms, the divorce cases addressed only the narrow problem of full faith and credit and not broader questions of divorce policy or constitutional law. The Court's involvement grew from its role as "umpire of the federal system"<sup>254</sup> and from the long-standing failure of Congress and the states to find a workable solution for the conflicts among the states over divorce. The opinions reveal a close connection between the divorce problem and larger questions of federalism and individual rights.

### III. DIVORCE AND THE CONSTITUTION

In the broader context of American constitutional law, the divorce cases can be located at the intersection of federalism and individual rights jurisprudence. Responding to a century of national debate and disagreement over standards for divorce and

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<sup>250</sup> *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 424 (1957) (Frankfurter, J., dissenting).

<sup>251</sup> CLARK, *supra* note 155, at 316.

<sup>252</sup> *See id.* ("If he is determined to have a divorce, so evidencing a choice not to honor her claim, she will accomplish little by blocking him. A successful defense to the divorce suit will not restore happy relations.")

<sup>253</sup> *Id.* at 316–17.

<sup>254</sup> *See* UROFSKY, *supra* note 8, at 114.

working within the doctrinal framework of the Full Faith and Credit Clause, the Supreme Court rejected an older vision of federalism and abandoned its attempt to mediate the normative pluralism of state divorce laws. The Court accomplished this, without addressing the substance of state laws and without defining new constitutional rights, by rewriting the rules of interstate federalism to provide greater protection for individual choices around family relationships.

### A. *Divorce Federalism*

For many generations, the Supreme Court has treated family law as a subject committed to the authority of state and local governments. This model finds support at least as early as the Court's 1859 decision in *Barber v. Barber*,<sup>255</sup> in which the Court "disclaim[ed]" for the federal courts any jurisdiction "upon the subject of divorce, or for the allowance of alimony."<sup>256</sup> More recently, with their major reworking of the federal commerce power in *United States v. Lopez*<sup>257</sup> and *United States v. Morrison*,<sup>258</sup> various members of the Court remarked on the local character of family law matters, this time in the context of the presence or absence of congressional authority.<sup>259</sup> A more accurate description of the historical and contemporary situation is that while some aspects of family law have remained within the control of state governments, many others have been regulated extensively by the national government, including both Congress and the federal courts.<sup>260</sup> In the mid-twentieth century, however, domestic relations law was understood as a matter for state regulation, and so the phenomenon of migratory divorce produced a significant federalism problem.

The Supreme Court's divorce cases illustrate the inherent difficulty with treating family law as purely local. States with restrictive policies on divorce, armed with a series of powerful moral and political arguments, had strong incentives to articulate and defend those policies in the competition with other states over regulation of individual families. Other states, with different moral and political views of divorce and different economic interests or demographics, proved equally unwilling to yield. Despite repeated and serious attempts to negotiate law reform measures that would manage these interstate differences, the political and policy impasse was never resolved. Local

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<sup>255</sup> 62 U.S. 582 (1859).

<sup>256</sup> *Id.* at 584; *see supra* notes 21–24 and accompanying text; *see also In re Burrus*, 136 U.S. 586 (1890) (stating that federal courts have no authority to issue an order that a child be returned to custody of her father); Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1821–25 (1995).

<sup>257</sup> 514 U.S. 549 (1995).

<sup>258</sup> 529 U.S. 598 (2000).

<sup>259</sup> *See, e.g., Lopez*, 514 U.S. at 564.

<sup>260</sup> For the historical view, *see COTT, supra* note 1. For a contemporary example, *see Ann Laquer Estin, Federalism and Child Support*, 5 VA. J. SOC. POL'Y & L. 541 (1998).



control over marriage and divorce was both the cause and the result of a national moral and political dissensus over these questions.<sup>261</sup>

By the mid-twentieth century, several factors had begun to break down the connections between families and local communities, making it more difficult to regulate families at the state level. First, the significant and increasing mobility of the American population undermined the efforts of more restrictive states to extend their control.<sup>262</sup> Several of the nineteenth-century divorce cases that reached the Supreme Court involved individuals who left home and established a new life in a new part of the country, leaving a wife or family behind.<sup>263</sup> Frequent moves made the concept of domicile more elusive and the tie between individuals and states more tentative.<sup>264</sup>

Local regulation of families also became more difficult as norms of coverture began to change. In the American context, women as well as men moved across state borders, and social and economic conditions—including the frequency of separation and divorce—fostered women's autonomy and opportunities to act independently. With emergence of the rule that a married woman could establish her own domicile,<sup>265</sup> a marital separation could lead to direct competition between two different states over which state was the appropriate location for jurisdiction over family disputes.<sup>266</sup>

With no clear method for determining to which community a particular marriage or family belonged, domestic relations law became preoccupied with convoluted problems in the conflict of laws. In order to maintain the tradition of local authority over divorce, the Court was obliged to get deeply involved in drawing a complex series of lines demarcating state authority. Despite these efforts, marital status was frequently uncertain and unpredictable.

The Justices of the Supreme Court conceptualized migratory divorce as a federalism problem. While the opinions in *Haddock* disagreed on the correct approach for the Court to take, they agreed that a fundamental conflict of interests existed among

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<sup>261</sup> The Court acknowledged this repeatedly in the divorce cases.

<sup>262</sup> See generally HARTOG, *supra* note 7.

<sup>263</sup> These include *Barber v. Barber*, 62 U.S. 582 (1858), and *Maynard v. Hill*, 125 U.S. 190 (1888). See *supra* notes 21–24, 33 and accompanying text.

<sup>264</sup> Justice Rutledge emphasized this phenomenon in his opinion in *Williams II*, 325 U.S. 226, 257–58 (1945) (Rutledge, J., dissenting). See also Corwin, *supra* note 112, at 352 (“Yes, indeed; ‘domicile’ is a frail thing to suspend a constitutional provision from in an age when ‘home is where the garage is.’”). For the view that determining domicile with more precision was a difficult but necessary aspect of resolving full faith and credit problems, see *Williams I*, 317 U.S. 287, 320–23 (1942) (Jackson, J., dissenting).

<sup>265</sup> See *supra* text accompanying notes 34–37.

<sup>266</sup> See Erwin N. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, 208–10 (1951); Holt, *supra* note 101, at 1019–23. By the mid-twentieth century, even individual domicile had become complex and difficult to determine in a range of different legal contexts. See, e.g., *Williams I*, 317 U.S. at 320–23 (Jackson, J., dissenting); Jackson, *supra* note 87, at 29–30; Willis L. M. Reese, *Does Domicil Bear a Single Meaning?*, 55 COLUM. L. REV. 589 (1955).

the states.<sup>267</sup> Forty years later, when the Court returned to the divorce problem, there was still no national consensus on divorce policy, but the center of gravity in the debate had shifted. A much broader body of opinion supported the view that divorce was an appropriate solution to a common social problem, and some states had begun experimenting with no-fault grounds for divorce.<sup>268</sup> In addition, a reliable divorce system had become increasingly important to assuring property titles, inheritance claims, and the new benefits available from the emerging welfare state.<sup>269</sup> Although the Court continued to approach the problem as one of federalism, within the rubric of the Full Faith and Credit Clause, the Court's opinions began to give more weight to the individual interests at stake in migratory divorce disputes.<sup>270</sup> As the protection of individual interests came to weigh more significantly in the balancing of state interests, and even though the Court never took an explicit position on the substance of state divorce laws, its rulings helped to shift the framework of the national divorce debate.

During this period, Justice Frankfurter took the most traditional approach to the federalism questions. His deference to state policies in domestic relations led him to a minimalist view of the obligations imposed by the Full Faith and Credit Clause. Frankfurter's opinions in the two *Williams* cases articulated a strong view of the state interest in regulating domestic relations matters, even as he asserted emphatically that the Court should not allow judgments of social policy to influence the resolution of full faith and credit disputes.<sup>271</sup> Frankfurter also opposed the rule articulated in *Sherrer* and *Johnson* that allowed couples to evade the laws of their home state by consenting to divorce jurisdiction in another state.<sup>272</sup> Conversely, Frankfurter was not concerned that after *Williams II* an individual might be validly divorced in one state and still married in another,<sup>273</sup> and he rejected the arguments that led other members of the Court to treat alimony differently from bare divorce decrees, even when his approach would impose hardship on a spouse in need of post-divorce financial support.<sup>274</sup> In the context of custody disputes, he consistently took the position that the Full Faith and Credit Clause should not require enforcement of other states' judgments because of the important state policies at stake.<sup>275</sup>

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<sup>267</sup> See *supra* notes 43–56, 86–88 and accompanying text.

<sup>268</sup> See DiFONZO, *supra* note 7, at 67–87.

<sup>269</sup> See Katherine L. Caldwell, *Not Ozzie and Harriet: Postwar Divorce and the American Liberal Welfare State*, 23 LAW & SOC. INQUIRY 1, 48 (1998) (arguing that these cases reflect “the shift from a formulation of the courts as a site for social control to the limitation of judicial concern to the protection of individual rights”); Friedman, *supra* note 167, at 654–59.

<sup>270</sup> See, e.g., *Estin v. Estin*, 334 U.S. 541, 546–47 (1948); *Sherrer v. Sherrer*, 334 U.S. 343, 356 (1948); *Williams I*, 317 U.S. at 299–300.

<sup>271</sup> See *supra* notes 121–23, 141–44 and accompanying text.

<sup>272</sup> See *supra* notes 179–84, 188 and accompanying text.

<sup>273</sup> See *supra* note 4 and accompanying text.

<sup>274</sup> See *supra* note 216 and accompanying text.

<sup>275</sup> See *supra* note 245 and accompanying text.

Justice Jackson was less sympathetic to arguments about state domestic relations policies and developed an approach to divorce questions under the Full Faith and Credit Clause that highlighted due process principles. Jackson took the concept of domicile seriously as the solution to conflicts problems under the Clause and wrote repeatedly about the importance of developing principles that could determine the community to which an individual belonged.<sup>276</sup> He also argued throughout these cases that due process principles incorporated in the Full Faith and Credit Clause required that a court have personal jurisdiction over both spouses before it could enter a divorce decree entitled to recognition in the other states.<sup>277</sup> Although Jackson dissented on this basis in *Williams I*, he agreed with the Court in *Sherrer* and *Johnson* that migratory divorce decrees based on the parties' consent to jurisdiction should not be subject to collateral attack.<sup>278</sup> For Jackson, the necessity of inventing "divisible divorce" in *Estin* and *Vanderbilt* was proof that the *Williams* rule was misguided.<sup>279</sup> Significantly, Justice Jackson did not assert that ex parte divorces should be invalid in the state in which they were entered as a matter of due process, and his opinions do not argue that other states should be precluded from extending recognition to divorces entered without jurisdiction over an absent spouse.<sup>280</sup> For Jackson, due process served as a practical and principled basis for resolving the policy conflict among the states. Jackson's incorporation of due process norms as an aspect of full faith and credit, rather than of the Fourteenth Amendment, marks his perspective as one grounded in federalism concerns rather than individual rights.<sup>281</sup>

The divorce law innovations and the new vision of federalism in these cases can be attributed most directly to Justice Douglas, who authored the majority opinions in *Williams I* and *Estin*,<sup>282</sup> and Justice Black, who wrote a dissenting opinion in *Williams II* and the majority opinion in *Vanderbilt*.<sup>283</sup> While Douglas and Black were joined by many other members of the Court in these opinions and also joined opinions written by Justices Vinson, Reed, and Burton in other divorce cases,<sup>284</sup> Douglas wrote the

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<sup>276</sup> See *supra* notes 127–28 and accompanying text.

<sup>277</sup> This reflects the general approach of the courts in New York, Jackson's home state. See *supra* text accompanying notes 39–40.

<sup>278</sup> See *supra* note 177.

<sup>279</sup> See *supra* note 217 and accompanying text; see also *Estin v. Estin*, 334 U.S. 541, 554 (1948) (Jackson, J., dissenting).

<sup>280</sup> See *supra* notes 127–28 and accompanying text.

<sup>281</sup> For example, in the context of custody disputes, Jackson argued for a jurisdictional rule based on the child's domicile. See *supra* notes 246–47 and accompanying text.

<sup>282</sup> See *supra* notes 111–20, 208–15 and accompanying text. After he wrote these opinions, Douglas had his own experiences with divorce. His divorce from his first wife in 1954 was the first in the history of the Supreme Court. See BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 287–91 (2003). He was divorced again in 1963 and in 1966. See *id.* at 369–74, 396.

<sup>283</sup> See *supra* notes 146, 223–24 and accompanying text.

<sup>284</sup> Douglas and Black joined the majority opinion by Chief Justice Vinson in *Sherrer*. See *supra* notes 172–78 and accompanying text. They joined the majority opinion by Justice Reed

principal opinions adopting the rule requiring full faith and credit for ex parte divorces and the rule that ex parte proceedings could not bind an absent spouse on financial matters.<sup>285</sup>

The Douglas and Black opinions reflect notably different priorities than those of Frankfurter and Jackson.<sup>286</sup> These Justices emphasized that exceptions to the command of the Full Faith and Credit Clause had been rarely approved and should not be made on the basis of social policy.<sup>287</sup> As Douglas wrote, "It is a Constitution which we are expounding—a Constitution which in no small measure brings separate sovereign states into an integrated whole through the medium of the full faith and credit clause."<sup>288</sup> Rejecting the approach that would allow one state to reconsider whether another state had appropriately exercised jurisdiction, they asserted instead that the Constitution gave states the freedom to set their own jurisdictional rules for divorce.<sup>289</sup> Justice Black argued in *Williams II* that, by reading a domicile requirement into the constitutional text, the Court was undermining state court divorce adjudications and expanding the power of the federal courts at the expense of the states.<sup>290</sup> While noting that Congress might have the authority to create exceptions to the broad rule requiring full faith and credit for state court judgments, the liberal Justices emphasized that it had not done so.<sup>291</sup> Douglas and Black emphatically rejected the fault principle as a basis for determining divorce jurisdiction.

In their approach to federalism issues, Douglas and Black integrated a heightened concern for the individual interests at stake in divorce disputes. Initially, these concerns were merged into the discussion of state interests, but as the series progressed they came to the foreground. In *Williams I*, Douglas made repeated references to the interests of the state of Nevada "in the marital status of persons domiciled within its borders"<sup>292</sup> and noted only indirectly the consequences for individuals of the new

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in *Johnson*. See *supra* notes 186–88. Douglas and Black also joined the majority opinion by Justice Burton in *May*. See *supra* notes 240–44.

<sup>285</sup> Justice Rutledge voted consistently with Douglas and Black in these cases during his tenure on the Court from 1943 to 1949.

<sup>286</sup> There is a substantial literature describing personal animosity among the Justices during this period, with Frankfurter and Jackson typically on one side and Douglas and Black on the other. See, e.g., JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* (1989); UROFSKY, *supra* note 8, at 143–45. Justice Murphy was often aligned with Black and Douglas, but not in the divorce cases. See *supra* note 125 and accompanying text.

<sup>287</sup> See, e.g., *Williams I*, 317 U.S. 287, 294–95 (1942); *Estin v. Estin*, 334 U.S. 541, 545–46 (1948); see also *supra* notes 119–20 and accompanying text.

<sup>288</sup> *Williams I*, 317 U.S. at 303.

<sup>289</sup> See *id.* at 301.

<sup>290</sup> *Williams II*, 325 U.S. 226, 270–74 (1945) (Black, J., dissenting).

<sup>291</sup> *Williams I*, 317 U.S. at 303–04; *Williams II*, 325 U.S. at 268–69 (Black, J., dissenting).

<sup>292</sup> *Williams I*, 317 U.S. at 298.

rule.<sup>293</sup> Three years later, Black's dissent in *Williams II* challenged the Court's focus on state as opposed to individual interests with this observation:

People in this country do not "belong" to the state. Our Constitution preserves an area of individual freedom which the state has no right to abridge. The flavor of the Court's opinion is that a state has supreme power to control its domiciliaries' conduct wherever they go and that the state may prohibit them from getting a divorce in another state. In this aspect the decision is not confined to a holding which relates to state as opposed to federal rights. It contains a restriction of individual as opposed to state rights.<sup>294</sup>

After the *Williams* cases, the Court began to treat individual rights rather than state interests as the important constraint in the application of the Full Faith and Credit Clause. Cases such as *Sherrer* and *Johnson* became easy decisions because both parties had agreed to the jurisdiction of the divorce court, and in these cases Black and Douglas were aligned with Justice Jackson and many of the newer members of the Court. With a clearer focus on individual rights, however, the *ex parte* divorce cases began to look more difficult because of concerns for due process and the interests of the absent spouse. Douglas and Black solved the dilemma with the expedient of divisible divorce, effectively concluding that an absent spouse—and the state of matrimonial domicile—had a right to participate in litigating financial and custodial matters but no right to prevent the dissolution of marriage.<sup>295</sup> Thus, in *Estin, May*, and *Vanderbilt*, the individual and state interests in resolution of family financial and custodial matters were allowed to override the command of full faith and credit.

### *B. Divorce as an Individual Right*

The notion of individual rights and interests that emerged from these federalism cases reflects an important shift in the Court's conception of marriage and marital status. Before *Williams*, domestic relations law constructed the relationship of husband and wife as a status which determined the many privileges, disabilities, and

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<sup>293</sup> *Id.* at 301 (noting "intensely practical considerations [that] emphasize for us the essential function of the full faith and credit clause in substituting a command for the former principles of comity").

<sup>294</sup> *Williams II*, 325 U.S. at 267 n.8 (Black, J., dissenting) (citation omitted). At this point, Black referred to Radin's article. See Radin, *supra* note 112, at 28–32. Justice Black's concern for these individual rights was especially strong in the *Williams* decisions because the outcome of the full faith and credit dispute was a prison sentence. See *Williams II*, 325 U.S. at 261–63, 275–78 (Black, J., dissenting); see also *Williams I*, 317 U.S. at 291–92.

<sup>295</sup> See *supra* notes 213–15, 250–53 and accompanying text.

restrictions imposed on marital relationships.<sup>296</sup> After *Williams* and its sequels, “marital status” was transformed into a set of rights and obligations that belonged to individuals.<sup>297</sup> Once this status was subject to termination by either member of the couple, acting alone, marital status had been redefined as a matter of primarily individual concern.<sup>298</sup> The Court allowed states to set the terms on which their courts were open to individuals seeking to change their own marital status, but it did not permit the states to extend their reach beyond state borders to constrain the choices made by their citizens when those individuals traveled to other states. After *Williams*, marital status had become an aspect of personhood, and the right to change that status became a privilege of national citizenship.

Seen from this perspective, the divorce cases connect with the Court’s early work during the 1940s on due process and civil rights.<sup>299</sup> The *Williams* cases, which allowed individuals who had recently arrived in a state to seek divorces in its courts, have a clear kinship with *Edwards v. California*,<sup>300</sup> decided the year before *Williams I*. In *Edwards*, the defendant challenged his misdemeanor conviction under a Depression-era statute that prohibited bringing an indigent person into the state.<sup>301</sup> While the majority concluded that the California law should be struck down on the basis of the Commerce Clause, Justice Douglas wrote a concurring opinion, joined by Justices Murphy and Black, asserting that “[t]he right to move freely from State to State is an incident of *national* citizenship protected by the privileges and immunities clause of the Fourteenth Amendment against state interference.”<sup>302</sup> Justice Black’s dissent in *Williams II* makes an explicit connection to *Edwards*, arguing that one consequence of the majority’s opinion

is to subject people to criminal prosecutions for adultery and bigamy merely because they exercise their constitutional right to pass from a state in which they were validly married into another

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<sup>296</sup> See generally CLARK, *supra* note 249, at 286–89 (summarizing a married woman’s legal status and rights before modern legislation); HARTOG, *supra* note 7, at 93–166 (describing the legal divide between married and non-married persons).

<sup>297</sup> For a useful discussion of different types of status, see Radin, *supra* note 112, at 24–26 (distinguishing status relationships defined by the law from status based on membership in a class with particular privileges or disabilities).

<sup>298</sup> See *supra* text accompanying notes 251–53.

<sup>299</sup> See generally UROFSKY, *supra* note 8, at 90–100, 213–30 (discussing individual rights in criminal procedure); *id.* at 100–04, 241–62 (discussing racial discrimination); *id.* at 104–29, 230–40 (discussing the First Amendment).

<sup>300</sup> 314 U.S. 160 (1941).

<sup>301</sup> *Id.* at 171.

<sup>302</sup> *Id.* at 178 (Douglas, J., concurring); see also UROFSKY, *supra* note 8, at 88–89. *Williams* and *Hendrix* made the privileges and immunities argument in their appellate brief for *Williams I*. See *supra* note 110 and accompanying text.

state which refuses to recognize their marriage. Such a consequence runs counter to the basic guarantees of our federal union.<sup>303</sup>

Both *Edwards* and *Williams* protected the right to travel and deployed national citizenship norms in the face of traditions that had left certain matters—like care of the indigent and questions of divorce—to be resolved by local communities.<sup>304</sup>

The divorce cases also have a kinship with *Skinner v. Oklahoma ex. rel. Williamson*,<sup>305</sup> decided by the Court during the same term as *Williams I*. *Skinner* concerned an Oklahoma man sentenced to sterilization under the state's Habitual Criminal Sterilization Act.<sup>306</sup> Justice Douglas's majority opinion, relying on the Equal Protection Clause, described the right to procreate as a "fundamental" right and held that classifications in a law providing for sterilization would be subject to strict scrutiny.<sup>307</sup> Although Douglas was more cautious in articulating the individual interests at stake in *Williams I*, the two opinions are linked by the broad language of *Skinner*, which declared, "Marriage and procreation are fundamental to the very existence and survival of the race."<sup>308</sup> Read together, *Skinner* and *Williams I* raised the question whether laws addressing divorce also touched on basic civil rights.

Twenty years after the Supreme Court's divorce revolution began, as the full faith and credit cases tapered off, the Court under Chief Justice Warren began to extend the analysis applied in *Skinner*, using the Fourteenth Amendment to set new limits on state power in various aspects of domestic relations. This is a well-known story, opening in 1965 with *Griswold v. Connecticut*,<sup>309</sup> which concluded that laws prohibiting use of birth control violated the privacy rights of married couples.<sup>310</sup> In 1967, *Loving v. Virginia* held that state laws prohibiting interracial marriages violated the Fourteenth

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<sup>303</sup> *Williams II*, 325 U.S. 226, 265 (1945) (Black, J., dissenting) (citing *Edwards*, 314 U.S. 160).

<sup>304</sup> See *Edwards*, 314 U.S. at 174–75.

<sup>305</sup> 316 U.S. 535 (1942).

<sup>306</sup> *Id.* at 536–37.

<sup>307</sup> *Id.* at 541. Justice Stone grounded his concurring opinion on the Due Process Clause. See *id.* at 544 (Stone, J., concurring).

<sup>308</sup> *Id.* at 541 (majority opinion).

<sup>309</sup> 381 U.S. 479 (1965).

<sup>310</sup> *Id.* at 485–86. Douglas's opinion located this right in the Ninth Amendment and the "penumbras" and "emanations" of other provisions in the Bill of Rights. *Id.* at 484. He anticipated many of these arguments in his dissent in *Poe v. Ullman*, in which the Court dismissed an earlier challenge to the same statute as nonjusticiable. 367 U.S. 497, 509–22 (1961) (Douglas, J., dissenting).

Subsequent decisions extended these privacy rights to other aspects of reproductive choice. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (extending the privacy right to a woman's right to choose an abortion); *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending rights to use contraception to unmarried individuals on equal protection grounds).

Amendment prohibition against racial discrimination,<sup>311</sup> and in 1968, *Levy v. Louisiana* concluded that classifications based on legitimacy of birth were “invidious” and unconstitutional under the Equal Protection Clause.<sup>312</sup> With *Griswold, Loving*, and *Levy*, the Court dramatically narrowed the scope of moral regulation of family life permitted to the states, continuing the trend it began twenty years earlier with *Williams* and *Skinner*. Just as the divorce cases abandoned the traditional view of marital status, both *Loving* and *Levy* rejected laws that permitted classifications on the basis of racial or birth status.<sup>313</sup> After these cases, individual autonomy around marriage, reproduction, and family relationships became a matter of constitutional right.<sup>314</sup>

The Supreme Court has never recognized a constitutional right to divorce in the broad terms of its other due process decisions. Divorce reappeared on the Court’s docket with *Boddie v. Connecticut*<sup>315</sup> in 1971 and *Sosna v. Iowa*<sup>316</sup> in 1975. *Boddie* raised a due process challenge, on behalf of a class of welfare recipients, to the filing fees charged in divorce cases.<sup>317</sup> The Court concluded that the fees were unconstitutional “given the basic position of the marriage relationship in this society’s hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship.”<sup>318</sup> *Boddie* did not declare a constitutional right to divorce, but it linked divorce to other familial rights protected by the Constitution<sup>319</sup> and described divorce proceedings as “the adjustment of a fundamental human relationship.”<sup>320</sup>

*Sosna* sustained Iowa’s one-year residency requirement for divorce petitioners, finding that the rule had justifications that were not present in other cases in which the Court had found durational residency requirements to be unconstitutional.<sup>321</sup> Justice Rehnquist’s majority opinion emphasized the states’ strong interests in marriage and divorce, and noted that forty-eight states included similar durational residency requirements in their divorce laws.<sup>322</sup> Justices Marshall and Brennan dissented but did not

<sup>311</sup> 388 U.S. 1 (1967).

<sup>312</sup> 391 U.S. 68, 71–72 (1968).

<sup>313</sup> See *supra* notes 296–98 and accompanying text.

<sup>314</sup> See generally PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997) (discussing the Supreme Court’s gradual articulation of family rights based on individual rights).

<sup>315</sup> 401 U.S. 371 (1971).

<sup>316</sup> 419 U.S. 393 (1975).

<sup>317</sup> *Boddie*, 401 U.S. at 372.

<sup>318</sup> *Id.* at 374. Justice Douglas concurred in the result, arguing that the law should be held unconstitutional as “[a]n invidious discrimination based on poverty.” *Id.* at 386 (Douglas, J., concurring).

<sup>319</sup> *Id.* at 376 (majority opinion).

<sup>320</sup> *Id.* at 383.

<sup>321</sup> *Sosna*, 419 U.S. at 404–10.

<sup>322</sup> *Id.* at 404–09 (citing *Williams II*, 325 U.S. 226 (1945); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Barber v. Barber*, 62 U.S. 582 (1859)). The Court distinguished *Boddie*, noting that *Sosna* was subject only to a delay in commencing divorce proceedings and not a total deprivation. *Sosna*, 419 U.S. at 410.



argue for a due process right to divorce.<sup>323</sup> Justice Douglas, in his last term on the Court, voted with the majority.<sup>324</sup>

### C. Divorce and Due Process

By deciding the divorce cases on full faith and credit grounds, the Supreme Court avoided ruling on what jurisdictional basis the Fourteenth Amendment required for the litigation of family disputes, leaving the doctrine where it stood when *Pennoyer v. Neff* was decided in 1877.<sup>325</sup> Various scholars have attempted to extrapolate a due process rule from the divorce cases, but over the past half-century the Court has never squarely addressed the question.

The divorce cases came during the same time period as *International Shoe*,<sup>326</sup> but the Court did not extend its minimum contacts approach to a family law matter until 1978. In *Kulko v. Superior Court of California*,<sup>327</sup> the Court found that the connections between a father in New York and the state of California, where his children resided with their mother, were too attenuated to permit the California court to exercise jurisdiction over the mother's claim for child support.<sup>328</sup> The Court's empathy for the father in reaching this conclusion was clear,<sup>329</sup> but the Court's more stringent application of the minimum contacts analysis in this setting has made the determination and enforcement of child support claims more difficult.<sup>330</sup> Although the standard applied in *Kulko* is vague, it remains the Court's only decision on this question.<sup>331</sup> The Court has never returned to the question of child custody jurisdiction addressed in *May v. Anderson*,<sup>332</sup> leaving significant confusion even after the passage of national and uniform state legislation attempting to define parameters for jurisdiction and full faith and credit in custody cases.<sup>333</sup>

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<sup>323</sup> *Id.* at 418–27 (Marshall, J., dissenting). They characterized the Court's justification as "amorphous" and argued that the divorce situation was not different from the others in which the Court had found these requirements unconstitutional. *Id.* at 421–23.

<sup>324</sup> *Id.* at 394 (majority opinion).

<sup>325</sup> See *supra* note 32 and accompanying text.

<sup>326</sup> *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945); see *supra* note 248 and accompanying text; see also *Hanson v. Denckla*, 357 U.S. 235 (1958); *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220 (1957).

<sup>327</sup> 436 U.S. 84 (1978).

<sup>328</sup> *Id.* at 84–85.

<sup>329</sup> See *id.* at 97–98 ("It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent. . . . [A]ppellant did no more than acquiesce in the stated preference of one of his children to live with her mother in California.").

<sup>330</sup> See Clark's criticism: "A rule of law which gives greater weight to the enforcement of commercial contracts than to the enforcement of duties of support in the family can only be characterized as enacting a topsy-turvy system of values." CLARK, *supra* note 249, at 447.

<sup>331</sup> See *id.* at 445–49.

<sup>332</sup> See *supra* notes 236–47 and accompanying text.

<sup>333</sup> See generally CLARK, *supra* note 249, at 459–94 (discussing the law of custody

The Supreme Court's failure to come to terms with these issues suggests the long shadow cast by much older conceptions of the family. Since *Pennoyer v. Neff*, the Court has treated divorce as exceptional, not subject to the same due process norms that apply to other litigation.<sup>334</sup> With the *Williams* cases, the Court avoided reliance on the idea that divorce proceedings were based on in rem jurisdiction but did not adopt a rule requiring in personam jurisdiction in its place.<sup>335</sup> Evidently, the Court still embraced the view that marriage was different from other contracts and appropriately subject to different jurisdictional standards. But this view, which traced to the nineteenth-century effort to prevent collusive attempts to evade state divorce laws, was largely irrelevant after the decisions in *Sherrer* and *Johnson* cleared a pathway for mutual consent divorce.<sup>336</sup> Shorn of its original logic, the sharp distinction that remains today between marital disputes and other private civil litigation serves principally to reflect the lingering power of marital status norms.

Given the Supreme Court's decision establishing the importance of consent to divorce jurisdiction in *Sherrer*,<sup>337</sup> it seems curious that the Justices did not implement a personal jurisdiction rule in *Estin* instead of creating divisible divorce.<sup>338</sup> The Court might have mandated personal jurisdiction over both spouses in all divorce proceedings and combined this with generous use of minimum contacts and other theories to make it easier for courts to take jurisdiction.<sup>339</sup> At the time, however, the Court had just begun to develop its new theories of personal jurisdiction, and the minimum contacts approach had been applied only to corporations.<sup>340</sup> Moving away from the conflicts rule that based divorce jurisdiction on the petitioner's domicile, a rule accepted by most states even before *Williams*, would have made migratory divorce more difficult in many cases.<sup>341</sup> Moreover, a holding that due process norms mandated full personal jurisdiction in divorce cases would have forced the Court to elaborate in some detail

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jurisdiction in the wake of *May*).

<sup>334</sup> See *supra* note 32 and accompanying text.

<sup>335</sup> See *supra* notes 111–20, 141–44 and accompanying text.

<sup>336</sup> See *supra* Part II.B.

<sup>337</sup> See *supra* notes 172–78 and accompanying text.

<sup>338</sup> *Estin* and *Sherrer* were both issued on June 7, 1948. *Estin v. Estin*, 334 U.S. 541 (1948); *Sherrer v. Sherrer*, 334 U.S. 434 (1948).

<sup>339</sup> One commentator advocating this course was Radin. See generally Radin, *supra* note 112, at 22–35 (discussing jurisdiction in general under the Full Faith and Credit Clause and as applied in divorce cases). This approach would have required an individual seeking a divorce to bring the proceeding in a state with personal jurisdiction over his or her spouse, or else to secure the spouse's consent to a divorce in another place. *Id.*; see also Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1 (1997).

<sup>340</sup> See Rutherglen, *supra* note 248, at 351.

<sup>341</sup> Most members of the Court had apparently decided that restricting access to divorce was not an appropriate role for the Court. Even Justice Jackson was not advocating a rule that would have affected the validity of an ex parte divorce in the state which had granted it. See *supra* notes 131–32 and accompanying text.

upon the circumstances in which state courts could appropriately exercise jurisdiction, and this would certainly have enmeshed the Court in new difficulties.

Divisible divorce, with its separation of marital status from financial issues and custody matters, served to accommodate the independence of each marital partner. The Court's approach allowed individuals the freedom to exit from marital relationships while preserving each partner's financial and custody claims. The different treatment of these issues suggests that the Court believed that the individual interests of the absent spouse and the state interests in protecting family members were stronger in these cases.

By refusing to apply the Full Faith and Credit Clause to sister-state financial and custody orders, the Court made it easier for state courts to take jurisdiction and litigate these collateral issues.<sup>342</sup> In effect, the rule of divisible divorce encouraged this, even as the Court rejected the states' claims to moral regulation of the marital relationship.<sup>343</sup> In the decades that followed, the problem of interstate conflict in domestic relations law shifted from the divorce question to center on the financial and custodial responsibilities of former spouses. On these issues, the effort to develop national and uniform legislation to coordinate state regulation has been quite successful.<sup>344</sup>

#### CONCLUSION

Problems of interstate federalism are embedded in American family law as a result of the long history of state authority over marriage and divorce, the wide differences among the states' substantive family law policies, and the significant mobility of the American population. As Justice Frankfurter observed in *Williams I*, "In a country like ours where each state has the constitutional power to translate into law its own notions of policy concerning the family institution, and where citizens pass freely from one state to another, tangled marital situations, like the one immediately before us, inevitably arise."<sup>345</sup> Through our history, these conflicts have involved not only divorce but also marriage rules, particularly the interracial marriage laws that emerged after

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<sup>342</sup> Ironically, under the rules embraced in *May* and *Kulko*, it is more difficult for a court to secure personal jurisdiction over an out-of-state spouse or partner in a custody or child support case than in other types of litigation. See *supra* note 330 and accompanying text.

<sup>343</sup> Later decisions of the Supreme Court furthered this trend by requiring that states protect the support rights of nonmarital children and the parental rights of unwed fathers. See, e.g., *Gomez v. Perez*, 409 U.S. 535 (1973); *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>344</sup> See generally, UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT (1950) (amended 1958), 9C U.L.A. 273 (2001) (improving enforcement of child support across state boundaries); REVISED UNIF. RECIPROCAL ENFORCEMENT OF SUPPORT ACT (1968), 9C U.L.A. 81 (2001) (same); UNIF. CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 261 (1999) (establishing uniform jurisdictional standards for state adjudication of child custody cases); UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT (1997), 9 U.L.A. 111 (1979) (same).

<sup>345</sup> *Williams I*, 317 U.S. 287, 304 (1942) (Frankfurter, J., concurring).

the Civil War and remained in force in some states until 1967.<sup>346</sup> In more recent years, Congress and the states have worked to coordinate state laws on child custody and child support jurisdiction and enforcement.<sup>347</sup> Today, interstate conflicts have emerged with the recognition of same-sex marriages and civil unions in a number of states.<sup>348</sup> Parallel questions in international law have become increasingly important, as the migrations across the continent of the nineteenth century have become migrations around the globe in the twenty-first.<sup>349</sup>

The divorce cases illustrate the key problem with federalism in family law: in a world in which people move frequently from place to place, there is no dependable means of allocating responsibility for families and family disputes among different states. Despite considerable creativity brought to the divorce problem over more than a century by judges, lawyers, treatise writers, and other academic experts, it had become increasingly apparent by 1942 that the old federalism, which gave states broad control over the norms of family law, did not work. The conflict among the states over divorce was understood as a political problem, but political solutions were not forthcoming,<sup>350</sup> and the Supreme Court was eventually unwilling to allow the policies of a few states to block a more workable national compromise. Divorce was not the only full faith and credit problem of the era, but it was the most morally and politically freighted, affecting large numbers of ordinary citizens.<sup>351</sup>

These cases made certain systemic values clear. First, the Supreme Court acted on the view that the Constitution demanded a more coherent and unified national approach to the divorce problem than what Congress or the states had been able to achieve. The Court recognized that its rulings would limit the conservative states in enforcement of their divorce laws but concluded that important personal rights were at stake, and that, on balance, the individual interest in marital freedom and the national interest in uniform rules were more important than state divorce policies.

At the same time, the Court supported the general authority of states to act on other family controversies that came before their courts. By distinguishing between the jurisdictional requirements for a divorce decree and the requirements for litigating

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<sup>346</sup> See *Loving v. Virginia*, 388 U.S. 1, 6 (1967) (“Virginia is now one of 16 States which prohibit and punish marriages on the basis of racial classifications.”).

<sup>347</sup> See, e.g., 28 U.S.C. §§ 1738A, 1738B (2000); see also sources cited *supra* note 344.

<sup>348</sup> See generally Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257 (2006) (discussing United States and international recognition of same-sex marriage); Annie O’Connell, “*Legal Impediments to Marriage*”: *Massachusetts’ Marriage Evasion Statutes, Same-Sex Marriage, and Privileges and Immunities Under the United States Constitution*, 44 BRANDEIS L.J. 509 (2006) (discussing Massachusetts’s treatment of non-resident, same-sex couples).

<sup>349</sup> See Hay, *supra* note 348.

<sup>350</sup> See, e.g., *Williams I*, 317 U.S. at 305 (Frankfurter, J., concurring); see also *supra* notes 61–80 and accompanying text.

<sup>351</sup> See *supra* notes 81–84 and accompanying text.

financial and custodial questions, the Court treated marital status as a matter of personhood, a question of individual right, an aspect of citizenship worthy of protection by the Court and weighty enough to prevail over important state interests in marriage. By treating financial and custody matters as distinct from matters of status, the Court supported state efforts to develop public policies to protect dependent spouses and children.

In the process of this transition, the Supreme Court set family law on a new course. After these cases, marital fault was no longer relevant to the determination of divorce jurisdiction, and states were free to grant unilateral ex parte divorces. Married couples gained a greater measure of freedom to come to terms together for the dissolution of their marriages. And while these developments spelled the end of strict controls over the grounds for divorce, they also ushered in a new era of greater attention to its custodial and financial incidents. Despite the traditional American view that family law belongs to the states, the Supreme Court and Congress have since 1942 taken on an essential national role, defining the parameters of the federal system and finding a basis to coordinate the divergent policies of the states. In the process, they have established a new national law of domestic relations.