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If You Grant It, They Will Come: The History and Enduring Legal Legacy of Migratory Divorce

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IF YOU GRANT IT, THEY WILL COME: THE HISTORY AND ENDURING LEGAL LEGACY OF MIGRATORY DIVORCE

Michael J. Higdon*

Abstract

Fifty years ago, California became the first state to enact no-fault divorce, making it easier than ever before for individuals to dissolve unsuccessful marriages. Soon, every state would follow suit, and over the years, much has been written about this national shift in the law of divorce. What has thus far escaped scrutiny, however, is one of the prime casualties of that switch—the phenomenon of migratory divorce. This failure is somewhat ironic given that, although no-fault divorce has existed for just over fifty years, migratory divorce played a prominent role in American legal history for well over a century. Migratory divorce is the process through which people who lived in states where a divorce was difficult to obtain would temporarily relocate to another state—one with more liberal divorce laws—in order to satisfy that state’s domicile requirement to obtain a divorce there. Divorce in hand, those people typically returned home to continue life as unmarried persons. Many states, however, opposed recognizing such divorces, giving rise to multiple Supreme Court opinions dealing with when a state is constitutionally required to recognize such a decree. Contemporaneous with that debate, a large number of Americans fiercely opposed the practice of migratory divorce altogether, fearing the impact it would have on the sanctity of marriage. As a result, there were several proposals over the years for dealing with this “problem,” primarily involving constitutional amendments and uniform laws. In light of this history, it is the position of this Article that the era of migratory divorce offers an invaluable resource for those studying not only the development but also the continuing evolution of American family law. Accordingly, this Article chronicles that legal phenomenon, offering a detailed analysis of the various social, legal, and political influences that ultimately shaped this unique time in American history. The purpose in doing so is, first, to ensure that this fascinating period in American history is not forgotten, but more important, to distill the legal lessons produced by this era—lessons that are highly instructive to contemporary scholars, courts, and policymakers alike as they continue to wrestle with the emerging problems facing the law of domestic relations.

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[T]he 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.

Haddock v. Haddock²

I. INTRODUCTION

Writing in 1955, James Sumner observed that “[t]he recognition of divorce decrees has perhaps created more concern in the United States than any other legal issue.”³ Today, such questions have largely been settled and, thus, the law of domestic relations is now consumed with other, more pressing issues like (to name a few) determining legal parentage in the face of evolving technology and societal mores,⁴ the extent to which cohabitants should be afforded marriage-like protections,⁵ and how, in the wake of *Obergefell*, states are to achieve true marriage

¹ During its heyday as a divorce destination, Reno actively promoted its divorce industry. One way they did so was by selling postcards that Reno’s divorce tourists could send home to friends and family. Pictured is one such postcard from circa 1942, featuring a drawing by cartoonist Lew Hymers. *Divorce Seeker and Cowboy*, RENO DIVORCE HIST., <https://renodivorcehistory.org/library/divorce-seeker-and-cowboy/> [https://perma.cc/ANX5-PHJZ] (last visited Sept. 8, 2021).

² 201 U.S. 562, 574 (1906).

³ James D. Sumner, Jr., *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 1 (1955).

⁴ See *infra* note 358 and accompanying text.

⁵ See *infra* note 357 and accompanying text.

equality.⁶ Nonetheless, bearing in mind philosopher George Santayana's admonition that "[t]hose who cannot remember the past are condemned to repeat it[.]"⁷ the question arises as to whether those grappling with these contemporary issues might benefit from revisiting earlier periods in American law—specifically the one to which Sumner was referring. After all, the legal issues posed by those events generated a considerable paper trail, including numerous Supreme Court opinions that span more than seventy years,⁸ as well as numerous proposals for uniform state laws and even constitutional amendments.⁹ It is the position of this Article that the evolving law of domestic relations would indeed benefit from a look back, not only to the issue of divorce recognition but also to the fascinating historical events that made that question such a hot-button issue in the first place.

Essentially, it would all begin in 1861 when the territory of Nevada adopted a law that, although quite innocuous on its surface, would eventually cause people the world over to associate Reno, Nevada, with "quickie" divorces. The law in question set the territory's residency requirement at six months.¹⁰ Nevada did so in light of the fact that, at the time, it had many new residents—most of whom were miners—pouring into the territory, and the territory wanted to make sure that these new arrivals did not have to wait too long before they could vote in territorial elections.¹¹ Of course, by obtaining residency, those individuals also gained access to a whole host of state rights, including, most notably, the right to petition for divorce—an opportunity that would soon catch the eyes of many who lived outside the state.

To understand why the right to petition for divorce garnished so much attention, one must first realize that throughout the nineteenth century, public attitudes towards divorce were changing, with fewer and fewer people thinking of marriage as a legal

⁶ See June Carbone & Naomi Cahn, *Marriage and the Marital Presumption Post-Obergefell*, 84 UMKC L. REV. 663, 664 (2016); Lee-ford Tritt, *The Stranger-to-the-Marriage Doctrine: Judicial Construction Issues Post-Obergefell*, 2019 WIS. L. REV. 373, 374 (2019).

⁷ 7 GEORGE SANTAYANA, *THE LIFE OF REASON OR THE PHASES OF HUMAN PROGRESS: INTRODUCTION AND REASON IN COMMON SENSE* bk. I 172 (Marianne S. Wokeck & Martin A. Coleman eds., 2011).

⁸ See *infra* Section III.A.

⁹ See *infra* Section III.B.

¹⁰ See ALICIA BARBER, *RENO'S BIG GAMBLE: IMAGE AND REPUTATION IN THE BIGGEST LITTLE CITY* 54 (2008) (referencing the "1861 law that provided for the conferral of Nevada territorial (and later, state) residency after just six months of continuous residence").

¹¹ See *id.* at 54 (describing the motivation behind the law as "hasten[ing] the ability of transient miners and other new arrivals to vote in territorial and, later, state elections"); see also NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 122 (1962) (explaining how mining territories passed laws of this sort in light of "the necessary mobility of frontier towns, where prospectors and other adventurers move in, try their luck, and often roll on again without staying more than a year in any locality. If such communities were to have voters, they had to specify periods of residence in terms of months rather than years").

status that could only be terminated upon the death of one of the spouses.¹² The laws, however, were not necessarily following suit,¹³ and a number of Americans found themselves desiring a divorce but living in states where they could not obtain one.¹⁴ Not all states, however, were that restrictive,¹⁵ and as a result, those who lived in stricter states began to realize that other forums might offer some relief. Some states became particularly attractive. Specifically, those that 1) maintained short residency requirements and 2) permitted divorce on more liberal grounds¹⁶ were seen by many as being well worth the expense of a temporary relocation. And where individuals saw a path to divorce, states saw a path to tremendous revenue. During the peak of migratory divorce in the mid-twentieth century, for instance, Nevada realized revenues of several million dollars a year.¹⁷ For that reason, over the next hundred years, various cities across several states would come to be characterized as “divorce mills,”¹⁸ each competing for the lucrative migratory divorce trade until, that is, the entire practice began to die out—largely due to the advent of no-fault divorce—in the late 1960s.¹⁹

Since that time, migratory divorce has come to be regarded as largely a historical relic, one that today receives relatively little attention from legal

¹² See A. Rachel Camp, *Pursuing Accountability for Perpetrators of Intimate Partner Violence: The Peril (and Utility?) of Shame*, 98 B.U. L. REV. 1677, 1703 (2018) (“Divorce became more accepted in the late 19th century. . . .”); JOANNA L. GROSSMAN & LAWRENCE W. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 163 (2011) (“Changing ideology, changing culture, and changing gender roles increased the demand for divorce.”).

¹³ See Sumner, *supra* note 3, at 3 (arguing that the rise of migratory divorce “indicates that the law has not kept abreast of the times”); see also *infra* note 32 and accompanying text.

¹⁴ Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RESV. L. REV. 447, 455–56 (2011) (“Some states banned divorces outright, and, of those that granted divorces, the more strict states, such as New York, permitted divorce only in cases of adultery.”).

¹⁵ See *infra* Section II.B.

¹⁶ At this point in history, no-fault divorce did not yet exist, and a person desiring a divorce was required to prove that his or her spouse had somehow breached the marital contract. See *infra* notes 60, 61, 71, and 73 and accompanying text.

¹⁷ See *infra* notes 155–159 and accompanying text.

¹⁸ See, e.g., Neil Ribner & Jason Ribner, *United States: 1901 to 1950*, in CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA 1244, 1247 (Robert E. Emory ed., 2013) (using the term “divorce mills” and defining it as “cities in liberal states that offered divorce like it was another tourist attraction”).

¹⁹ See Helen Garfield, *The Transitory Divorce Action: Jurisdiction in the No-Fault Era*, 58 TEX. L. REV. 501, 523–24 (1980) (“The widespread acceptance of no-fault divorce has also diminished substantially the importance of another evil the present rules were designed to combat—migratory divorce.”); see also *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1198, 1245 (1980) (“With the widespread adoption of no-fault divorce laws in recent years, however, the frequency of such migratory divorces has greatly diminished, and such interstate jurisdictional squabbles have become rare.”) (citation omitted).

scholars.²⁰ Even among the scholars who refer to this period in American law,²¹ none have chronicled the rich history behind the phenomenon of migratory divorce, nor has any delved into the complex social, legal, and political influences that would coalesce to shape this unique period in American family law. And this failure is problematic for two reasons. First, it is a truly captivating period in American legal history, one that boasts an elaborate and colorful complexity with which many are unfortunately unacquainted. Second, and most important, a number of contemporary legal problems facing the law of domestic relations either owe their existence to the various legal dilemmas that emerged as a result of migratory divorce or, even if not directly arising from that practice, could nonetheless be better analyzed by harnessing the lessons offered by that period in history.²² These contemporary problems are far from being discrete issues of limited import, but instead include such pervasive issues as the evolution of divorce as an individual right, the harms that flow from family law's failure to adapt to changing societal norms, the value derived from uniform codes pertaining to the family, and the limitations imposed on states by the Full Faith and Credit Clause of the United States Constitution.²³ For all those reasons, the era of migratory divorce deserves renewed attention.

The aim of this Article is two-fold: first, to chronicle the timeline of events comprising this period in American legal history and, second, to analyze the impact that history has played—and continues to play—in the development of the law of domestic relations in the United States. In so doing, this Article is the first to offer a detailed exploration of the various historical events that contributed to the prolific, brazen forum shopping that has come to characterize this legal era.²⁴ For instance,

²⁰ See Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 479 (1990) (“[N]o-fault schemes now provide a common denominator among the jurisdictions, and one hears little about migratory divorce resulting solely from efforts to evade the law of the domicile.”); Jeanne Louise Carriere, *“It’s Deja Vu All over Again”: The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1731 (1998) (“The relative uniformity of current divorce law has made migratory divorce an irrelevancy.”).

²¹ See, e.g., Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 516–25 (2008); Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87 (2004); Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CAL. L. REV. 2017 (2000); Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 LOY. L. REV. 407 (2004); Kimberly Diane White, *Covenant Marriage: An Unnecessary Second Attempt at Fault-Based Divorce*, 61 ALA. L. REV. 869, 882 (2010).

²² See *infra* Part IV.

²³ U.S. CONST. art. IV, § 1.

²⁴ Michael Boucai, *Before Loving: The Lost Origins of the Right to Marry*, 2020 UTAH L. REV. 69, 137 (2020) (describing migratory divorce as “a species of forum shopping that pitted jurisdictions with more restrictive divorce laws against those with less restrictive rules”); Kaylah Campos Zelig, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223, 1225 (1993) (“Migratory divorce is a species of forum shopping . . .”).

this Article chronicles not only the competition that unfolded among the states in the race to attract out-of-state divorce business²⁵ but also the strict divorce laws that made migratory divorce such an attractive option in the first place.²⁶ Likewise included are contemporaneous reactions to this phenomenon, most of which were quite critical, and the texts of various laws and Constitutional amendments that were proposed to bring migratory divorce to an end.²⁷ Finally, this Article includes an analysis of the twelve decisions by the Supreme Court—decisions that spanned a period of more than seventy years—dealing with the constitutional implications of such divorces.²⁸

To both accomplish these goals and to delineate the various historical elements, this Article is organized into four parts. Part II begins with a discussion of divorce laws as they existed at America's founding up until the mid-nineteenth century when couples began seizing upon migratory divorce as a solution to dissolving unsuccessful marriages. Part II then chronicles the various states that attracted those divorce seekers—some unintentionally, some purposefully—explaining why Nevada ultimately emerged as the most successful. Part III turns to the legal reactions to migratory divorce. It begins by discussing the long list of Supreme Court cases that wrestled with the issue of when states were required, under the Full Faith and Credit Clause, to give effect to migratory divorces before then turning to the various legal proposals aimed at ending the practice. Finally, Part IV traces the impact of all this history on several contemporary issues within the field of family law, noting the degree to which migratory divorce is relevant to the development of each. Part IV next argues how understanding the relationship between these contemporary issues and migratory divorce is crucial to courts, policymakers, and scholars alike, enabling them to analyze these issues more effectively going forward.

II. HISTORY OF MIGRATORY DIVORCE

Migratory divorce has been defined as “a divorce granted to a person who has left his home in one state and resorted temporarily to another state for the express purpose of obtaining a divorce from its courts.”²⁹ The practice has existed in some form or another since the country's founding, owing its emergence to the confluence of several legal and social movements. However, as the country expanded westward and Americans became more mobile, the practice grew exponentially.³⁰ This rise in migratory divorce was driven primarily by the growing demand for divorce and the failure of some states to be responsive to that demand.³¹ As one Nevadan would

²⁵ See *infra* Section II.B.

²⁶ See *infra* Section II.A.

²⁷ See *infra* Section III.B.

²⁸ See *infra* Section III.A.

²⁹ David F. Cavers, *Migratory Divorce*, 16 SOC. FORCES 96, 97 (1937).

³⁰ See *infra* Section II.B.

³¹ DEBORA ANN MACCOMB, *TALES OF LIBERATION, STRATEGIES OF CONTAINMENT: DIVORCE OF THE REPRESENTATION OF WOMANHOOD IN AMERICAN FICTION, 1880–1920* 128

answer—when asked how his state could justify granting a divorce after only six weeks of residence (which was to be the shortest residency requirement any state would adopt)—“You can’t change human nature by law. So what we’re trying to do is to make human nature legal.”³²

Nevada is, of course, the state most often associated with migratory divorce. However, it was not until 1931 that Nevada lowered its residency requirement to six weeks.³³ By that time, several decades of competition among the states to attract out-of-state divorce seekers had already passed.³⁴ Further, that competition would play on long after Nevada made that bold move. The purpose of this section then is to go beyond Nevada and chronicle the broader history of migratory divorce in the United States, from how it owes its origins to the earliest divorce laws of the American colonies, to the various states that jockeyed for the revenue generated by these “divorce tourists,”³⁵ and finally to how it all unceremoniously ended in the late 1960s with the advent of no-fault divorce.

A. Early Divorce Laws

The controversy that inevitably surrounds divorce has been shaping the law of domestic relations in the United States for longer than the country has even officially existed.³⁶ As Judith Areen describes, “[t]he roots of American family law were planted nearly four centuries ago when new England Puritans adopted both civil marriage and divorce in clear violation of the laws of the Church of England.”³⁷ When English settlers first arrived in what would eventually become the United States, the Church of England “continued to adhere to the doctrine of indissolubility.”³⁸ That is not to say that people in England could not obtain a divorce—they could, but it took (quite literally) an act of Parliament: “The only

(2000) (“The western states’ migratory divorce industry arose because, like any other business, it responded to consumer demand for a particular product.”).

³² William G. Shepherd, *Making Human Nature Legal*, COLLIER’S: THE NATIONAL WEEKLY, June 20, 1931, at 14.

³³ See *infra* note 150 and accompanying text.

³⁴ See RODRICK PHILLIPS, UNTYING THE KNOT: A SHORT HISTORY OF DIVORCE 160 (1991) (“The distinction of being the most popular divorce haven was shared by several midwestern and western divorce states at different times.”).

³⁵ See GROSSMAN & FRIEDMAN, *supra* note 12, at 168–69 (“Today we have eco-tourism, and sex tourism; in the past there was a flourishing business of divorce tourism.”).

³⁶ See *Massachusetts v. U.S. Dep’t Health & Hum. Servs.*, 698 F. Supp. 2d 234, 237–38 (D. Mass. 2010), *aff’d*, 682 F.3d 1 (1st Cir. 2012) (“Several issues relevant to the formation and dissolution of marriages have served historically as the subject of controversy . . .”).

³⁷ Judith Areen, *Uncovering the Reformation Roots of American Marriage and Divorce Law*, 26 YALE J.L. & FEMINISM 29, 83 (2014).

³⁸ MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 31 (1972).

possibility of remarriage before the death of the spouse of a prior marriage consisted of the grant of a special privilege by the king in Parliament.”³⁹

Early American settlers, however, brought with them the influence of protestant reformers like Martin Luther and John Calvin, both of whom believed that “marriage and divorce were civil concerns.”⁴⁰ Incorporating those principles, the Massachusetts Bay Colony began granting divorces as early as 1639.⁴¹ Although the Puritans certainly did not encourage divorce, they nonetheless “feared that forcing all estranged couples to remain harnessed by law would eventually undermine the social harmony they were trying to achieve.”⁴² Other New England colonies soon followed suit, with Connecticut granting its first divorce in 1655.⁴³ In fact, the colony of New Haven, which would eventually become part of the Connecticut colony, was the first to adopt legislation listing the grounds for divorce—those grounds being “adultery, desertion, and male impotence, or, in the tactful words of the legislators, a husband’s failure to perform his ‘conjugal duty’ to his wife.”⁴⁴ The remaining New England colonies of Rhode Island and New Hampshire likewise granted divorces during the colonial period.⁴⁵

Not all colonies embraced the idea of divorce as a civil remedy.⁴⁶ The southern colonies in particular were quite hostile to the idea and continued to adhere to “English thinking regarding divorce.”⁴⁷ The reason the different colonies took such

³⁹ *Id.*; see also GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 13 (1991) (noting that under “English policy, established in the Act of 1534, [] only the legislature—Parliament—could grant an absolute divorce”).

⁴⁰ RILEY, *supra* note 39, at 11 (“Before migrating to the colonies in 1620, many Separatists embraced Martin Luther’s and John Calvin’s belief that marriage and divorce were civil concerns.”). For an excellent discussion of what Luther and Calvin had to say on the subject, see Areen, *supra* note 37.

⁴¹ See Lynda Wray Black, *The Long-Arm’s Inappropriate Embrace*, 91 ST. JOHN’S L. REV. 1, 19 n.139 (2017) (“The first divorce in the United States was granted in Massachusetts Bay in 1639 to Mrs. James Luxford on the grounds of bigamy.”).

⁴² See RILEY, *supra* note 39, at 10. The Puritans acceptance of divorce also sprung from the fact that they celebrated sex inside of marriage. See Areen, *supra* note 37, at 70 (noting that the divorce was seen as “the best way to prevent an innocent spouse in a failed marriage from being forced to remain celibate for life”).

⁴³ See CHRISTINA KASSABIAN SCHAEFER, *THE HIDDEN HALF OF THE FAMILY: A SOURCEBOOK FOR WOMEN’S GENEALOGY* 75 (1999) (noting that the first Connecticut divorce was granted “for three years’ desertion, seven years’ absence without word, cruelty, fraudulent contract, and adultery”).

⁴⁴ RILEY, *supra* note 39, at 18–19.

⁴⁵ Colonial law in Rhode Island provided “that in case of adulterie, a generall or towne magistrate may grant a bill of divorce against ye partie offendinge uppon ye demand of ye partie offended,” whereas New Hampshire “followed the lead of neighboring Massachusetts.” BLAKE, *supra* note 11, at 39–41.

⁴⁶ RILEY, *supra* note 39, at 34 (“During this period, each region of the new nation—the South, Northeast, and West—embraced divorce with varying degrees of enthusiasm.”).

⁴⁷ *Id.* at 26; see also Ayelet Hoffmann Libson, *Not My Fault: Morality and Divorce Law in the Liberal State*, 93 TUL. L. REV. 599, 603 (2019) (“In America, the southern colonies generally followed the English tradition . . .”).

disparate approaches to divorce stems not from geography but primarily from the different religious denominations of early settlers.⁴⁸ As one author describes, “[t]hroughout the colonial period, the cultural and religious affiliations of colonies often served as the determining factor in establishing the extent to which an individual had access to the institution of divorce.”⁴⁹ For instance, “[w]hen the first Virginians arrived at Jamestown in 1607, they adhered to Anglican beliefs more closely than did the Puritans and thus transplanted English policy prohibiting divorce.”⁵⁰ Religion likewise played a role in the middle colonies, which took a more “scattered”⁵¹ approach given that “these settlements drew their population and their customs from a variety of sources.”⁵² Pennsylvania, for example, was a Quaker colony and, thus, “tended to restrain the granting of divorces,”⁵³ even though it did at one point employ divorce as a punishment for those who committed adultery.⁵⁴ New Jersey, on the other hand, which was “[s]ettled by a great variety of colonists, some of whom like the Dutch and the Puritans looked upon marriage as a dissoluble civil contract,”⁵⁵ took a rather liberal approach, even granting divorces by mutual consent at one point.⁵⁶ The role that religion would play in early divorce law is notable because it would eventually set the stage for the growing demand for migratory divorce as well as the inability of the states to agree on a solution to that “problem.”⁵⁷

Following the American Revolution, the newly formed states not only threw off the shackle of English rule but, along with it, the previous limitations regarding marital dissolution.⁵⁸ Divorce soon became widely available throughout the United

⁴⁸ See MARY SOMERVILLE JONES, AN HISTORICAL GEOGRAPHY OF THE CHANGING DIVORCE LAW IN THE UNITED STATES 17 (1987) (“The reason for this regional variation is to be found in the religious antecedents of the settlers.”).

⁴⁹ Deborah L. Bauer, *Colonial America*, in CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA 288, 289 (Robert E. Emery ed., 2013).

⁵⁰ RILEY, *supra* note 39, at 25.

⁵¹ *Id.* at 23.

⁵² BLAKE, *supra* note 11, at 41; see also CLARE A. LYONS, SEX AMONG THE RABBLE: AN INTIMATE HISTORY OF GENDER AND POWER IN THE AGE OF REVOLUTION, PHILADELPHIA, 1730–1830 35 (2006) (“Colonial Pennsylvania’s marriage law allowed the colony’s diverse cultural groups to follow their own traditions.”).

⁵³ C. LaRue Munson & William D. Crocker, *The Divorce Question in the United States*, 18 YALE L.J. 387, 388 (1909).

⁵⁴ The law in Pennsylvania provided, as one of the punishments for adultery, that “both he and the woman shall be liable to a Bill of Divorcement, if required by the grieved husband or wife, within the said term of one year after Conviction.” BLAKE, *supra* note 11, at 45.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ See *infra* notes 323 and 324 and accompanying text.

⁵⁸ See J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1095 (1992) (reviewing DIVORCE REFORM AT THE CROSSROADS (Stephen D. Sugarman & Herma Hill Kays eds., 1990)) (“After the American Revolution, most states quickly accepted the idea of absolute divorce . . .”).

States, with even the southern states coming on board.⁵⁹ It is important to note, however, that the practice of divorce at this time was a far cry from how it operates today. To begin with, it was fault-based, meaning that to obtain a divorce, an aggrieved spouse would have to “prove that the other spouse had violated the marital contract in some severe way”⁶⁰ and, at this point in history, those grounds were quite limited.⁶¹ Perhaps the biggest difference, however, lies in the fact that, although a state might permit divorce, the courts in that state often lacked jurisdiction to grant them. Instead, in some states, it was the state legislature—similar to Parliament in England—that was responsible for dissolving marriages.⁶²

This practice, known as legislative divorce, required aggrieved spouses to petition the legislature for “private bills granting a divorce to a single couple, who, *in the opinion of the legislators*, deserved one.”⁶³ Maryland, for instance, passed over 500 divorce acts between the years 1790 and 1850.⁶⁴ In some states, like Virginia, only the legislature could grant an absolute divorce.⁶⁵ In others, like

⁵⁹ See RILEY, *supra* note 39, at 34–35 (“Southern legislatures, except in South Carolina, made a radical change in their divorce policy after the American Revolution; although they had opposed absolute divorce during the colonial period, they now began to allow it.”).

⁶⁰ Ribner & Ribner, *supra* note 18, at 1245; see also Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 VA. L. REV. 1497, 1501 (2000) (“A divorce action was, in form, an adversary lawsuit. The plaintiff came before the court as an innocent victim arguing that the defendant, husband or wife, had broken the marriage contract. State statutes contained lists of bad deeds that constituted ‘grounds’ for divorce.”).

⁶¹ See Ribner & Ribner, *supra* note 18, at 1245 (explaining that grounds typically involved “abuse, infidelity, or extreme cruelty”); see also Naomi R. Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. ILL. L. REV. 651, 665 (2002) (“At the beginning of the nineteenth century, even the most liberal of divorce laws allowed divorce only on very limited fault grounds.”); see also JONES, *supra* note 48, at 19–24 (delineating the various grounds for divorce in the states following the American Revolution).

⁶² See, e.g., Roscoe Pound, *The Administration of Justice in the Modern City*, 26 HARV. L. REV. 302, 302 (1913) (“Legislative divorces were granted in New York after the Revolution and were known in Connecticut, Maryland, and Rhode Island in the nineteenth century.”); RILEY, *supra* note 39, at 35 (“After the Revolution, southern legislatures replicated this [Parliamentary] practice by granting legislative divorces to southern men and women.”).

⁶³ Joanna L. Grossman, *Separated Spouses*, 53 STAN. L. REV. 1613, 1645 (2001) (reviewing HENDRICK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000)).

⁶⁴ RICHARD H. CHUSED, *PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW* 1 (1994).

⁶⁵ See Areen, *supra* note 37, at 82 (“In 1803, the Commonwealth of Virginia first began to grant divorces, but only by legislative act.”). It is worth noting, however, that Virginia began permitting its citizens divorce largely due to “[s]lavery and racism rather than religion” *Id.* Indeed, the first two divorces granted in Virginia were to husbands whose wives had given birth to biracial children, admitting that they had sexual relations with a slave. As Areen explains, “[w]hatever the strength of the opposition to divorce in Anglican Virginia, it was no match for the reaction of the legislature when confronted with a marriage that involved not only adultery by a wife, but adultery with a slave.” *Id.* at 82–83.

Georgia, the legislature authorized a “two-stage procedure”⁶⁶ that involved both the judiciary and the legislature.⁶⁷ The reason for the legislatures’ reluctance to completely divest themselves of this authority was the concern that some citizens who might be “deserving” of a divorce would nonetheless be unable to satisfy the limited statutory grounds for obtaining one.⁶⁸ However, given that legislative divorce “was a time-consuming process and one for which the ordinary legislative committee was poorly equipped,”⁶⁹ one by one, the states began to end the practice, many by constitutional amendment.⁷⁰ In most states, the practice ended prior to the Civil War, typically following legislation that expanded the grounds for obtaining a judicial divorce.⁷¹

Even with the eventual move to judicial divorce in all states, different jurisdictions required different grounds for dissolving a marriage.⁷² Not surprisingly, some states were more liberal than others,⁷³ and some made it extremely difficult to escape an unhappy marriage. South Carolina was the strictest, refusing to allow divorce of any kind until 1949.⁷⁴ Next was New York, which, from 1787 until 1968, only permitted one ground for divorce: adultery.⁷⁵ For couples living in those states, it was only a matter of time before they realized there was another avenue available to those who truly wished to terminate a marriage.

⁶⁶ See PHILLIPS, *supra* note 34, at 144.

⁶⁷ See BLAKE, *supra* note 11, at 52–53 (discussing how Georgia’s 1798 constitution “permitted two-thirds of each branch of the legislature to pass acts of divorce, but specified that this might be done only after the parties had had a fair trial before the superior court”).

⁶⁸ Blake provides two such examples. First, he describes how “the Kentucky legislature continued to pass private divorce bills, usually to accommodate individuals whose cases did not come clearly under the regular statute.” *Id.* at 54. Missouri did likewise, motivated by concerns “that the ordinary law did not provide for many cases of real hardship.” *Id.* at 56.

⁶⁹ *Id.* at 55.

⁷⁰ RILEY, *supra* note 39, at 36 (“Only gradually did constitutional provisions and amendments bring a halt to legislative divorce.”).

⁷¹ See BLAKE, *supra* note 11, at 56–57 (“In most states the granting of legislative divorce was halted sometime before the Civil War . . . [and] was hastened by more liberal general statutes.”).

⁷² See Cahn, *supra* note 61, at 665 (“By the end of the [nineteenth] century, states had experimented with various different, and more liberal, grounds for permitting divorce . . .”).

⁷³ Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1690 (2011) (“The Midwestern and Western states tended to adopt more liberal standards.”).

⁷⁴ *Id.*; James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 917 (2000) (“With the exception of ten years during the Reconstruction Era, South Carolina courts allowed no divorces until 1949.”).

⁷⁵ See RILEY, *supra* note 39, at 46 (“New York was the only northeastern state to limit divorce to the sole ground of adultery.”); J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 559, 579 (2007).

B. The Rise of the “Divorce Mills”

Although Reno, Nevada, would eventually become known as the “Divorce Capital of the Nation,”⁷⁶ divorce mills (as they came to be called) actually started in the east and, over time, existed in some form in over a dozen states.⁷⁷ The states of the northeast appear to have been the first to successfully tempt out-of-state residents to temporarily relocate for the purpose of securing a divorce. Although most required a full year of residence to establish domicile,⁷⁸ it was well worth it to those who resided in neighboring New York given that, prior to 1787, one could only obtain a divorce by petitioning the legislature.⁷⁹ As James Kent, writing in 1832, would remark: “This strictness was productive of public inconvenience, and often forced the parties . . . to some other state, to avail themselves of a more easy and certain remedy.”⁸⁰ Pennsylvania, in particular, seemed to be a popular destination, as referenced in a New York legislative committee report from 1840: “Yet how many unfortunate ‘yoke fellows’ annually seek a refuge from our inexorable law, and take up a residence in moral Pennsylvania, for the sole purpose of dissolving a connection which has been productive of nothing but bitter unhappiness.”⁸¹

Although New York would eventually begin allowing judicial divorce, courts there could only bestow one upon those spouses who could prove that the other had committed adultery.⁸² Thus, New York marriages that were free of adultery could only be dissolved through one of two means, either manufacturing “adultery” or relocating to a state with more favorable divorce laws. The first option, as Joanne Grossman and Lawrence Friedman describe, was quite popular:

New York developed what has been called soft-core adultery. The husband would check in to a hotel. A woman (for some reason, she was usually a blonde) would come to his room. They would take off some of their

⁷⁶ See JACK HARPSTER, *THE GENESIS OF RENO: THE HISTORY OF THE RIVERSIDE HOTEL AND THE VIRGINIA STREET BRIDGE* 69 (2016).

⁷⁷ See JONES *supra* note 48, at 25 (showing a map of the various “divorce havens” over time, specifically Alabama, Arkansas, Connecticut, Florida, Idaho, Illinois, Indiana, Nevada, North Dakota, Ohio, Oklahoma, Pennsylvania, South Dakota, Utah, and Wyoming).

⁷⁸ BLAKE, *supra* note 11, at 117 (“This was a more patient generation than ours, and divorce seekers did not expect to win their freedom in a mere six weeks. At least a year’s residence was required in all eastern states, and in otherwise liberal Connecticut three years were specified.”).

⁷⁹ J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 564 (2007) (noting how in New York in 1787, “the power to grant such relief resided in the legislature with no provision for a trial on the facts”).

⁸⁰ 2 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* 68 (9th ed. 1858).

⁸¹ BLAKE, *supra* note 11, at 117.

⁸² See RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 443–44 (1988) (noting that, in 1787, New York passed a law that “specified adultery as the sole ground for divorce,” and that law “remained substantially unchanged for almost two centuries”).

clothes (usually not all) [T]here would be a knock on the door—a maid with towels, or a bellboy with a telegram. Then a photographer would burst in and take pictures. The woman would then collect her fee (\$50 was normal), and disappear. The photos would show up in court, as evidence of adultery.⁸³

For the more affluent,⁸⁴ however, the option of migratory divorce provided another pathway to divorce—one that did not require the spouses to engage in collusive perjury.

In mid-nineteenth-century America, Ohio⁸⁵ and Illinois⁸⁶ became popular divorce destinations, but it was the unique attributes of Indiana's laws that made it especially attractive to those seeking a quick divorce.⁸⁷ As Nelson Blake has described, the law there included “two unusual features.”⁸⁸ The first was an “omnibus clause” that permitted Indiana courts to grant a divorce not only for the enumerated grounds, but for “any other cause, and in any other case, where the court, in their discretion, shall consider it reasonable and proper that a divorce should be granted.”⁸⁹ The second was the state's “almost non-existent residency requirement,”⁹⁰ which required only that the plaintiff be a “bona fide resident of the county,” for which the plaintiff's “own affidavit was accepted as prima facie evidence.”⁹¹ An 1860 editorial in the *Indiana Daily Journal* bemoaned the fact that the convergence of these two provisions “gave the whole Union a chance to be divorced here and flooded our courts with the abomination of half the dishonored

⁸³ GROSSMAN & FRIEDMAN, *supra* note 12, at 167–68 (citation omitted).

⁸⁴ See Wylene Rhoetter, *New York*, in CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA 880, 880 (Robert E. Emery ed., 2013) (“Migratory divorce was the choice of the wealthy.”); Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 613 n.21 (1999) (“[M]igratory divorces were common only among the wealthy who could afford an extended trip to a jurisdiction that granted quick divorces.”).

⁸⁵ See JONES, *supra* note 48, at 23 (“Ohio's liberalism lay in having a substantial number of grounds (10), several of which lent themselves to a broad interpretation.”).

⁸⁶ BLAKE, *supra* note 11, at 118 (“After the Civil War Chicago gained renown as a divorce Mecca.”).

⁸⁷ What all three had in common, however, was their proximity to the east. As one historian describes, “the impetus for change had passed from the northeastern U.S. to what has become known as the Old Northwest (Ohio, Indiana and Illinois).” JONES, *supra* note 48, at 22.

⁸⁸ BLAKE, *supra* note 11, at 119.

⁸⁹ Michael Grossberg & Amy Elson, *Family Law in Indiana: A Domestic Relations Crossroads*, in THE HISTORY OF INDIANA LAW 60, 64 (David J. Bodenhamer & Randall T. Shepard eds., 2006).

⁹⁰ Jennifer Ann Drobac, *Jazzing Up Family Law: The First Annual Midwest Family Law Conference*, 42 IND. L. REV. 533, 542 (2009).

⁹¹ BLAKE, *supra* note 11, at 119.

homes on the continent.”⁹² Indeed, from 1867 to 1871, Indiana was the first in the nation in granting divorces to those who were married in other states.⁹³ Although many in Indiana were delighted—chief among them divorce attorneys and boardinghouse operators⁹⁴—others in the state became concerned with this growing notoriety and eventually succeeded in 1859 in lobbying the legislature to enact a one-year residency requirement⁹⁵ that was subsequently increased to two years in 1873.⁹⁶ By 1881, Indiana had fallen from first all the way to seventh in the rankings of divorce-granting states.⁹⁷

With Indiana out of the running, the race was on for the next state to dominate the business of migratory divorce. Between the 1870s and 1880s, Iowa, Rhode Island, and the District of Columbia all⁹⁸ had some degree of success in attracting “the pseudo-tourists of the divorce trade,”⁹⁹ but, as Blake put it, “the path of divorce—like that of the empire—seemed destined to move westward.”¹⁰⁰ And much of that movement had to do with mining, or more specifically, the short residency requirements that many of the western territories had established to cater to the large number of miners who were relocating there.¹⁰¹ Of course, these laws had nothing to do with marriage or divorce but were instead “[o]riginally intended to hasten the ability of transient miners and other new arrivals to vote in territorial and, later, state elections.”¹⁰²

Divorce seekers soon learned, however, that a short residency requirement, coupled with laws providing more liberal grounds for divorce, offered an avenue for

⁹² See Val Nolan, Jr., *Indiana: Birthplace of Migratory Divorce*, 26 IND. L.J. 515, 520 n.22 (1951).

⁹³ *Id.* at 526. In fact, during that period, Indiana was responsible for granting approximately ten percent of the divorces in the nation, averaging between 1096 and 1210 per year. *Id.*

⁹⁴ BLAKE, *supra* note 11, at 120 (“Indiana lawyers and boardinghouse keepers were happy to accommodate the migrants.”); Drobac, *supra* note 90, at 542 (“While this divorce industry might have been good for Indiana businesses and services, especially those provided by Indiana lawyers, sister states such as New York, with no such legal escapes, decried the practice.”).

⁹⁵ See RILEY, *supra* note 39, at 65 (noting that “[p]roof of residency beyond the petitioner’s affidavit was also required”).

⁹⁶ See Drobac, *supra* note 90, at 543 n.84 (“[T]he residency requirement increased to one year in 1859 and two years in 1873.”). Apparently, even after the enactment of the one-year residency requirement, Indiana “remained sufficiently inviting to bring many divorce seekers to the state.” BLAKE, *supra* note 11, at 120.

⁹⁷ Nolan, *supra* note 92, at 526 (“Indiana fell from first in the nation between 1867 through 1871 to fourth during the next five year period, and seventh in the next.”).

⁹⁸ BLAKE, *supra* note 11, at 121.

⁹⁹ BARBER, *supra* note 10, at 90.

¹⁰⁰ BLAKE, *supra* note 11, at 121.

¹⁰¹ See *supra* note 11 and accompanying text.

¹⁰² BARBER, *supra* note 10, at 54; see also RILEY, *supra* note 39, at 135 (noting that the Nevada residency law was “intended to accommodate the needs of a highly mobile population of miners and entrepreneurs”).

those living out of state to obtain a relatively quick divorce. For that reason, both the Utah Territory and the Dakota Territory emerged as popular destinations for those seeking divorces.¹⁰³ In Utah, the divorce statute required only that the plaintiff be “a resident of the Territory, or wishes to become one,”¹⁰⁴ while the Dakota Territory enacted a mere three-month residency requirement—one that was subsequently retained by the resulting states of North and South Dakota.¹⁰⁵ In both Utah and the Dakotas, however, negative publicity eventually led to the passage of stricter laws—laws that effectively ended the migratory divorce trade in those states.¹⁰⁶ Another western territory, however, would prove steadfast in maintaining its favorable divorce laws and, as time wore on, would make it increasingly easier for those traveling from out of state to obtain a divorce. Indeed, when it came to migratory divorce, “the winner, in the long run, was Nevada.”¹⁰⁷

Nevada’s success stemmed from an 1861 law that the then-territory passed regarding residency. Once again, motivated by the large number of miners flooding into the state, the law only required six months of continuous residence.¹⁰⁸ Miners soon learned, however, that the law (which Nevada retained when it became a state in 1864) also made it easier for them to obtain a divorce. And this ability was quite attractive to them given that, as one commentator describes, “[m]iners who came to find fortunes in the Comstock often found new lives and new loves. If they were going to establish new families—legally—they had to be sure of legal separation from former mates.”¹⁰⁹ Nevada safeguarded that ability by maintaining its short residency requirement but also by adopting relatively liberal grounds for divorce. As historian Alicia Barber explains:

New York, for instance, provided only one ground for divorce, adultery. [In contrast,] Nevada had retained seven grounds for divorce: desertion, cruelty, nonsupport, drunkenness, impotency, imprisonment, and adultery. To make matters even easier, many of these grounds, like “cruelty” were quite open to interpretation; in addition, no evidence was required to prove

¹⁰³ BLAKE, *supra* note 11, at 122–23.

¹⁰⁴ *Id.* at 122. In addition to its enumerated grounds, Utah maintained an omnibus clause, stating that a judge could grant a divorce “when it shall be made to appear to the satisfaction and conviction of the court that the parties cannot live in peace and union together and that their welfare requires a separation.” RILEY, *supra* note 39, at 96 (quoting Utah Territorial Laws 82–84 (1852)).

¹⁰⁵ See JONES, *supra* note 48, at 33 (“The Dakotas had the most lenient residence requirements in the period 1879–1899.”).

¹⁰⁶ See BLAKE, *supra* note 11, at 122–23 (describing how “the territorial legislature [of Utah] eventually slammed the door by enacting a one-year residence requirement and abolishing the omnibus clause”); see also RILEY, *supra* note 39, at 100–01 (discussing how South Dakota increased its residence requirement to one year in 1909 and North Dakota did the same in 1899).

¹⁰⁷ GROSSMAN & FRIEDMAN, *supra* note 12, at 169.

¹⁰⁸ See *supra* notes 10–11 and accompanying text.

¹⁰⁹ BARBARA LAND & MYRICK LAND, A SHORT HISTORY OF RENO 47 (1995).

any of these charges, [thus allowing] unhappy spouses to pursue divorce without stating much of a reason at all.¹¹⁰

For a time, these peculiarities of Nevada law would remain somewhat unknown to those outside the state. Near the turn of the twentieth century, however, something “unexpected”¹¹¹ happened—an event that would catapult Reno, Nevada, into the consciousness of the nation and lead to its ultimate reputation as the “refuge of restless hearts.”¹¹²

The event in question was the arrival of Laura Corey, who came to Reno in 1905 by “private railroad car of steel magnate Charles Schwab”¹¹³ with “a retinue of maids and servants.”¹¹⁴ Corey was the wife of U.S. Steel President William E. Corey, and the two had been married for twenty-two years.¹¹⁵ Mrs. Corey, however, did not behave like the typical tourist. For instance, she did not check into a local hotel but instead signed a six-month lease for a furnished home “at a very high rent.”¹¹⁶ A great deal of publicity attended her arrival, with reporters repeatedly asking whether there was any truth to the rumors that she was there to get a divorce so that her husband could marry actress Mabel Gilman.¹¹⁷ Corey adamantly denied these rumors: “There is no truth in that foolish story To even think that my husband is infatuated with an actress is ridiculous. I am not in Nevada to get a divorce, but came with my sister-in-law and her friend for the benefit of the latter’s health.”¹¹⁸ Nonetheless, once she had been in Reno for the requisite six months, Corey immediately filed for and received a divorce on the grounds of desertion.¹¹⁹ She soon left Reno for Pennsylvania, and her ex-husband did indeed marry Ms. Gilman the following year.¹²⁰ The whole affair was quite the scandal, but because the public came to see Mrs. Corey as the wronged party, “Nevada’s prompt and easy surgery won wide applause.”¹²¹

¹¹⁰ BARBER, *supra* note 10, at 54; see also Katherine L. Caldwell, *Not Ozzie and Harriet: Postwar Divorce and the American Liberal Welfare State*, 23 L. & SOC. INQUIRY 1, 39–40 (1998) (describing Nevada as a divorce mill that “offer[ed] ‘quickie’ divorces on grounds such as ‘mental cruelty’ very liberally defined”).

¹¹¹ See BARBER, *supra* note 10, at 53.

¹¹² *Id.* at 58.

¹¹³ *Id.* at 53.

¹¹⁴ HARPSTER, *supra* note 76, at 86.

¹¹⁵ LAND & LAND, *supra* note 109, at 48 (noting that “the steel tycoon had a wondering eye”).

¹¹⁶ BARBER, *supra* note 10, at 53.

¹¹⁷ *Id.* at 54; see also DANIEL J. BOORSTIN, *THE AMERICANS: THE DEMOCRATIC EXPERIENCE* 71 (2010) (noting that William Corey had “unceremoniously deserted his wife and family for the attractive musical-comedy singer, Mabelle Gilman”).

¹¹⁸ See BARBER, *supra* note 10, at 54 (quoting *Expects a Divorce*, ALTOONA MIRROR, (Dec. 7, 1905)).

¹¹⁹ *Id.* at 55.

¹²⁰ *Id.*

¹²¹ BLAKE, *supra* note 11, at 153; see also BOORSTIN, *supra* note 117, at 71 (“The press

In July 1906, the *New York Times* reported Corey's divorce decree on its front page, but publicity of this sort was only the beginning. As one historian described it, "Laura Corey may have left Reno, but the national spotlight did not."¹²² Soon, countless people across the country began following Mrs. Corey's lead and traveled to Reno in order to obtain their own speedy divorce¹²³—or to get "Reno-vated" as some began to call it.¹²⁴ Such pilgrimages were made easier by enterprising attorneys who, sensing a business opportunity, moved to Reno and began advertising their divorce services in publications nationwide. For instance, in 1907, attorney William Schnitzer moved from New York City to Reno and promptly opened a practice specializing in divorce.¹²⁵ He soon published a pamphlet titled "Marriage and Divorce," which he distributed to "more than 2000 lawyers in New York and Canada."¹²⁶ Such efforts paid off, and more and more people began traveling to Reno to secure a divorce. Before long, stories of unhappy spouses who traveled to Reno for purposes of securing a divorce made their way into a number of popular movies,¹²⁷ books,¹²⁸ plays,¹²⁹ and even music¹³⁰ from that time period. As a result, phrases like "'going to Reno' and the 'Reno cure' quickly became nationally recognized euphemisms for seeking a divorce."¹³¹

Not all Nevadans welcomed this newfound publicity, and some took to heart the public censure that critics began hurling at the state. In 1911, for instance, an editorial in the *New York Times* declared that "[t]he divorce mill itself is a scandal.

fumed with righteous indignation against [William], but praised the laws of Nevada as the shield of the injured innocent.").

¹²² BARBER, *supra* note 10, at 56; *see also* RILEY, *supra* note 39, at 136 ("The resulting publicity catapulted Reno into the national spotlight.").

¹²³ *See* RILEY, *supra* note 39, at 136 (noting how the Corey divorce brought "the ease of Reno divorce, at least for those who could afford to travel to Nevada and spend six months there" to the public's attention); BLAKE, *supra* note 11, at 153 (noting how, after the Corey divorce, "more and more outsiders began to come to Nevada for divorces").

¹²⁴ *See* GUY CLIFTON, *IMAGES OF AMERICA: RENO 7* (2012) (describing how "thousands of people from throughout the United States [made] their way to town to get 'The Cure' or become 'Reno-vated,' as the Eastern papers called it").

¹²⁵ *See* RILEY, *supra* note 39, at 136.

¹²⁶ BARBER, *supra* note 10, at 56. As one historian notes, however, "[w]hen the Reno Bar Association objected to Schnitzer's advertising as unethical, the Nevada Supreme Court in 1911 suspended his license to practice for eight months." BLAKE, *supra* note 11, at 154.

¹²⁷ *See, e.g.*, *A RENO DIVORCE* (Warner Bros. 1927), *THE ROAD TO RENO* (Paramount Pictures 1931), *MERRY WIVES OF RENO* (Warner Bros. 1934), *MAISIE GOES TO RENO* (MGM 1944), *THE MISFITS* (Seven Arts Productions 1961).

¹²⁸ *See, e.g.*, EDITH WHARTON, *THE CUSTOM OF THE COUNTRY* (1913); FAITH BALDWIN, *TEMPORARY ADDRESS: RENO* (1941).

¹²⁹ *See, e.g.*, CLARE BOOTH LUCE, *THE WOMEN* (1936); WINCHELL SMITH & FRANK BACON, *LIGHTNIN'* (1918).

¹³⁰ *See, e.g.*, WILLIAM JEROME & JEAN SCHWARTZ, *I'M ON MY WAY TO RENO* (1910).

¹³¹ Friedman, *supra* note 60, at 1505 ("'Going to Reno' became almost a synonym for getting a divorce."); *see also* BARBER, *supra* note 10, at 57 ("For better or for worse, Reno was now literally a household name.").

Reno has made itself a reproach and a shame.”¹³² When former president Theodore Roosevelt visited the state in 1911, he reportedly declared “that no city or State could long exist by harboring divorce and building up a colony of married people who sought to be rid of their mates.”¹³³ Nevadans would soon join these calls for change, and in 1913 the state’s leading newspaper at the time published an editorial, warning readers that “[t]his state and this city cannot advance permanently unless they be fortified not only in self-respect, but in the respect of all who think of us. Any work too damaging for any other state to do is certainly too damaging for Nevada to do.”¹³⁴

Eventually, on February 7, 1913, this dissatisfaction came to a head, and 160 angry Nevadans marched on the state capital demanding change.¹³⁵ As one historian, writing in 1962, describes:

[T]he militant visitors marched straight to the capitol building where they crowded into the assembly chamber, overflowing the gallery and standing in every available space on the floor of the house itself. The clergyman who made the opening prayer called God’s attention to the fact that the eyes of the commonwealth and the nation were upon Nevada and asked “that strength be given that the state be freed from the curses which beset her.”¹³⁶

The reformers’ efforts worked. The Nevada legislature voted to amend the law and institute a one-year residency requirement for those whose spouses resided outside of the state.¹³⁷

With that change in the law, however, came the realization of just how much the state economy had benefitted from migratory divorce. After all, each Reno divorce typically brought with it a number of temporary residents: “a plaintiff; a defendant, unless the divorce was uncontested; other family members; witnesses; often friends and supporters; and in the case of wealthy divorce-seekers, maids and servants.”¹³⁸ Further, each of these people would have needed to remain in the state for six months, resulting in considerable revenue for a number of Nevadans. As one historian describes it: “Lawyers and lodging operators profited most directly, but the ripple effect spread to clothing stores, restaurants, salons, pharmacies, and other businesses that provided services to them as well as the permanent population.”¹³⁹

¹³² *Sensitive Reno*, N.Y. TIMES, Oct. 17, 1911, at 10.

¹³³ *Roosevelt Assails Reno*, N.Y. TIMES, Apr. 4, 1911, at 1.

¹³⁴ BLAKE, *supra* note 11, at 155.

¹³⁵ See RILEY, *supra* note 39, at 136.

¹³⁶ BLAKE, *supra* note 11, at 155.

¹³⁷ See BARBER, *supra* note 10, at 88 (noting that the residency requirement was extended “to twelve months for parties with only one spouse residing in Nevada”); BLAKE, *supra* note 11, at 155 (describing how, in light of the reformers’ demonstration, “the prod divorce majority melted away, and the one-year residence bill was expedited toward final passage”).

¹³⁸ HARPSTER, *supra* note 76, at 136.

¹³⁹ BARBER, *supra* note 10, at 85.

By raising the residency period to a full year, however, Nevada had lost much of its appeal as a divorce destination, thus eroding the ample revenue from which so many Nevadans had come to depend.¹⁴⁰ Many Nevadans were none too pleased with this prospect of reduced income¹⁴¹—a sentiment reflected in the words of a Nevada poet writing in the early 1900s:

Have you ever thought about the Reno Colony,
And what we owe this little fad, divorce?
Fair plaintiffs oft advising,
Forever criticising,
Yet their money helps us on a bit, of course.

If you legislate against the Reno colony,
To other fields the fair ones you will drive.
For ill-advised propriety
Brings poverty with piety,
And some of us would prefer to thrive.¹⁴²

As such resentments grew, Nevadans would once again demand a change in the law, this time using the ballot box.

In 1914—the very same year that the new residency requirement took effect—Nevadans successfully voted out of office a number of state politicians seen as responsible for the change in the law. Included in that group was the governor, Tasker Oddie, who had signed the one-year residency requirement into law, as well as a number of state legislators who had voted in favor of it.¹⁴³ The following year, their replacements succeeded in reinstating the six-month residency provision.¹⁴⁴ In so doing, the new governor, Emmet D. Boyle, said that any future changes should come from the people, by way of popular referendum: “Moral and social questions on which the people are divided, should, if possible, be kept out of the legislature where they tend to obscure legislation of even greater moment to the serious

¹⁴⁰ See RILEY, *supra* note 39, at 136 (“[B]usiness people and entrepreneurs created a public outcry against the measure. They sorely missed the revenues, including transportation costs, legal fees, entertainment, meals, and lodging that the divorce trade put into their pockets.”).

¹⁴¹ See BLAKE, *supra* note 11, at 155–56 (“The reformers’ victory was bitterly resented by the lawyers, hotelkeepers, and merchants who had profited from the divorce colony.”); BOORSTIN, *supra* note 117, at 71 (pointing out that “lawyers, merchants, bartenders, hotelkeepers, and others quickly registered their protest”).

¹⁴² LESLIE CURTIS, *RENO REVERIES* 60 (1912).

¹⁴³ BLAKE, *supra* note 11, at 156; see also HARPSTER, *supra* note 76, at 111 (“Governor Tasker Oddie signed the measure, but he and many of the legislators paid the price when they were defeated at the polls the following year.”).

¹⁴⁴ See BARBER, *supra* note 10, at 89 (describing how those in favor of reinstating the earlier law succeeded “with the help of many new faces in the legislature, as well as a new governor”).

detriment of good government.”¹⁴⁵ Citizens attempted to do just that in 1922 when they placed a proposition on the ballot to again raise the residency requirement to one year.¹⁴⁶ The proposal lost by a vote of three to one.¹⁴⁷

Going forward, Nevada not only embraced its status as a divorce haven but also actively attempted to ward off any competitors who sought to siphon off portions of that industry.¹⁴⁸ In 1927, as countries like Mexico and France began to horn in on the migratory divorce trade, Nevada reduced its residency requirement even further to just three months.¹⁴⁹ When it then became evident that Idaho and Arkansas intended to likewise lower their residency requirements to three months, Nevada doubled down and, in 1931, lowered it again to a mere six weeks.¹⁵⁰ In response, one of the headlines from that time read “Revival of Gold Rush Days Predicted. Beat This One, If You Can.”¹⁵¹ It was no coincidence that, in the very same year, Nevada also legalized gambling, which meant that those who traveled to the state to obtain a divorce now had even more ways to spend their money as they whiled away the required six weeks.¹⁵² And, to maximize the time these Reno divorce seekers would have to spend in the state, the 1931 divorce law “required a sworn witness to testify that the divorce-seeker had been sighted in the state each and every day for six weeks.”¹⁵³ Statistics from that year reveal that Nevada had the highest divorce rate in the country—four times the national average, in fact.¹⁵⁴ It was further estimated

¹⁴⁵ BLAKE, *supra* note 11, at 156 (internal quotation marks omitted).

¹⁴⁶ *Id.*; RILEY, *supra* note 39, at 137.

¹⁴⁷ BLAKE, *supra* note 11, at 156; RILEY, *supra* note 39, at 137.

¹⁴⁸ See BOORSTIN, *supra* note 117, at 71 (“Nevada still had competitors, and the legislature remained alert.”); see also RILEY, *supra* note 39, at 137 (noting that Nevada was “[a]lways under pressure from other divorce mill states, especially Idaho and Arkansas”).

¹⁴⁹ BOORSTIN, *supra* note 117, at 71 (adding that there was “a rumor that Wyoming might reduce her residence requirement”); see also BLAKE, *supra* note 11, at 156–57 (“It was imperative to keep Nevada’s divorce attractions bright in competition with those of France, Mexico, and other potential competitors.”).

¹⁵⁰ BLAKE, *supra* note 11, at 156–57; BOORSTIN, *supra* note 117, at 71; see also BARBER, *supra* note 10, at 118 (noting that “Reno’s hold on the lucrative divorce industry . . . seemed even more precarious once Idaho and Arkansas each” adopted three-month residency provisions); PHILLIPS, *supra* note 34, at 196 (describing the “veritable divorce trade war [that] broke out among states such as Nevada, Idaho, and Arkansas”).

¹⁵¹ BLAKE, *supra* note 11, at 157.

¹⁵² I. Nelson Rose, *Gambling and the Law®: The Third Wave of Legal Gambling*, 17 VILL. SPORTS & ENT. L.J. 361, 374 (2010) (“The Great Depression gave birth to the third wave of legal gambling. Nevada re-legalized casino gambling in 1931.”); see also BARBER, *supra* note 10, at 119 (noting that, when it came to reducing the residency requirement and legalizing gambling, “the two bills were in many ways intertwined”); RILEY, *supra* note 39, at 137 (“[L]iberal gambling provisions guaranteed that divorce-seekers would be able to amuse themselves—and spend more money—while they waited for their residencies to become final.”).

¹⁵³ BARBER, *supra* note 10, at 135.

¹⁵⁴ *Id.* at 129; see also RILEY, *supra* note 39, at 137 (noting that, from 1930 to 1931, Nevada went from granting 2,609 divorces per year to 5,260).

that the divorce trade brought between \$1 million and \$5 million per year to the state.¹⁵⁵ As one commentator from that period remarked, “[s]ince divorce is a \$4,000,000-a-year industry for Reno, you might as well move all orange trees out of Florida as take the divorce business from Nevada.”¹⁵⁶

Of course, with revenues that large, it was no surprise that other states would take notice. As one scholar writing in 1935 put it: “Other states came to envy the monopolization by Nevada of such a lucrative business, and competition unsheathed its sharpened claws.”¹⁵⁷ In addition to Idaho and Arkansas, mentioned earlier,¹⁵⁸ states like Wyoming, Florida, and Alabama were also eager to obtain their share of the migratory divorce business. In 1935, for instance, the Wyoming legislature reduced the state’s residency requirement from one year to sixty days.¹⁵⁹ That same year, Florida reduced its one-year residency requirement to three months.¹⁶⁰ The Florida representative who introduced the law had this to say in support of the measure: “If they are going to get divorces, . . . we can’t stop them and we might as well invite them to Florida to spend the money.”¹⁶¹ And indeed, Florida did enjoy considerable success as a divorce haven. As Blake describes: “In 1946, at the peak of the postwar rise in divorce, Florida granted over 26,000 divorces. The rate per thousand population was 12.1, second only to that in Nevada.”¹⁶² That success, however, would end in 1957 when the governor persuaded state lawmakers to raise the residency requirement to six months.¹⁶³

Ultimately, the most successful challenger was Alabama, which for a period of time even eclipsed the popularity of Nevada as a divorce destination. It all started in 1945 when Alabama amended its law to provide that the state’s one-year residency requirement did not apply “when the court has jurisdiction of both parties to the

¹⁵⁵ RUSSELL R. ELLIOT, *HISTORY OF NEVADA* 285 (2d ed. 1987); *see also* HARPSTER, *supra* note 76, at 125 (“It has been estimated that the divorce business in Reno accounted for more than \$5 million annually at the time (equivalent to \$66 million today).”).

¹⁵⁶ SHEPHERD, *supra* note 32, at 50.

¹⁵⁷ Frank W. Ingram & G. A. Ballard, *The Business of Migratory Divorce in Nevada*, 2 *LAW & CONTEMP. PROBS.* 302, 306 (1935).

¹⁵⁸ *See supra* note 148–150 and accompanying text.

¹⁵⁹ BLAKE, *supra* note 11, at 167 (noting nonetheless that Wyoming’s tourist business was likely “modest”).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*; *see also* C. Jonathan Hauck, Jr., *Birds of Passage*, 28 *GEO. L. J.* 809, 811 n.12 (1940) (describing how, when the representative was asked if this measure was intended to put Florida into competition with Nevada, he replied: “It is in competition to all the United States; it is to get people to come to Florida”).

¹⁶² BLAKE, *supra* note 11, at 168; JONES, *supra* note 48, at 110 (noting that among the states attempting to compete for the migratory divorce business at that time, “only Florida had the tourist attractions and easy accessibility to compete with Nevada”).

¹⁶³ BLAKE, *supra* note 11, at 168–69 (noting that, in response to amending the law, the governor “praised the legislature for taking action that would ‘enhance the prestige of our state everywhere’”).

cause of action.”¹⁶⁴ Thus, in the absence of any specific period of residence, “if either party was a *bona fide* resident of the state, the Alabama courts would assume jurisdiction to grant divorce either for or against him, provided the other party submitted to the jurisdiction of the court by making a general appearance.”¹⁶⁵ And apparently, there was no shortage of Alabama attorneys willing to misrepresent the residency status of those who had only just arrived in the state. As a story in *TIME* magazine from 1962 described:

The fact is that for several years now, the easiest divorce terms in the nation are to be found not in Nevada but in Alabama. A divorce seeker need show up in Alabama only long enough to meet a lawyer, pay a fee, fill out the papers and wait a few hours. The lawyer shoots off usually to a rural county, hires a local lawyer to handle the court work, gets a decree and hops back to his client.¹⁶⁶

In the two decades following Alabama’s change to its residency requirement, the state’s divorce rate rose by 400%.¹⁶⁷ In 1960, for instance, Nevada granted 9,274 divorces while Alabama granted more than 17,000.¹⁶⁸ Alabama’s numbers would only start to drop when the state amended its rules of professional responsibility to prohibit attorneys from assisting clients in misrepresenting their status as an Alabama resident in order to obtain a quick divorce¹⁶⁹—a law that would eventually lead to the indictment and disbarment of several attorneys and even two judges.¹⁷⁰

¹⁶⁴ *Migratory Divorce: The Alabama Experience*, 75 HARV. L. REV. 568, 569–70 (1962); *Jennings v. Jennings*, 251 Ala. 73, 74 (1948) (laying out the full text of the amendment).

¹⁶⁵ BLAKE, *supra* note 11, at 169.

¹⁶⁶ *Alabama Unbound*, *TIME*, Jan. 5, 1962, at 47.

¹⁶⁷ See Wylene Rholetter, *Alabama*, in *CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA* 56 (Robert E. Emery ed., 2013).

¹⁶⁸ Kelly Kazek, *When Alabama Flourished as Divorce Mill, Famous People Flocked Here to Get Unhitched (Odd Travels)*, AL.COM (Mar. 14, 2013), https://www.al.com/living/2013/03/when_alabama_flourished_as_div.html [<https://perma.cc/7WYD-ZH75>].

¹⁶⁹ See *Migratory Divorce*, *supra* note 164, at 569. The amended rule provided as follows:

No person heretofore or hereafter admitted to practice law in Alabama shall . . . while acting as attorney for either party in any suit for divorce in any court in Alabama represent to the court or conspire with any party, attorney, or person to represent to the court that either party to such suit is a *bona fide* resident of Alabama, knowing such representation to be false.

Id.

¹⁷⁰ See Kazek, *supra* note 168 (noting that “[i]n August of 1970, two Alabama circuit court judges and seven others were indicted for taking part in a quickie divorce scam”); see also *Alabama Indictments Cast Doubt on Legality of ‘Quickie’ Divorces by Mail*, N.Y. TIMES

Nevada, on the other hand, would stay the course until the very end and even to this day maintains a residency period of six weeks for purposes of receiving a divorce.¹⁷¹ As the 1960s drew to a close, however, “one of the pillars of [the state’s] tourist economy began to crumble.”¹⁷² That pillar, of course, was the migratory divorce trade, its decline primarily attributable to the increasingly liberal divorce laws that began sweeping the country.¹⁷³ In 1968, for instance, New York amended its divorce laws to allow for grounds other than adultery,¹⁷⁴ and South Carolina finally began to permit judicial divorce in the late 1940s.¹⁷⁵ In addition, in 1970, California would become the first state to enact no-fault divorce,¹⁷⁶ whereby “[i]nstead of holding a trial to determine whether a spouse was guilty of a serious marital offense, no fault statutes allowed spouses to obtain divorces by mutual consent or on grounds of incompatibility or ‘irretrievable breakdown’ of the marriage.”¹⁷⁷ By the mid-80s, most of the other states would likewise adopt some form of no-fault divorce.¹⁷⁸ Thus, “[f]rom being almost impossible without evidence of fault or the agreement of one’s spouse,” divorce had become essentially unilateral

(Aug. 23, 1970), <https://timesmachine.nytimes.com/timesmachine/1970/08/23/107201718.html?pageNumber=53> [<https://perma.cc/HCW9-P9WM>] (highlighting that “those indicted were three disbarred Birmingham lawyers”); see also Rholetter, *supra* note 167, at 56 (“It was not until the early 1960s—when the Alabama Bar Association, in a self-policing action, took a stand against the migratory divorces by disbarring some of its members”).

¹⁷¹ See NEV. REV. STAT. § 125.020(1)(c) (2021).

¹⁷² BARBER, *supra* note 10, at 180.

¹⁷³ Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 67 (1976) (“But there were broader pressures building up for reform—pressures more powerful than the greed of those who profited from divorce mills.”).

¹⁷⁴ See *id.* (listing the new grounds as “cruelty, abandonment, and two-years’ separation”); *Christian v. Christian*, 365 N.E.2d 849, 852 (N.Y. 1977) (“With the enactment of the Divorce Reform Law of 1966, New York abandoned its position as the only State in the union which regarded adultery as the sole ground for absolute divorce.”) (internal citations omitted).

¹⁷⁵ See James W. Ely, Jr. & David J. Bodenhamer, *Regionalism and American Legal History: The Southern Experience*, 39 VAND. L. REV. 539, 564 n.129 (1986); see generally J.D. Sumner, Jr., *The South Carolina Divorce Act of 1949*, 3 S.C. L.Q. 253, 257–59 (1951).

¹⁷⁶ Friedman & Percival, *supra* note 173, at 67 (noting that, in doing so, California “abolished divorce as it had been classically constituted. In its place came ‘dissolution’ of marriage—available when ‘irreconcilable differences’ cause the ‘irremediable breakdown’ of a marriage”).

¹⁷⁷ Mintz, *infra* note 339, at 655.

¹⁷⁸ Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664 (1984) (“California was a pioneer state, but no-fault is now the rule almost everywhere.”); see also Lauren Guidice, *New York and Divorce: Finding Fault in a No Fault System*, 19 J.L. & POL’Y 787, 796 (2011) (“By the mid-1980s, all states had some form of a no-fault provision integrated into their divorce law.”).

throughout the United States.¹⁷⁹ And, with that legal development, migratory divorce “retreated into insignificance,” relegated to “little more than a subject for historical study.”¹⁸⁰

III. LEGAL REACTIONS

For migratory divorce to work as intended, states had to be willing to recognize out-of-state divorces secured by their citizens during a temporary stay in the degree-granting state. And indeed, many states were willing to do just that out of comity.¹⁸¹ Some states, however, refused. They balked at the idea that one of its resident citizens could have his or her marriage dissolved by a sister state simply because that person’s spouse spent a certain amount of time in the sister state. Thus, the question arose as to when a state was *required* to recognize a foreign divorce. And given the inability of those opposed to migratory divorce to otherwise curb the practice through a constitutional amendment¹⁸² or uniform legislation,¹⁸³ “the burden of prescribing such policies and criteria [was] shouldered”¹⁸⁴ by the Supreme Court. Indeed, over a period spanning more than seventy years, the Court would issue twelve opinions on the subject—opinions that represented the Court’s evolving views on the issue and which would ultimately affect tremendous change in the law of domestic relations.¹⁸⁵

A. The Supreme Court: Comity Versus Full Faith and Credit

The Supreme Court’s first exposure to migratory divorce came in 1858 with the case of *Barber v. Barber*.¹⁸⁶ There, Hiram Barber and Huldah Adeline Barber were married in New York.¹⁸⁷ Huldah eventually received a legal separation that required Hiram to pay alimony, but in an attempt to avoid paying, Hiram “plac[ed] himself

¹⁷⁹ ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG 18 (1992).

¹⁸⁰ HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §13:2, at 724 (2d ed. 1987).

¹⁸¹ See Cavers, *supra* note 29, at 103. As defined by the Supreme Court:

“Comity,” in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

¹⁸² See *infra* Section III.A.

¹⁸³ See *infra* Section III.B.

¹⁸⁴ Sumner, *supra* note 3, at 1.

¹⁸⁵ See *infra* Part IV.

¹⁸⁶ 62 U.S. 582 (1858).

¹⁸⁷ *Id.* at 584.

beyond the jurisdiction of the court which could enforce it” by moving to Wisconsin and divorcing Huldah.¹⁸⁸ The case presented only the discrete question of whether Huldah could file suit in Wisconsin to enforce the New York order, and the Court agreed that she could.¹⁸⁹ Thus, *Barber* did not provide an opportunity to answer the larger question that migratory divorce would soon bring to the forefront of the evolving law of domestic relations in the United States—namely, whether and to what extent one state, pursuant to the Full Faith and Credit Clause of the Constitution,¹⁹⁰ is required to recognize a divorce obtained in a sister state.

The Court would first weigh in on that question in 1869 when it decided *Cheever v. Wilson*.¹⁹¹ In that case, Mrs. Cheever traveled to Indiana (a popular divorce destination of the time),¹⁹² where she filed for divorce.¹⁹³ Mr. Cheever not only participated in the Indiana proceeding but consented to the dissolution.¹⁹⁴ Divorce in hand, Mrs. Cheever left Indiana, but a property dispute in Washington D.C. subsequently arose between her and a third party—one that implicated the Indiana divorce settlement.¹⁹⁵ The lower court ruled that the foreign divorce decree was void, but the Supreme Court reversed, invoking the Full Faith and Credit Clause and holding that “[t]he Constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana.”¹⁹⁶ In response to the argument that Mrs. Cheever did not actually reside in Indiana at the time of the divorce, the Court was satisfied by the fact that the divorce decree “expressly found” that she was a resident, and no party had produced evidence to suggest otherwise.¹⁹⁷

The Court’s job in *Cheever* was made somewhat easier by the fact that Mr. Cheever had participated in the Indiana divorce. In 1888, however, the Supreme Court would rely on principles it first identified in *Pennoyer v. Neff*¹⁹⁸ to hold that a court can grant a divorce even in the absence of jurisdiction over the non-resident

¹⁸⁸ *Id.* at 588.

¹⁸⁹ *Id.* at 584 (“The record raises these inquiries: Whether a wife . . . can acquire another domiciliation in a State of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States having equity jurisdiction, to recover from him alimony due . . .”).

¹⁹⁰ U.S. CONST. art. IV, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

¹⁹¹ 76 U.S. 108 (1869).

¹⁹² See *supra* notes 85–97 and accompanying text.

¹⁹³ *Cheever*, 76 U.S. at 109.

¹⁹⁴ *Id.* at 110 (noting that Mr. Cheever filed “a cross-bill, setting forth . . . that he had abandoned her with intent never to live with her again; that reconciliation was impossible; and he, too, on his part concluded his petition with a prayer for” divorce).

¹⁹⁵ *Id.* at 111–12.

¹⁹⁶ *Id.* at 123.

¹⁹⁷ *Id.* (“The finding is clearly sufficient until overcome by adverse testimony. None adequate to that result is found in the record.”).

¹⁹⁸ 95 U.S. 714 (1878).

spouse.¹⁹⁹ The case was *Maynard v. Hill*,²⁰⁰ and it involved a husband who obtained a legislative divorce in Oregon. The wife was not a resident of Oregon and claimed that she never received notice of the pending action.²⁰¹ The Court described the issue as follows: “If the Assembly possessed the power to grant a divorce in any case, its jurisdiction to legislate upon his status, he being a resident of the territory is undoubted, unless the marriage was a contract within the prohibition of the federal Constitution against its impairment by legislation”²⁰² The Court ruled that marriage is, indeed, a status or an institution and not a contract: “though formed by contract, it signifies the relation of husband and wife, deriving both its rights and duties from a source higher than any contract of which the parties are capable, and as to these uncontrollable by any contract which they can make.”²⁰³ In essence, the Court recognized divorce as an *in rem* action and upheld the validity of the Oregon divorce, although largely focusing on the right of a legislature to issue a divorce and essentially ignoring the wife’s claim that she never received notice.²⁰⁴

In 1901, the Court would again take up the subject of migratory divorce, issuing three opinions on the subject. In two of them, the Court held that a state was not required to recognize a migratory divorce when the party who procured it did not establish domicile in the divorce-granting state. For instance, in *Bell v. Bell*, the husband obtained a Pennsylvania divorce by representing that he had resided in the state for the required one-year period.²⁰⁵ Just ten weeks prior to that representation, however, he had represented himself as a resident of New York in a separate action there to probate a will.²⁰⁶ For that reason, the Court held that “the court in Pennsylvania had no jurisdiction of the husband’s suit for divorce, because neither party had a domicile in Pennsylvania, and the decree of divorce was entitled to no faith and credit in New York or in any other state.”²⁰⁷ Similarly, in *Streitwolf v.*

¹⁹⁹ See Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 386 (2007) (noting the Court’s reliance on *Pennoy* when deciding *Maynard v. Hill*).

²⁰⁰ 125 U.S. 190 (1888).

²⁰¹ *Id.* at 193.

²⁰² *Id.* at 209.

²⁰³ *Id.* at 212 (emphasis omitted). The Court added that, “[w]hen formed, this relation is no more a contract than ‘fatherhood’ or ‘sonship’ is a contract.” *Id.* (internal quotation marks omitted).

²⁰⁴ See Mark Strasser, *Divorce, Domicile, and the Constitution*, 108 KY. L.J. 301, 304–05 (2019) (“[T]he Court simply did not address whether Lydia’s allegation that she had not received actual or constructive notice of the divorce, if true, was a basis upon which the divorce should be nullified. Instead, the Court focused on whether a legislature rather than a judge could issue a divorce”); see also Sumner, *supra* note 3, at 4 (“In this country a divorce suit has always been regarded as in the nature of an *in rem* proceeding. Consequently, it is held that judicial jurisdiction over the defendant spouse is not necessary, as it is in the ordinary adversary proceeding.”).

²⁰⁵ 181 U.S. 175 (1901).

²⁰⁶ *Id.* at 177 (noting that, in that action, he described himself “as residing at Buffalo, in the county of Erie and state of New York”).

²⁰⁷ *Id.* at 178.

Streitwolf, the husband obtained a divorce in North Dakota after representing himself as having resided there for ninety days when, in fact, he had only spent a few weeks in the state, spending the remainder of that time either back home in New York or traveling through Yellowstone National Park.²⁰⁸

In the third case, however, the Court ruled that the state of New York was required to recognize a Kentucky divorce. The case was *Atherton v. Atherton*, and although it technically did not involve migratory divorce, the Court's rationale would prove instrumental in subsequent cases dealing with migratory divorce.²⁰⁹ There, the couple had married in New York but ultimately resided in Kentucky until such time as the wife, claiming that the husband was abusive, returned to New York.²¹⁰ He subsequently obtained a Kentucky divorce on the grounds of abandonment.²¹¹ In ruling that the judgment was binding on New York, the Court introduced the concept of "matrimonial domicile."²¹² Specifically, the Court held that because Kentucky was the state in which the couple had last resided as a married couple, and the husband had continued to reside there after the wife returned to New York, the divorce was entitled to full faith and credit.²¹³

In 1903, however, the Court went further and issued a more controversial opinion, holding that a state need not recognize a foreign divorce even when the spouse who procured it had satisfied the residency requirement of the divorce-granting state. In *Andrews v. Andrews*, Charles and Kate Andrews were married and subsequently resided in Massachusetts.²¹⁴ Four years later, Charles desired a divorce and thus traveled to South Dakota, where he seemingly resided long enough to establish residency.²¹⁵ He then returned to Massachusetts, where he remarried.²¹⁶ When he died, both wives came forward claiming to be his widow.²¹⁷ The second wife pointed to the foreign divorce as evidence that his first marriage legally terminated, but the Massachusetts court refused to recognize the divorce on the basis of state law, which provided that a divorce is invalid "if an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth."²¹⁸ Finding that Charles's

²⁰⁸ 181 U.S. 179, 182 (1901).

²⁰⁹ 181 U.S. 155 (1901).

²¹⁰ *Id.* at 155–56.

²¹¹ *Id.* at 157–58.

²¹² *Id.* at 171.

²¹³ *Id.* at 162 ("There can be no doubt that this decree was by law and usage entitled to full faith and credit as an absolute decree of divorce in the state of Kentucky.").

²¹⁴ 188 U.S. 14 (1903).

²¹⁵ *Id.* at 16 (noting that "he remained personally in that state a period of time longer than is necessary by the laws of said state to gain a domicil there . . .").

²¹⁶ *Id.* at 17.

²¹⁷ *Id.* at 15.

²¹⁸ *Id.* at 29.

time in South Dakota was insufficient to have established a “bona fide domicile,”²¹⁹ the Supreme Court agreed that Massachusetts could constitutionally refuse to recognize the South Dakota divorce.²²⁰

Together, these cases stand for the proposition that a state is not bound by a foreign divorce issued in a state where the party requesting that divorce was not *domiciled* at the time, even if the party had established *residency* in that state. In 1906, however, the Court would take what Justice Brown described as “a step backward in American jurisprudence,”²²¹ and hold that even in the face of a foreign domicile, a state need not recognize a divorce from a sister state. The case was *Haddock v. Haddock*, and it involved a couple that was married in New York.²²² Shortly after the marriage, the husband alone relocated to Connecticut, where he obtained a divorce.²²³ It was undisputed, however, that Connecticut did not have jurisdiction over Mrs. Haddock, given that “the pendency of the petition was by publication and she had not appeared in the action.”²²⁴ The Court began the opinion by recognizing that the spouses had effectuated separate domiciles—the husband in Connecticut and the wife in New York.²²⁵ It further held that the Connecticut divorce was valid and enforceable within the state of Connecticut.²²⁶ At the same time, however, the Court ruled that New York was not bound by the divorce, given that the two had never established “matrimonial domicile”²²⁷ in Connecticut.²²⁸

²¹⁹ *Id.* at 27. In so doing, the Court upheld the lower court which had found “that Andrews had always retained his domicile in Massachusetts, had gone to Dakota for the purpose of obtaining a divorce, in fraud of the laws of Massachusetts, and with the intention of returning to that state when the divorce was procured.” *Id.* at 18.

²²⁰ In explaining why the Full Faith and Credit Clause did not demand otherwise, the Court noted that “although a particular provision of the Constitution may seemingly be applicable, its controlling effect is limited by the essential nature of the powers of government reserved to the states when the Constitution was adopted.” *Id.* at 34.

²²¹ *Haddock v. Haddock*, 201 U.S. 562, 628 (1906) (Brown, J., dissenting).

²²² *Id.* at 564.

²²³ *Id.* at 565.

²²⁴ *Id.*

²²⁵ *Id.* at 572 (noting that “the husband . . . at the time when the decree was rendered [was] domiciled in [Connecticut, while] New York was the domicile of the wife . . .”).

²²⁶ *Id.* (“[N]o question can arise on this record concerning the right of the state of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut . . .”).

²²⁷ *Id.* at 527, 570 (“Where the domicile of matrimony was in a particular state, and the husband abandons his wife and goes into another state in order to avoid his marital obligations, such other state to which the husband has wrongfully fled does not . . . become a new domicile of matrimony.”).

²²⁸ *Id.* at 605–606 (“Without questioning the power of the state of Connecticut to enforce within its own borders the decree of divorce which is here in issue, . . . we hold that the decree of the court of Connecticut rendered under the circumstances stated was not entitled to obligatory enforcement in the State of New York by virtue of the full faith and credit clause.”).

The Court believed this resolution necessary, given that “if 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.”²²⁹ Further, the Court introduced the idea that marital fault somehow played a role in divorce jurisdiction, noting that New York could constitutionally disregard the Connecticut divorce given that Mr. Haddock’s domicile there flowed directly from his abandonment of his wife.²³⁰ As a result, the decision resulted in a situation whereby the couple was legally married in New York yet was legally divorced in Connecticut. Ruling as it did, the Court effectively went back on a key observation it had made in *Atherton*—namely, that “[a] husband without a wife, or a wife without a husband, is unknown to the law.”²³¹ Four justices dissented in *Haddock*, with Justice Holmes characterizing the majority opinion as one that “not only reverses a previous well-considered decision of this court, but is likely to cause considerable disaster to innocent persons, and to bastardize children hitherto supposed to be the offspring of lawful marriage.”²³²

Haddock did indeed engender a great deal of confusion, and “[c]riticisms of it grew stronger over the years as the rules and exceptions [it] spawned . . . grew steadily more complicated.”²³³ In an attempt to synthesize these various opinions, one commentator described the uncertainty of the governing rule as follows: “a state was not compelled to give full faith and credit to a divorce decree unless the rendering state had as minimum contacts the domicile of one of the parties plus ‘something else.’”²³⁴ Nonetheless, it would take over thirty years before the Court would begin to right the ship, which it first attempted to do in 1938 with *Davis v. Davis*.²³⁵ There, Mark and Maude Davis were married in Washington D.C., where they resided as husband and wife.²³⁶ Eventually, the two legally separated, and a D.C. court ordered Mark to pay alimony.²³⁷ Mark subsequently moved to Virginia, where he secured a divorce on the basis of desertion.²³⁸ In so doing, he alleged that he had resided in Virginia for the one-year period required to establish domicile.²³⁹

²²⁹ *Id.* at 573.

²³⁰ *Id.* at 571 (“[I]f the husband . . . abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, . . . he yields up that power and authority over her which alone makes his domicile hers.”) (quoting *Barber v. Barber*, 62 U.S. 582, 595 (1858)).

²³¹ *Atherton v. Atherton*, 181 U.S. 155, 162 (1901).

²³² 201 U.S. at 628 (Holmes, J., dissenting).

²³³ *Estin*, *supra* note 199, at 389.

²³⁴ *Sumner*, *supra* note 3, at 5 (emphasis added).

²³⁵ 305 U.S. 32 (1938).

²³⁶ *Id.* at 35.

²³⁷ Mark had received a legal separation on the grounds of cruelty in D.C., where “absolute divorce was not then permitted for desertion or cruelty.” *Id.*

²³⁸ *Id.*

²³⁹ *Id.* at 36.

Maude appeared specially to contest jurisdiction but was unsuccessful.²⁴⁰ Mark then attempted to use the Virginia divorce to modify the earlier judgment of the D.C. court regarding alimony.²⁴¹ Citing *Haddock*, the D.C. court refused to recognize the Virginia divorce.²⁴² On appeal, the Supreme Court acknowledged the conflicting tests for “matrimonial domicil” that had arisen post-*Haddock* but nonetheless refused to offer any clarification, instead stating that the case before it did not warrant doing so.²⁴³ Instead, the Court distinguished *Davis* on the basis that Maude, unlike the wife in *Haddock*, had received notice of the Virginia divorce and had even participated in it to a limited degree, apparently rejecting the argument that Maude had only appeared for purposes of contesting jurisdiction.²⁴⁴ On that basis, the Court held that the Full Faith and Credit Clause required the D.C. court to give effect to the husband’s foreign divorce.

Four years later, the Court would go even further and explicitly overrule *Haddock*. The case was *Williams v. State of North Carolina*²⁴⁵—typically referred to as *Williams I*—and it involved a North Carolina man and woman who both traveled to Nevada, stayed there for the required six weeks, and then divorced their respective spouses. The pair then promptly married one another and returned to North Carolina.²⁴⁶ Upon their return, they were arrested and convicted of bigamous cohabitation.²⁴⁷ In challenging their convictions, the case made its way to the Supreme Court, which was asked to determine “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.”²⁴⁸ The Court ruled that it was, and in the process overruled *Haddock*, which according to

²⁴⁰ *Id.* (“Process of the Virginia court was served personally upon the respondent in the District of Columbia. She filed a plea stating that she appeared ‘specially and for no other purpose than to file this plea to the jurisdiction of the court.’”).

²⁴¹ *Id.* at 37–38.

²⁴² According to the lower court: “It was necessary . . . under *Haddock v. Haddock* . . . that Virginia be the last matrimonial domicil of the parties or, if not, that the wife be subjected to the jurisdiction of the court [below], either by personal service within [Virginia], or by voluntary appearance and participation in the suit.” *Id.* at 39 (internal quotes omitted).

²⁴³ *Id.* at 41 (noting that, although a single definition for “matrimonial domicil” both “is not to be found; it need not be attempted here”).

²⁴⁴ *Id.* at 43 (“Plainly her plea and conduct in the Virginia court cannot be regarded as special appearance merely to challenge jurisdiction. . . [and as such,] she submitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties.”).

²⁴⁵ 317 U.S. 287 (1942).

²⁴⁶ *Id.* at 290.

²⁴⁷ North Carolina’s criminal code provided as follows: “If any person, being married, shall contract a marriage with any other person outside of this state . . . and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy.” See *State v. Williams*, 17 S.E.2d 769, 774 (N.C. 1941) (quoting statute).

²⁴⁸ See *Estin*, *supra* note 199, at 397 (quoting North Carolina’s brief in opposition to the petition for grant of certiorari).

the Court improperly relied upon the concept of marital fault, or as the Court put it, “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.”²⁴⁹ Thus, *Williams I* established that states are required to recognize *ex parte* divorces obtained in a sister state whenever either party to the marriage established domicile in the divorce-granting state.

Importantly, however, North Carolina did not initially challenge the defendants’ claims that they had indeed established a valid Nevada domicile.²⁵⁰ As a result, after the Court’s holding in *Williams I*, North Carolina once again prosecuted the couple for bigamy by rejecting the validity of their Nevada domicile. The couple challenged their convictions a second time, but this time the Supreme Court sided with North Carolina. In what would come to be known as *Williams II*, the Court held that a “[s]tate of domiciliary origin should not be bound by an unfounded, even if not collusive, recital in the record of a court of another State.”²⁵¹ According to the Court, “[t]he fact that the Nevada court found that they were domiciled there is entitled to respect, and more But simply because the Nevada court found that it had power to award a divorce decree cannot . . . foreclose reexamination by another State.”²⁵² Thus, whereas *Williams I* gave the promise of clearer standards, *Williams II* took that away by holding that a party could be divorced in one state (i.e., Nevada) yet still married in another (i.e., North Carolina).

For that reason, the Court’s holding in *Williams II* was controversial, prompting vigorous dissents²⁵³ and posing particular difficulty for those seeking migratory divorces. As Ann Laquer Estin explains:

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. For those seeking a tourist divorce, however, *Williams II* reintroduced the risk of complications.²⁵⁴

²⁴⁹ See *Williams*, 317 U.S. at 300 (“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 in such circumstances.”).

²⁵⁰ See Estin, *supra* note 199, at 397–98 (noting that “the Nevada divorce decrees were based on findings of domicile, and these findings had not been controverted in the North Carolina proceeding . . .”).

²⁵¹ *Williams v. State of North Carolina*, 325 U.S. 226, 230 (1945).

²⁵² *Id.* at 233–34.

²⁵³ Justice Rutledge, for instance, warned that “[o]nce again the ghost of ‘unitary domicile’ returns on its perpetual round, in the guise of ‘jurisdictional fact,’ to upset judgments, marriages, divorces, undermine the relations founded upon them, and make this Court the unwilling and uncertain arbiter between the concededly valid laws and decrees of sister states.” *Id.* at 244 (Rutledge, J., dissenting).

²⁵⁴ Estin, *supra* note 199, at 404 (citation omitted).

Thus, an unhappy spouse could venture to another state in search of more favorable divorce laws, remain there long enough to meet its domicile requirements, and yet still be prosecuted for bigamy upon returning “home.” Of course, for those migratory divorces that were uncontested, few if any problems would arise. And, indeed, the Supreme Court would soon issue two decisions that made migratory divorce even easier for those couples that mutually consented to the divorce.

The first case to do so was the 1948 decision in *Sherrer v. Sherrer*.²⁵⁵ There, Margaret Sherrer, who was married to Edward, left Massachusetts for what was supposed to be a vacation in Florida. While there, however, she decided to file for divorce after living in the state for four months.²⁵⁶ Edward, who still lived in Massachusetts, nonetheless participated in the divorce proceeding, denying the allegations.²⁵⁷ After the divorce was granted, Margaret remarried and returned to Massachusetts with her new husband.²⁵⁸ At that point, Edward challenged the validity of the Florida divorce, and the Massachusetts court agreed. Drawing upon *Williams II*, the court held that “full faith and credit did not preclude the Massachusetts courts from reexamining the finding of domicile made by the Florida court.”²⁵⁹ The Supreme Court, however, reversed. It did so by noting that Edward had participated in the Florida divorce.²⁶⁰ Thus, the Court distinguished the case from *Williams II* and held that, under the Full Faith and Credit Clause, Massachusetts was bound by the Florida decree.²⁶¹ In so ruling, the Court held that Edward had already received “his day in court with respect to every issue involved in the litigation, including the jurisdictional issue of petitioner’s domicile. Under such circumstances, there is nothing in the concept of due process which demands that a defendant be afforded a second opportunity to litigate the existence of jurisdictional facts.”²⁶²

Three years later, the Court would hold that, in addition to the spouses themselves, third parties were likewise foreclosed from relitigating a foreign divorce in which both spouses had participated. In *Johnson v. Muelberger*,²⁶³ the facts were somewhat similar to those of *Sherrer*. E. Bruce Johnson lived in New York, but in

²⁵⁵ 334 U.S. 343 (1948).

²⁵⁶ *Id.* at 345.

²⁵⁷ Edward did contest the allegations that she had effectuated a Florida domicile, but the Florida court rejected his arguments, and husband “failed to challenge the decree by appeal.” *Id.* at 346.

²⁵⁸ *Id.* at 347.

²⁵⁹ *Id.* at 348.

²⁶⁰ *Id.* (“The respondent personally appeared in the Florida proceedings. Though his attorney he filed pleadings denying the substantial allegations of petitioner’s complaint. It is not suggested that his rights to introduce evidence and otherwise to conduct his defense were in any degree impaired . . .”).

²⁶¹ *Id.* at 349 (“[U]nlike the situation presented in [*Williams II*], the finding of the requisite jurisdictional facts was made in proceedings in which the defendant appeared and participated.”).

²⁶² *Id.* at 348.

²⁶³ 340 U.S. 581 (1951).

1942, his second wife traveled to Florida to divorce him.²⁶⁴ It was apparently undisputed that his wife did not satisfy Florida's residency requirement; however, neither party contested that fact, and the divorce was granted.²⁶⁵ Mr. Johnson subsequently remarried. Upon his death in 1945, his daughter from his first marriage learned that her inheritance would be reduced based on the elective share that was owed his third wife.²⁶⁶ The daughter then sought to invalidate the Florida divorce in hopes of voiding her father's third marriage. The lower court sided with the daughter, holding that the divorce decree bound only the parties to the marriage and that his daughter was thus free to contest the divorce.²⁶⁷ The Supreme Court disagreed and held that, because Florida law would not have permitted the daughter to attack the divorce decree in that state, "it cannot be attacked by them anywhere in the Union. The Full Faith and Credit Clause forbids."²⁶⁸ Taken together, *Sherrer* and *Johnson* establish that lack of domicile is no bar to requiring a state to give full faith and credit to a foreign divorce obtained by parties who consented to that court's jurisdiction.²⁶⁹

In the following years, the Court would introduce the concept of divisible divorce, which in many ways represented "a compromise between the interests of the spouse seeking an ex parte divorce and the spouse who was absent from the proceeding."²⁷⁰ Characterizing divorce as divisible simply means that a particular state may not be able to adjudicate all of the issues arising out of a divorce proceeding absent jurisdiction over both parties.²⁷¹ But, as developed in the cases

²⁶⁴ *Id.* at 582.

²⁶⁵ As the Court pointed out, "the undisputed facts as developed in the New York Surrogate's hearing show that she did not comply with the jurisdictional ninety-day residence requirement [but] the decedent appeared by attorney . . . not questioning the allegations as to residence in Florida." *Id.*

²⁶⁶ *Id.* at 583.

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 589.

²⁶⁹ See MORRIS PLOSCOWE, *SEX AND THE LAW* 87 (1951) ("[I]n the recent cases of *Sherrer v. Sherrer* and *Coe v. Coe*, it [the Supreme Court] took the position that bona-fide domicile was not a prerequisite to the exercise of divorce jurisdiction by a state, if both husband and wife appeared in the divorce proceeding and went through the form of controversy.").

²⁷⁰ *Estin*, *supra* note 199, at 414.

²⁷¹ See *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957) ("Since the wife was not subject to its jurisdiction, the Nevada divorce court had no power to extinguish any right which she had under the law of New York to financial support from her husband."). As the Court noted, "[i]t 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." *Id.* This concept of divisible divorce was first articulated by the Court in *Estin v. Estin* where it held that a husband who obtained an ex parte divorce in Nevada could not use the existence of that divorce to avoid an alimony order his wife had obtained earlier in New York. 334 U.S. 541, 549 (1948) ("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.").

discussed above, the Supreme Court had already established that parties were free to travel to sister states to obtain a divorce, and—if they either established domicile there *or* their spouses consented to that court’s jurisdiction—the resulting divorce would essentially be unassailable in another state, including those states that only permitted divorce on the narrowest grounds. Thus, the law of divorce had become what an editorial in Chicago’s *Daily News* aptly described as “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.”²⁷²

B. Legislative Responses: Attempts to Nationalize Divorce

Over time, migratory divorce was no doubt seen as a blessing by countless individuals who desired a divorce but were otherwise unable to obtain one. For other Americans, however, the practice was a national scandal, with many going so far as to describe it as an “evil”²⁷³ or, in one instance, a “mad race for sex freedom and return to paganism.”²⁷⁴ Among those who shared such views, many of them turned to the legislature in hopes of curing the problems posed by—in the words of one court writing in 1859—“that large class of discontented or lecherous pilgrims seeking the Mecca of divorce.”²⁷⁵ Thus, the purpose of this section is to chronicle 1) those reform proposals, which included both constitutional amendments and uniform laws, and 2) the reason none of them—despite repeated attempts—were able to garner sufficient support to become law.

1. Proposals to Amend the Constitution

In 1906, President Theodore Roosevelt implored Congress to amend the Constitution to provide federal control over the laws of marriage and divorce. From the words he used, it is clear the President viewed migratory divorce as a problem that demanded such an extraordinary step:

I am well aware of how difficult it is to pass a constitutional amendment. Nevertheless . . . [a]t present the wide differences in the laws of the different States on this subject result in scandals and abuses; and surely there is nothing so vitally essential to the welfare of the nation, nothing around which the nation should so bend itself to throw every safeguard, as the home life of the average citizen.²⁷⁶

²⁷² See Estin, *supra* note 199, at 401 (quoting *Williams v. North Carolina: Editorial Comment from the Lay Press*, 29 A.B.A. J. 78 (1943)).

²⁷³ See *infra* notes 308 and 309 and accompanying text; see also W.O. Hart, *Uniform Divorce Laws*, 28 COM. L. BULL. J. 137, 137 (1923) (“The great evil in divorce suits is what is known as the migratory divorce . . .”).

²⁷⁴ *This Reno-vating Racket: An Editorial*, RENO DIVORCE RACKET (1931), at 3.

²⁷⁵ *McQuigg v. McQuigg*, 13 Ind. 294, 313 (1859).

²⁷⁶ See BLAKE, *supra* note 11, at 146.

Five years later, a young state senator from New York named Franklin D. Roosevelt would make a similar argument when he introduced a resolution supporting “the adoption of . . . an amendment to the Constitution of the United States, delegating to Congress power to establish uniform laws on the subject of married persons throughout the United States.”²⁷⁷ In so doing, Roosevelt expressed the opinion that “the divorce laws of Nevada and some other Western states are too lax.”²⁷⁸

During the decades in which migratory divorce flourished, such calls for reform were constant.²⁷⁹ In response, between the years 1884 and 1963, Congress would propose over seventy-five constitutional amendments aimed at nationalizing the law of divorce.²⁸⁰ Consider, for instance, the proposed 1921 amendment, which is emblematic of the form these various proposals typically took: “The Congress shall have power to establish uniform laws on the subject of marriage and divorce from the bonds of matrimony throughout the United States.”²⁸¹ Other proposals attempted to go further and grant Congress even greater authority over domestic relations. For instance, a 1923 proposed amendment provided that “[t]he Congress shall have power to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimation of children, and the care and custody of children affected by divorce.”²⁸²

Some proposals were motivated not only by migratory divorce but also by other societal concerns pertaining to the law of marriage within the United States at that time. For instance, a number of amendments outlawing polygamy were proposed over the years, and several of those included language that would likewise federalize divorce jurisdiction. For example, an 1887 proposal provided that: “Congress shall have power to legislate upon the subjects of marriage and divorce by general laws applicable alike to all the States and Territories, and neither bigamy nor polygamy shall exist or be permitted within the United States or any place subject to their jurisdiction.”²⁸³ Similarly, the subject of interracial marriage made an appearance in at least one of these amendments. Namely, a 1928 proposed amendment seemingly grew out of concerns involving not only migratory divorce but also fears that the

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 147.

²⁷⁹ See Carriere, *supra* note 20, at 1742 (“Migratory divorce’s many harms provided an impetus for two centuries of divorce reform, both conservative and liberal.”).

²⁸⁰ See generally Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 666–85 (2004) (compiling all proposed amendments regarding marriage to the U.S. Constitution, including those “relating to the evasion of state marriage or divorce laws” as well as those “relating to Congress’s jurisdiction over divorce”); see also RILEY, *supra* note 39, at 111 (“[B]eginning in 1884, at every session of Congress, members considered motions suggesting that the Constitution be amended.”).

²⁸¹ Stein, *supra* note 280, at 681 (citing H.R.J. Res. 83, 67th Cong. (1921)).

²⁸² BLAKE, *supra* note 11, at 149.

²⁸³ Stein, *supra* note 280, at 669 (citing S.J. Res. 2, 50th Cong., 1st Sess. (1877)).

Fourteenth Amendment might be interpreted to prohibit state restrictions on interracial marriage:

The Congress shall have power to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimation of children, and the care and custody of children affected by annulment of marriage or by divorce, but the power to legislate concerning the relation between persons of different races is hereby reserved to and may be exercised by the several States.²⁸⁴

Finally, an 1899 proposal seemed designed to not only give Congress the power to regulate divorce but also to establish a religious affiliation for the entire nation: “The Congress, as the highest law-making power of a Christian nation, shall have exclusive power to regulate marriage and divorce in the several States, Territories, and the District of Columbia.”²⁸⁵

Despite the number of proposed amendments, “[n]one garnered enough support to come to a vote.”²⁸⁶ Multiple reasons exist for this failure. First, there was concern that giving Congress control over marriage and divorce would simply make it too difficult for individuals to obtain a divorce.²⁸⁷ Over the years, a growing number of people had started to recognize the value of divorce.²⁸⁸ For women, in particular, divorce had come to be seen increasingly as a “solution to problems posed by desertion, spousal abuse, or the laws of coverture.”²⁸⁹ Thus, many viewed “the divorce mills [as] providing a needed service by countering the unjust laws that prohibited individuals from exiting destructive unions in their home states.”²⁹⁰ Second, many conservatives feared that whatever rules Congress came up with

²⁸⁴ *Id.* at 683 (citing H.R.J. Res. 162, 70th Cong., 1st Sess. (1928)).

²⁸⁵ *Id.* at 673 (citing S.J. Res. 40, 56th Cong., 1st Sess. (1899)).

²⁸⁶ See RILEY, *supra* note 39, at 111 (noting that none of the proposed amendments ever “garnered enough support to come to a vote”).

²⁸⁷ See RILEY, *supra* note 39, at 118 (noting the fear some had that “restricted divorce provisions . . . would hurt wives by reducing the ease of divorce, thus forcing wives to remain in harmful marriages”). This point was particularly relevant when it came to a constitutional amendment given that “[a]n amendment of this nature would interfere with the privacy of the individual and the right of citizens to make decisions about their personal lives.” *Id.* at 111.

²⁸⁸ See BARBER, *supra* note 10, at 68 (“To many Americans, the increasing availability and frequency of divorce was a sign of emancipation, not regression.”). Consider, for instance, the words of William E. Carson, writing in 1915: “[I]t is clear that divorce is not in itself a disease, but is a remedy for a disease.” WILLIAM E. CARSON, *THE MARRIAGE REVOLT: A STUDY OF MARRIAGE AND DIVORCE* 461 (1915) (noting that “the increase of divorce is, in reality, a healthy sign, proving, as it does, that people have become less tolerant of evils which were once endured and for which divorce is the only remedy”).

²⁸⁹ Estlin, *supra* note 199, at 392. Elizabeth Cady Stanton, for instance, wrote in 1902 that “[t]he states that have more liberal divorce laws are for women today what Canada was for the fugitive in the old days of slavery.” BLAKE, *supra* note 11, at 150–51.

²⁹⁰ BARBER, *supra* note 10, at 68.

regarding divorce, they likely would not be as restrictive as those currently operating in some states, thus forcing some states to adopt more liberal divorce laws. After all, during much of this time, New York still only permitted divorce on the grounds of adultery,²⁹¹ and South Carolina did not permit divorce at all between the years of 1878 and 1949.²⁹² Although it was the “archaic laws”²⁹³ of states like these that many believed were driving migratory divorce by incentivizing their citizens to seek divorces elsewhere,²⁹⁴ the same states were nonetheless opposed to any attempt by Congress to force them to relax those restrictions. As one representative from South Carolina said, “Why should we be forced to lower our standard of morality because you want to raise yours?”²⁹⁵

The final impediment to adopting a Constitutional amendment regarding divorce was general concerns regarding state sovereignty. As expressed by an 1897 editorial in the *New York Times*, “a constitutional amendment would be ‘contrary to the whole theory of the constitution and subversive of the principles upon which the distinction between State and Federal jurisdiction is founded.’”²⁹⁶ Although some were inspired by the positive benefits that had accrued as a result of the Reconstruction Amendments,²⁹⁷ which had likewise diminished states’ rights, “most Congressmen felt that the situation was not grave enough to justify increasing the power of the federal government at the expense of the states.”²⁹⁸

As such, the last proposal to amend the Constitution to protect against migratory divorce would come in 1963, providing that “[t]he laws of the State, territory, Commonwealth or possession of the United States in which a marriage is contracted shall be the controlling law in any proceeding for the dissolution of such marriage instituted in any other State”²⁹⁹ Like all such proposals that had come before it, it never even came up for a vote.³⁰⁰

²⁹¹ See *supra* note 174 and accompanying text.

²⁹² See *supra* note 175 and accompanying text.

²⁹³ BLAKE, *supra* note 11, at 143.

²⁹⁴ See *infra* note 304 and accompanying text.

²⁹⁵ DiFonzo, *supra* note 74, at 920.

²⁹⁶ WILLIAM L. O’NEILL, *DIVORCE IN THE PROGRESSIVE ERA* 248 (1967); see also RILEY, *supra* note 39, at 111 (“[D]efenders of states’ rights also saw national divorce legislation as a threat to states’ long-standing regulation of the marital status of their citizens.”).

²⁹⁷ See BLAKE, *supra* note 11, at 133 (“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.”).

²⁹⁸ O’NEILL, *supra* note 296, at 240.

²⁹⁹ Stein, *supra* note 280, at 684 (H.R.J. Res. 176, 88th Cong., 1st Sess. (1963)).

³⁰⁰ *Id.*; see also *supra* note 286 and accompanying text.

2. Attempts to Create Uniform Legislation

Divorce reformers were by no means ignorant of the challenges associated with any attempt to amend the Constitution.³⁰¹ As a result, contemporaneous with those attempts were efforts aimed at voluntary action among the states, specifically regarding uniform legislation prescribing divorce jurisdiction. In fact, as one commentator describes, “uniformity was the single most talked about solution to the divorce problem.”³⁰² Leading that charge was New York, the state which stubbornly maintained only one ground for divorce³⁰³ and, correspondingly, from which many residents traveled to sister states to obtain a divorce.³⁰⁴ In 1889, New York Governor David B. Hill called upon the legislature to create a “Commission for the Promotion of Uniform Legislation in the United States.”³⁰⁵ Other states followed suit, and soon the various commissions would join forces, becoming the National Conference of Commissioners on Uniform State Laws.³⁰⁶

The aim was to promulgate a uniform code relating to divorce that a large number of states would adopt and, thus, “bring laws into greater harmony so as to eliminate the attraction of divorce migration.”³⁰⁷ The first such proposal by the National Conference came in 1900 when it issued a model statute intended to “attack[] directly, and . . . effectively, three of the greatest evils, considered from a legal standpoint, of the present condition of our various and conflicting divorce laws.”³⁰⁸ The first such “evil” was “the scandal of migratory divorces,”³⁰⁹ and indeed, the text suggests that much of the proposal was aimed at making such divorces more difficult to obtain:

³⁰¹ See BLAKE, *supra* note 11, at 141 (describing how reformers thought “all efforts to secure the passage of a constitutional amendment would be ‘futile’”).

³⁰² O’NEILL, *supra* note 296, at 252; see also PARKMAN, *supra* note 179, at 17 (“The increased use of migratory divorces . . . created pressures for uniform laws throughout the United States.”).

³⁰³ See DiFonzo & Stern, *supra* note 79, at 560–64.

³⁰⁴ See, e.g., BLAKE, *supra* note 11, at 171 (“In 1935, it was estimated that transients from New York and New Jersey were the parties in about three-fifths of Nevada’s divorce cases.”).

³⁰⁵ RILEY, *supra* note 39, at 111.

³⁰⁶ *Id.* at 112 (“[T]he governors of Massachusetts, New Jersey, Pennsylvania, Delaware, and Michigan had appointed state commissions to study uniform divorce legislation.”). In addition, Blake notes that, “by 1898, a total of thirty-two states and one territory were cooperating in the movement.” BLAKE, *supra* note 11, at 137.

³⁰⁷ PHILLIPS, *supra* note 34, at 161.

³⁰⁸ *Tenth Annual Conference of State Commissioners for the Promotion of Uniformity of Legislation in the United States*, in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 5, 45 (1900).

³⁰⁹ *Id.* Second was “the wrong of speedy decrees against absent defendants, who may be ignorant of any suit pending” and third was “the Interstate confusion arising from some few states forbidding remarriage, while a great majority of the states permit it.” *Id.*

Section. 1. No divorce shall be granted for any cause arising prior to the residence of the complainant or defendant in this State, which was not a ground for divorce in the State where the cause arose.

Sec. 2. No person shall be entitled to a divorce for any cause arising in this State, who has not had actual residence in this State for at least one year next before bringing suit for divorce, with a bona fide intention of making this State his or her permanent home.

Section 3. No person shall be entitled to a divorce for any cause arising out of this State unless the complainant or defendant shall have resided within this State for at least two years next before bringing suit for divorce, with a bona fide intention of making this State his or her permanent home.³¹⁰

This first proposal dealt only with divorce jurisdiction and not the grounds upon which states should condition a grant of divorce.³¹¹ When it came to that question, the National Conference would not attempt to provide an answer until several years later. The problem was the delegates' inability to agree on what form a uniform divorce standard should take. When they first met in Washington in 1906, it appeared they did agree on quite a few issues: "a two-year residency requirement; personal notification of a defendant rather than notification by publication; public divorce hearings; and a one-year ban on remarriage."³¹² On the subject of divorce grounds, however, discussions broke down.³¹³ After all, although the primary goal was to encourage more liberal states to become more restrictive when it came to permitting divorce, a model law would simultaneously require the most restrictive states to become more permissive.³¹⁴ As an editorial from the *New York Tribune* in 1906 put it: "States which have strict laws will hardly relax them so as to recognize

³¹⁰ *Id.* at 44.

³¹¹ See Grossman, *supra* note 21, at 96 (noting how the 1900 proposal "purported to deal only with divorce procedure") (internal quotations omitted).

³¹² RILEY, *supra* note 39, at 117.

³¹³ BLAKE, *supra* note 11, at 141–42 (describing the numerous disagreements that emerged from proposals regarding the permissive grounds for divorce); PHILLIPS, *supra* note 34, at 157 (noting how the delegates "could not agree on a single divorce code that would be acceptable to all the states").

³¹⁴ As Ann Laquer Estin explains:

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.

Estin, *supra* note 199, at 419.

six causes in place of one cause for divorce.”³¹⁵ Those states knew that if they did relax their requirements for obtaining a divorce, they would see a rise in their divorce rate—a result thought “too dear a price to pay for uniformity.”³¹⁶

In the end, the delegates seemingly compromised by recognizing six grounds, but carefully pointing out that, while those six “seem to be in accordance with the legislation of a large number of [states], this Congress, desiring to see the number of causes reduced rather than increased, recommends that no additional causes should be recognized in any state.”³¹⁷ Further, in reference to the more conservative divorce states like New York and South Carolina, the report concluded that “in those states where causes are restricted, no change is called for.”³¹⁸

When it came to when one state must recognize a divorce issued by a sister state, the model statute read as follows:

Full faith and credit shall be given in all the courts of this state to a decree of annulment of marriage or divorce by a court of competent jurisdiction in another State, territory or possession of the United States when the jurisdiction of such court was obtained in the manner and in substantial conformity with the conditions prescribed in . . . this act . . . 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.³¹⁹

In fashioning such a proposal, nobody thought it realistic to expect divorce-mill states to embrace any law that would make it more difficult to grant divorces. As one critic of the push for uniform state laws put it, “not in a thousand years could you move some of those Western States to reform their divorce laws.”³²⁰ Even so, the proposal was even less successful than hoped, and ultimately only three states adopted it.³²¹

³¹⁵ BLAKE, *supra* note 11, at 145.

³¹⁶ O’NEILL, *supra* note 296, at 247–48.

³¹⁷ See James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096, 2120 (1991). The six causes were “adultery, bigamy, conviction of felony, intolerable cruelty, willful desertion for two years, and habitual drunkenness.” BLAKE, *supra* note 11, at 142.

³¹⁸ White, *supra* note 317, at 2120.

³¹⁹ *Report of the Committee on Marriage and Divorce*, in HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING 120, 129–30 (1907).

³²⁰ O’NEILL, *supra* note 296, at 247.

³²¹ White, *supra* note 317, at 2107. As White points out, the states were Delaware, New Jersey, and Wisconsin. *Id.*

Just as religion had earlier influenced each state's approach to divorce,³²² it likewise posed a significant obstacle when it came to achieving uniformity. Around the turn of the twentieth century, a number of religious leaders became actively involved in the uniform law movement:

Episcopal Bishop William C. Doane of Albany, a strong supporter of New York's strict divorce law, spearheaded the organization of an Inter-Church Conference on Marriage and Divorce that met in 1903 and included representatives from approximately twenty-five religious denominations. In 1904, the *New York Times* reported that the American Baptist Home Mission Society had joined the growing list of religious groups favoring uniform divorce law. In 1905, the New York Tribune noted that Bishop Doane and a group of representatives from the Inter-Church Conference had urged President Theodore Roosevelt to lend his support to the law of legislative change.³²³

The problem, however, was that the different religions were just as incapable as the states in agreeing upon what was acceptable when it came to divorce. As one commentator describes: "The campaign for voluntary uniformity, although widely applauded, was doomed from the start because different religious groups with differing ideas on divorce dominated enough state legislatures to prevent the passage of model laws."³²⁴

Nonetheless, the calls for uniformity continued. Indeed, "[w]henver some dramatic episode focused attention on the migratory divorce problem, newspaper editorial writers would deplore the fact that there was no uniform national law of marriage and divorce."³²⁵ After unsuccessful proposals in 1928 and 1930,³²⁶ the National Conference scored its biggest success in 1947 when it passed The Uniform Divorce Recognition Act, the provisions of which attempted to incorporate the Supreme Court's holdings in *Williams I* and *Williams II*.³²⁷

³²² See *supra* Section II.A.; see also Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 12–13 (1997) ("Given that settlers in different parts of the country had different religious backgrounds, the grounds available for divorce varied significantly from state to state.").

³²³ RILEY, *supra* note 39, at 114.

³²⁴ O'NEILL, *supra* note 296, at 253.

³²⁵ BLAKE, *supra* note 11, at 133.

³²⁶ See Grossman, *supra* note 21, at 97. For instance, the 1930 proposal provided "that no court would exercise divorce jurisdiction unless both parties were domiciled in the state in which the court was located or, if only one party was, then the domicile must have continued for one uninterrupted year prior to filing for divorce." *Id.*

³²⁷ *Id.* at 100 ("The 1947 Uniform Divorce Recognition Act reflected the approach in the two *Williams* opinions.").

Section 1: A divorce obtained in another jurisdiction shall be of no force or effect in this state if both parties to the marriage were domiciled in this state at the time the proceeding for the divorce was commenced.

Section 2: Proof that a person hereafter obtaining a divorce from the bonds of matrimony in another jurisdiction was (a) domiciled in this state within 12 months before the commencement of the proceeding therefor, and resumed residence in this state within 18 months after the date of the person's departure therefrom, or (b) at all times after the person's departure from this state and until the person's return maintained a place of residence within this state, shall be prima facie evidence that the person was domiciled in this state when the divorce proceeding was commenced.³²⁸

Even then, however, the proposed statute was only adopted in nine states,³²⁹ and those states rarely relied upon it.³³⁰ In fact, the National Conference would ultimately withdraw the proposal due to it being "obsolete."³³¹

In the end, the 1947 proposal would be the final model statute on divorce jurisdiction put forth. Of course, as outlined above,³³² the Supreme Court by that time had largely settled the constitutional standards regarding state recognition of foreign divorce decrees and, thus, there existed considerably less space within which state laws on that topic could operate.

IV. LASTING IMPACTS

Although migratory divorce may have come to an end in the late 1960s, its impact on the law of domestic relations continues to this day. It is the position of this Article, in fact, that in many ways, the migratory divorce era represents a watershed period in the development of contemporary family law—one that courts, policymakers, and contemporary family law scholars must be mindful of as they

³²⁸ See *Proceedings of the Annual Meeting of the Association*, 23 CONN. B.J. 98, 122 (1949) (quoting proposal).

³²⁹ See 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, 1400 (1967) ("The Uniform Divorce Recognition Act, framed to discourage rather than encourage migration in pursuit of divorce, has been adopted by only nine states.") (internal quotations omitted).

³³⁰ See, e.g., *Dietrich v. Dietrich*, 261 P.2d 269 (Cal. 1953) (holding that, despite the language of the Uniform Divorce Recognition Act, that defendant was estopped from asserting the invalidity of the plaintiff's Nevada divorce given that the defendant married the plaintiff in California the day following the Nevada decree).

³³¹ See Nancy G. Maxwell, *Unification and Harmonization of Family Law Principles: The United States Experience*, in PERSPECTIVES FOR THE UNIFICATION AND HARMONISATION OF FAMILY LAW IN EUROPE 249, 265 (Katharina Boele-Woelki ed., 2003).

³³² See *supra* Section III.A.

confront a number of contemporary issues affecting families. Particularly relevant are the complex social, legal, and political influences that contributed to the phenomenon of migratory divorce, as well as the responses that either failed or ultimately proved successful in addressing the resulting legal questions. To illustrate the role this history continues to play in the law of domestic relations, this Part looks at four themes found in contemporary family law debates, noting the connections that each one shares with migratory divorce in general and also identifying some of the specific legal inquiries currently taking place that may benefit from a greater understanding of this historical period. Although it is beyond the scope of this Article to posit solutions to all those contemporary debates, it is hoped that by drawing these connections to migratory divorce, those actively engaged in those debates will utilize this history to more effectively advance viable solutions to those problems.

A. Individual Rights v. States' Rights

Writing in 1881, the Supreme Court described state power concerning the law of domestic relations as follows: “The State . . . has absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”³³³ One consequence of the migratory divorce cases, however, was to forever alter that balance.³³⁴ Consider, for instance, Justice Black’s 1945 dissent in *Williams II*, where he noted that the “Constitution preserves an area of individual freedom which the state has no right to abridge.”³³⁵ For that reason, Black disagreed with the majority’s conclusion that North Carolina could second-guess Nevada’s adjudication of domicile, noting that “[t]he 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.”³³⁶ As such, Black criticized the majority opinion as resting on “a restriction of individual as opposed to state rights.”³³⁷

Although only a minority view at the time of the two *Williams* cases, one of the lasting legacies of migratory divorce and the Supreme Court cases it spawned is the idea that divorce is not so much an issue of state sovereignty but is more so one of individual rights. As Ann Laquer Estin explains, those cases “resolved a long-standing federalism problem by redefining the scope of state power over marital status . . . fundamentally alter[ing] state power over the family by extending to individuals greater control over their marital status.”³³⁸ Thus, whereas family law

³³³ *Pennoyer v. Neff*, 95 U.S. 714, 734–35 (1878).

³³⁴ See Estin, *supra* note 199, at 381 (noting how the migratory divorce cases “fundamentally altered state power over the family by extending to individuals greater control over their marital status”).

³³⁵ *Williams v. North Carolina*, 325 U.S. 226, 267 n.8 (1945) (Black, J., dissenting).

³³⁶ *Id.*

³³⁷ *Id.* at 267 n.8, 262 (“The fact that two people will be deprived of their constitutional rights impels me to protest as vigorously as I can against affirmance of these convictions.”).

³³⁸ Estin, *supra* note 199, at 381.

was once considered to be entirely an issue of state control,³³⁹ there now existed a “growing emphasis on privacy and individual rights.”³⁴⁰ Indeed, looking at the migratory divorce cases, the Court’s earliest decisions focused much more on the states’ right to control the marital status of their citizens.³⁴¹ By the end, however, “marital status had become an aspect of personhood, and the right to change that status became a privilege of national citizenship.”³⁴² Consider, for instance, the *Sherrer* and *Johnson* decisions,³⁴³ which in essence permitted divorce by mutual consent of the parties.³⁴⁴ By 1971, the Supreme Court would go even further, characterizing divorce proceedings as “the adjustment of a fundamental human relationship.”³⁴⁵

The impact of that shift lives on today and has spawned a whole host of complex questions regarding the family. First, as one commentator explains, “[g]reater solicitude for individual prerogatives in the area of family relations can be identified in the Court’s post-*Williams II* decisions, which base personal jurisdiction for custody and child support actions on in personam jurisdiction instead of domicile.”³⁴⁶ But such reverberations extend much further than simply the incidences of legal divorce. In the decades that followed, the Supreme Court would begin focusing on the personal liberty interests at play in various aspects of domestic relations law. In the process, the law of the family, which had once been seen as entirely the province of state law, would become increasingly subject to constitutional constraints. Consider, for instance, cases like *Griswold v. Connecticut*³⁴⁷ and *Eisenstadt v. Baird*,³⁴⁸ which ruled unconstitutional state restrictions on contraception. In turn, those cases gave rise to a fundamental right to

³³⁹ Steven Mintz, *Children, Families and the State: American Family Law in Historical Perspective*, 69 DENV. UNIV. L. REV. 635, 648 (1992) (describing how the law once “viewed families as instruments of the state”).

³⁴⁰ *Id.* at 636.

³⁴¹ See, e.g., *Andrews v. Andrews*, 188 U.S. 14, 31 (1903) (holding that to say Massachusetts was required to recognize the foreign divorce would undermine the “authority of the state of Massachusetts to legislate over a subject inherently domestic in its nature and upon which the existence of civilized society depends”); see also Sumner, *supra* note 3, at 2 (noting how those cases seemingly evinced “greater concern over the states’ interests than there was with the desires, rights and status of individuals”).

³⁴² Estin, *supra* note 199, at 425.

³⁴³ See *Sherrer v. Sherrer*, 334 U.S. 343 (1948); *Johnson v. Muelberger*, 340 U.S. 581 (1951); *Williams v. State of North Carolina*, 325 U.S. 226 (1945).

³⁴⁴ Estin, *supra* note 199, at 409 (describing how the two cases “appeared to have ratified” the understanding “that despite the stringencies of the law on the books, the law in fact offered opportunities for couples to divorce by mutual agreement”).

³⁴⁵ See *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971).

³⁴⁶ Nick Tarasen, *Untangling the Knot: Finding A Forum for Same-Sex Divorces in the State of Celebration*, 78 UNIV. CHI. L. REV. 1585, 1612 (2011).

³⁴⁷ See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

³⁴⁸ See *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

privacy,³⁴⁹ upon which the Court would subsequently build in *Roe v. Wade*³⁵⁰ and *Lawrence v. Texas*³⁵¹ to strike down abortion restrictions and laws criminalizing sodomy, respectively. During this time, the Court would likewise recognize other fundamental rights in the realm of family law, including parents' rights to direct the upbringing of their children³⁵² and the right to marry the person of one's choice.³⁵³

In many respects, then, the phenomenon of migratory divorce opened the door to the law of domestic relations taking on increasing constitutional dimensions, and it is that legacy with which the law must continue to wrestle today. One particular aspect that continues to fuel these difficult questions is the Court's willingness to decouple family law protections from overly formalistic state definitions of "family." As one commentator has described, the "new notions of privacy, sexual equality and children's rights produced a revolution in American family law"—one that has prompted "a gradual erosion in the traditional conception of the nuclear family as a legal entity with its own distinctive rights."³⁵⁴ Consider, for instance, *Eisenstadt*, where the Court held that the right to contraception likewise encompasses unmarried individuals,³⁵⁵ or *Levy v. Louisiana*, where the Court began to strike down state laws that discriminated against nonmarital children.³⁵⁶ Building on these precedents, both courts and scholars continue to address related questions of whether and to what extent family law protections should extend to those who fail to satisfy the legal definitions of "spouse" or "child." For example, a number of legal commentators are engaged with questions involving whether cohabitants are, despite not being married, nonetheless entitled to family law protections.³⁵⁷ Others

³⁴⁹ See Derrick Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 77 (1985) (describing the right of privacy as being "recognized and protected in" *Griswold* and *Eisenstadt*).

³⁵⁰ See *Roe v. Wade*, 410 U.S. 113 (1973).

³⁵¹ See *Lawrence v. Texas*, 539 U.S. 558 (2003).

³⁵² See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

³⁵³ See *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations."); *Obergefell v. Hodges*, 576 U.S. 644, 666 (2015) ("There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices.").

³⁵⁴ Mintz, *supra* note 339, at 653.

³⁵⁵ *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) ("[W]hatever the rights of the individual to access to contraceptives may be, the rights must be the same for the unmarried and the married alike.").

³⁵⁶ *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that "[l]egitimacy or illegitimacy of birth has no relation" to the right at issue).

³⁵⁷ See, e.g., Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 2 (2017) (calling "for moving beyond the marriage-nonmarriage dyad in allocating property rights between individuals who are not, or have not been, married"); Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1509 (2016) (noting that "states have

are engaged with the complicated question of whether a person is entitled to the constitutional protections afforded parents when that person is neither the child's biological nor adoptive parent.³⁵⁸

Beyond expanding family law protections to those who might not have traditionally qualified as “family,” there is the related question of whether those who already meet those definitions might nonetheless be entitled to greater rights than have historically been recognized. Consider, for instance, the question of whether children might enjoy constitutional rights independent of their parents’ wishes and directives. The Supreme Court decisions in the context of abortion suggest that the answer is yes,³⁵⁹ but there are some who argue that children enjoy individual rights that extend even further.³⁶⁰ Similarly, the degree to which grandparents might enjoy constitutional protections vis-à-vis their grandchildren is a question that the Supreme Court has explored but never answered.³⁶¹ As contemporary legal minds continue

routinely responded to the legalization of same-sex marriage by eliminating their nonmarital statuses” and discussing the harms that have resulted); Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 50 (2015) (arguing that “cohabiting couples whose relationship shows that they are (or were) deeply committed to one another [should be treated] as married in fact”).

³⁵⁸ See, e.g., Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1491 (2018) (arguing “for a definition of constitutional parenthood that accounts not only for those who share a biological connection to the child, but also those who were the intended parents of the resulting child, regardless of biology”); Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. 261, 261 (2020) (challenging “the conventional assumption that the Constitution protects only biological parent-child relationships and makes an affirmative case for constitutional protection for nonbiological parents”); David D. Meyer, *The Constitutionality of “Best Interests” Parentage*, 14 WM. & MARY BILL RTS. J. 857, 860 (2006) (“[T]he circumstances that enabled the law’s tidy assumptions linking parenthood with biology and adoption have collapsed.”).

³⁵⁹ See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 899 (1992) (“Our cases establish, and we reaffirm today, that a State may require a minor seeking an abortion to obtain the consent of a parent or guardian, provided that there is an adequate judicial bypass procedure.”).

³⁶⁰ See, e.g., Anne C. Dailey & Laura A. Rosenbury, *The New Law of the Child*, 127 YALE L.J. 1448, 1453 (2018) (arguing for what the authors describe as “a direct departure from existing constitutional law,” a new approach to children’s rights which “would recognize children’s affirmative rights as children to certain goods and services essential to furthering their broader interests”); Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 362 (1994) (arguing “that the law should accord children an independent liberty interest in their relationships with both ‘legal parents’ and ‘nonlegal parents’ irrespective of biological ties”).

³⁶¹ In *Troxel v. Granville*, the Supreme Court ruled against grandparents seeking greater visitation on the basis that the Washington statute upon which they relied was overly broad. 530 U.S. 57, 72–73 (2000). The Court, however, explicitly did not address the question of “whether the Due Process Clause requires all nonparental visitation statutes to include a

analyzing these and related questions, it is helpful to remember the story of migratory divorce. Given the impetus it provided for recognizing the constitutional dimensions afforded individual members of a “family” and the resulting doctrines that flow from such recognition, that era provides a number of invaluable tools for analyzing these contemporary tensions between family law and individual rights.

B. Societal Evolution, Self-Correction, and Enduring Harm

One of the biggest influences behind the rise in migratory divorce was quite simply the fact many states refused to provide the legal remedy that their citizens longed for.³⁶² Specifically, divorce became more socially acceptable once people realized the advantages that came from dissolving marriages that were broken.³⁶³ Thus, when they could not obtain the relief that they desired in their home states, people naturally began to look for relief elsewhere. Thus, as one judge, writing in 1942, would characterize it, those who traveled to other states in search of divorce were simply “the victims of a legal system of divorce at war with social convention.”³⁶⁴ And, after decades of debating the social desirability of migratory divorce and countless attempts to curb it, the practice instead ended as a result of—in the words of Joanna Grossman—“a social movement that perhaps unexpectedly produced virtually uniform laws of divorce: the no-fault revolution. The revolution did not come about because of the desire for uniformity; uniformity, rather, was an unintended byproduct of a percolating demand for easier, less costly, and more honest divorce.”³⁶⁵

The lesson to be derived here is that the law of domestic relations is essentially driven by the public’s evolving conceptions of family. And to the extent the law is slow to recognize such change, societal forces will eventually force a self-correction. In this regard, migratory divorce was certainly not the last example of this phenomenon. Consider, for instance, the degree to which the law completely reversed course when it came to the legality of prenuptial agreements. Originally dismissed as violative of public policy, courts were unwilling to enforce any such agreements that contemplated the possibility of divorce.³⁶⁶ However, as social acceptance for cohabitation rose and—at the same time—people became increasingly dissatisfied with the lack of control spouses had regarding property

showing of harm or potential harm to the child as a condition precedent to granting visitation.” *Id.* at 73.

³⁶² See Garfield, *supra* note 19, at 504 (describing migratory divorce as “a predictable consequence of overly restrictive divorce laws”); see also *supra* notes 72–75 and accompanying text.

³⁶³ See *supra* notes 286–288 and accompanying text.

³⁶⁴ *Ruppert v. Ruppert*, 134 F.2d 497, 502 (D.C. Cir. 1942) (Rutledge, J., concurring).

³⁶⁵ Grossman, *supra* note 21, at 97.

³⁶⁶ Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 150 (1998) (“Until the mid-1970s, most American courts held that premarital agreements and other contracts made ‘in contemplation of divorce’ were unenforceable as against public policy.”).

division at divorce, more couples opted to forego marriage and not risk the financial consequences that would follow a divorce.³⁶⁷ In response, courts soon began taking a different position. Given the states' interest in encouraging marriage,³⁶⁸ courts in the early 1970s began upholding the agreements.³⁶⁹ Today such agreements are permitted in every state.³⁷⁰

To point out that family law will eventually catch up with the reality of American lives is hardly revolutionary; however, that is not the point. Instead, the principle to be gleaned from the example set by migratory divorce is that family law must be vigilant when it comes to recognizing areas in which it is out of sync. After all, the fact that the law will eventually self-correct is of little comfort to those who are adversely impacted by the law prior to that rectification. Consider, for instance, the plaintiffs in *Williams* who were ultimately sentenced to prison terms simply by virtue of having received a divorce in Nevada.³⁷¹ More generally, consider those who were trapped in broken marriages because their states essentially denied them the opportunity to obtain a divorce and a migratory divorce was not an economically feasible option. Similar harms would have befallen those who, prior to the time states changed their minds about prenuptial agreements, entered into a marriage thinking they were protected by a contract that was ultimately deemed unenforceable. Or, for a more contemporary example, consider that there were countless same-sex relationships that never obtained the protections of marriage simply because those relationships ended—either through death or informal dissolution—while awaiting the legalization of same-sex marriage.³⁷²

³⁶⁷ See, e.g., Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 896 (1997) (describing how “[i]f previously married individuals can’t contract to avoid the most unpleasant aspects of divorce, they might simply choose not to get married”); Carolyn Counce, *Family Law—Cary v. Cary: Antenuptial Agreements Waiving or Limiting Alimony in Tennessee*, 27 U. MEM. L. REV. 1041, 1047 (1997) (pointing out that “the once prevalent societal constraints on living together without marriage have largely disappeared,” and thus, couples might not remarry “if they had no means of limiting the extent of their liability”).

³⁶⁸ See Matsumura, *supra* note 357, at 1556 (noting the “state’s interest in encouraging marriage”).

³⁶⁹ The first court credited with doing so is the Supreme Court of Florida. See Posner v. Posner, 233 So.2d 381, 387 (Fla. 1970). Other states soon followed Florida’s lead. See Stephen T. Gary, *To Agree or Not to Agree: Treatment of Postnuptial Agreements Under Oklahoma Law*, 63 OKLA. L. REV. 779, 784 n.27 (2011) (listing cases).

³⁷⁰ See Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 254 (1994) (noting that “[a]ll states recognize, to some extent, the enforceability of premarital agreements”).

³⁷¹ Fortunately, the couple whose Nevada marriage gave rise to *William I* and *William II* apparently escaped punishment. A story in *Life* magazine from 1945 reported that the two “were granted a reprieve by the state on condition that they remarry in North Carolina,” which they did in August of 1945. Fred Rodell, *Divorce Muddle*, LIFE, Sept. 3, 1945, at 90.

³⁷² See Michael J. Higdon, *While They Waited: Pre-Obergefell Lives and the Law of Nonmarriage*, 129 YALE L.J. F. 1, 1 (2019).

Such considerations are important because there are currently a number of legal issues relating to family law that arise from the law's failure to recognize evolving norms. To name but two are the laws relating to cohabitating couples and those relating to parentage. In terms of cohabitation, couples who once lived with one another outside of marriage did so at great peril, given that the law refused to afford them any rights or remedies vis-à-vis one another.³⁷³ Although California in the 1970s opened the door for cohabitants to enter into enforceable agreements regarding property distribution,³⁷⁴ most states continue to deny meaningful protections to unmarried cohabitants. Indeed, a few states refuse to permit any recovery whatsoever³⁷⁵ and, even among those that do, almost all condition recovery on the existence of a contract—a formality few cohabitating couples would think to undertake.³⁷⁶ This inertia on the law's part might not be so concerning were it not for the drastic increase in cohabitation over the last few decades.³⁷⁷ Thus, “[d]espite the growing prevalence and cultural acceptance of this form of household, and wide-ranging support for providing a more diverse menu of family-configuration choices beyond just marriage, legal protections for unmarried cohabitants are limited and largely stagnant.”³⁷⁸ In terms of parentage, a number of scholars have pointed out the mismatch that currently exists when it comes to how the law limits legal

³⁷³ Elizabeth Hodges, *Will You “Contractually” Marry Me?*, 23 J. AM. ACAD. MATRIM. LAWS. 385, 398 (2010) (“[H]istorically cohabitation has had a negative connotation both socially and legally.”).

³⁷⁴ See *Marvin v. Marvin*, 557 P.2d 106, 112 (Cal. 1976) (holding that (1) express contracts between cohabitants regarding property distribution were enforceable so long as they were not conditioned “upon the immoral and illicit consideration of meretricious sexual services” and (2) in the absence of an express agreement, recovery was likewise permitted on the basis of implied contract and other equitable remedies).

³⁷⁵ See Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2020 (2018) (“Georgia, Illinois, and Louisiana seem to go further, rejecting any claim arising from a cohabitant relationship.”).

³⁷⁶ See Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 262 (2004) (describing the “contract-based” approach as the “default framework”).

³⁷⁷ For instance, U.S. Census data reveals that not only did the number of cohabitating couples increase seventy-two percent between 1990 and 2000, Christopher Marquis, *Total of Unmarried Couples Surged in 2000* U.S. Census, N.Y. TIMES (Mar. 13, 2003), <https://www.nytimes.com/2003/03/13/us/total-of-unmarried-couples-surged-in-2000-us-census.html> [<https://perma.cc/ZC2Z-J7XS>], but the number of cohabitating couples also increased an additional forty-one percent between 2000 and 2010. DAPHNE LOFQUIST, TERRY LUGAILA, MARTIN O’CONNELL & SARAH FELIZ, U.S. CENSUS BUREAU, HOUSEHOLD AND FAMILIES: 2010 5 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> [<https://perma.cc/JSW9-FDDK>].

³⁷⁸ *Restitution at Home: Unjust Compensation for Unmarried Cohabitants’ Domestic Labor*, 133 HARV. L. REV. 2124, 2124–25 (2020); see also *supra* note 357 and accompanying text.

parenthood to biological and adoptive parents.³⁷⁹ After all, with advances in assisted reproduction, the legalization of same-sex marriage, and the increased frequency of divorce, remarriage, and cohabitation, states now regularly encounter claims of parental identity that thirty years ago would have been unimaginable.³⁸⁰ Yet, a number of states have ignored the need for more nuanced laws regarding legal parentage, and even among those that have made some changes, rights and protections vary greatly from state to state.³⁸¹

These are but two examples of contemporary family law debates that stem from the laws' failure to adjust to the new reality of American lives. Looking at the lessons gleaned from the history of migratory divorce, lawmakers would be wise to recognize that societal forces will almost always force a self-correction; however, the longer the delay, the greater the number of lives and relationships will be forever harmed. In the context of domestic relations law, such harm is particularly salient given that the states' obligation to protect individuals is one of family law's "most basic duties,"³⁸² and in the words of Carl Schneider, who is credited with describing this "protective function" of family law, doing so requires "protecting people from physical harm, as the law of spouse and child abuse attempts to do, *and from non-physical harms*, especially economic wrongs and psychological injuries."³⁸³

C. Full Faith and Credit's Limitations on State Exceptionalism

One of the most enduring lessons of the migratory divorce era was the degree to which the Full Faith and Credit Clause effectively limits a state's ability to refuse recognition of a divorce decree issued by a sister state.³⁸⁴ Consider, for instance, an early Massachusetts' statute aimed at refusing enforcement of migratory divorces:

A divorce decreed in another State or country according to the laws thereof, by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this commonwealth; but if an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this

³⁷⁹ See Higdon, *supra* note 358; see also Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 656 (2008) ("[I]t is important to distill out the different attributes of bionormativity in order to balance the competing priorities that inform a conceptualization of parenthood."); Ayelet Blecher-Prigat, *Conceiving Parents*, 41 HARV. J.L. & GENDER 119, 145 (2018) (arguing that "relationships should be considered together with both intent and biology" in determining legal parentage).

³⁸⁰ See Higdon, *supra* note 358, at 1486 ("These changes have raised a number of questions that, 30 years ago, would have been unheard of.").

³⁸¹ *Id.* at 1483.

³⁸² Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497 (1992).

³⁸³ *Id.* (emphasis added).

³⁸⁴ See *supra* Section III.A.

Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth.³⁸⁵

Although the Supreme Court would side with Massachusetts in 1903 on its ability to legislate in this manner,³⁸⁶ the Court was forced to revisit the issue as the constitutional questions arising from migratory divorce proved more complex. Ultimately, the Supreme Court would rule that any state could dissolve the marital status of one who was domiciled there, resulting in a divorce decree that sister states were constitutionally required to recognize.³⁸⁷ In light of the Supreme Court's evolving jurisprudence on that issue, states were forced to accept that, realistically, they had very little power when it came to defining what sorts of divorces they would accept.

Similar debates concerning full faith and credit are playing out today. For example, the issue of same-sex marriage raised the question of whether the Full Faith and Credit Clause might extend beyond divorce to other familial statuses. By way of background, in 1993, the Supreme Court of Hawaii suggested that its state constitution might require the legalization of same-sex marriage,³⁸⁸ and this decision quickly led to a nationwide panic.³⁸⁹ The concern was that such an action—analogueous to Nevada's legalization of “quickie divorces”—would, in essence, legalize same-sex marriage throughout the United States as Americans would travel to Hawaii to wed their same-sex partners and then return home, demanding that their

³⁸⁵ See *Andrews v. Andrews*, 188 U.S. 14, 29 (1903) (quoting the Massachusetts statute).

³⁸⁶ See generally *Atherton v. Atherton*, 181 U.S. 155 (1901); *Andrews v. Andrews*, 188 U.S. 14 (1903).

³⁸⁷ See generally *Davis v. Davis*, 305 U.S. 32 (1938); *Williams v. North Carolina*, 317 U.S. 287 (1942); *State v. Williams*, 17 S.E.2d 769 (N.C. 1941).

³⁸⁸ See *Baehr v. Lewin*, 852 P.2d 44, 67 (Haw. 1993). In that case, the court ruled that, although there was no fundamental right to same-sex marriage, under the Hawaii Constitution “sex is a ‘suspect category’ for purposes of equal protection analysis.” *Id.* For that reason, the court held that the state's discriminatory definition of marriage was presumptively unconstitutional, and the state could only rebut that presumption by a showing that “(a) the statute's sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights.” *Id.*

³⁸⁹ See Keith Cunningham-Parmeter, *Marriage Equality, Workplace Inequality: The Next Gay Rights Battle*, 67 FLA. L. REV. 1099, 1107 (2015) (“[W]hen the Hawaii Supreme Court shocked the nation in 1993 and ruled in favor of Nina Baehr's petition to marry her female partner in *Baehr v. Lewin*, the issue of same-sex marriage drew prominent national attention.”); David L. Chambers & Nancy D. Polikoff, *Family Law and Gay and Lesbian Family Issues in the Twentieth Century*, 33 FAM. L.Q. 523, 526 (1999) (noting how the Hawaii opinion “stirred by far the most attention, for it led to the first appellate decision in the United States suggesting that same-sex couples were constitutionally entitled to marry and produced a seismic political reaction in Hawaii and the mainland”).

state recognize the union.³⁹⁰ In response, a large number of states took preemptive action and adopted constitutional amendments proclaiming that they would only recognize marriages between one man and one woman.³⁹¹ As public pressure grew, the federal government also got involved, passing The Defense of Marriage Act in 1996.³⁹² The act declared, in part, that no state would be required to recognize same-sex marriages performed in other states.³⁹³

As the debate over same-sex marriage raged on, the question emerged as to whether a state could, consistent with the Full Faith and Credit Clause, refuse to recognize same-sex marriages validly performed in other states. The conventional wisdom was that they could indeed refuse such recognition. Basically, it had long been assumed that full faith and credit applied only to state *judgments* and not state *laws*, with marriage—unlike divorces which are clearly judgments—falling more into the latter category.³⁹⁴ As Steve Sanders explains, “[m]arriage, according to this conventional wisdom, is simply another subject for ordinary lawmaking—no different from things like workers’ compensation, insurance regulation, gas royalties, or fishing licenses—where each state gets to decide policy for itself.”³⁹⁵ As such, most scholars were fairly confident that rules regarding choice of law, and not the Full Faith and Credit Clause, would provide the proper guide for answering questions regarding marriage recognition.³⁹⁶

³⁹⁰ See Brian H. Bix, *State Interest and Marriage—The Theoretical Perspective*, 32 HOFSTRA L. REV. 93, 105–06 (2003) (“[T]he combination of national citizenship (as enforced by the Full Faith and Credit Clause) and the usual rules of recognizing marriages validly celebrated in another state, meant that . . . there was a fear . . . that all other states would have to recognize same-sex unions celebrated in Hawaii.”).

³⁹¹ See William Buss & Emily Buss, *Escaping the American Blot? A Comparative Look at Federalism in Australia and the United States Through the Lens of Family Law*, 48 CORNELL INT’L L.J. 105, 133 n.151 (2015) (“Within twelve years of the Hawaii Supreme Court’s ruling, many states, including Hawaii, had added an express ban on same-sex marriage to their laws, and a majority of these prohibitions were ultimately adopted as constitutional amendments.”).

³⁹² See Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419, 2419–20 (1996) (codified at 28 U.S.C. § 1738C (2006)).

³⁹³ See 28 U.S.C. § 1738C (2012) (“No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . .”).

³⁹⁴ See Rebecca Aviel, *Faithful Unions*, 69 HASTINGS L.J. 721, 728–34 (2018) (internal quotation marks omitted) (outlining the “conventional wisdom” of why the Full Faith and Credit Clause is inapplicable when it comes to “interstate marriage conflicts”).

³⁹⁵ Steve Sanders, *Is the Full Faith and Credit Clause Still “Irrelevant” to Same-Sex Marriage?: Toward a Reconsideration of the Conventional Wisdom*, 89 IND. L.J. 95, 96 (2014).

³⁹⁶ See, e.g., Tobias Barrington Wolff, *Interest Analysis in Interjurisdictional Marriage Disputes*, 153 U. PA. L. REV. 2215, 2222 n.18 (2005) (“As conflicts scholars must explain with increasing frequency, the decision by one state to give effect to a marriage performed in another state is a matter of comity, not constitutional or federal mandate.”).

However, during oral arguments for *Obergefell v. Hodges*³⁹⁷—the case that would ultimately make marriage equality a reality—something interesting happened: the justices seemed quite critical of the idea that marriage recognition fell outside the dictates of the Full Faith and Credit Clause. For instance, Justice Scalia expressed skepticism that “there’s nothing in the Constitution that requires a state to acknowledge . . . marriages in other states”³⁹⁸ Justice Ginsburg likewise remarked that “it is odd, isn’t it, that a divorce does become the decree for the nation [B]ut not the act of marriage.”³⁹⁹ Despite the intriguing nature of this line of questioning and what it all might portend for the intersection of marriage and full faith and credit going forward, oral argument marked the full extent to which the Court would address the issue. When Kennedy’s opinion was released in June of 2015, it did not even mention the Full Faith and Credit Clause.⁴⁰⁰ Of course, given the nature of the Court’s holding, it was unnecessary: “The Court . . . holds same-sex couples may exercise the fundamental right to marry in all States. It follows that . . . there is no lawful basis for a State to refuse to recognize a lawful same-sex marriage performed in another State on the ground of its same-sex character.”⁴⁰¹

Nonetheless, the questions raised by the Court have given further life to an excellent point raised by Joanna Grossman: “[t]he fact that the Full Faith and Credit Clause *has not* been invoked in the marriage context does not mean that it *could not* be.”⁴⁰² Indeed, a number of scholars have argued that it is applicable for a variety of reasons.⁴⁰³ For example, some have pointed out that merely leaving marriage to a choice of law analysis is problematic given such “analysis inherently favors state interests over individual rights,”⁴⁰⁴ and marriage is increasingly seen as an individual right—one subject to constitutional protection. Further, as a constitutional right, some national uniformity is required if American law is to avoid the situation in which individuals’ federal constitutional rights vary depending upon the state in

³⁹⁷ *Obergefell v. Hodges*, 576 U.S. 644 (2015).

³⁹⁸ Transcript of Oral Argument on Question 2 at 27, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (No. 14-556); *see also* Aviel, *supra* note 394, at 735 (internal quotations omitted). Aviel further points out that, when counsel conceded that Scalia’s statement was “essentially correct,” Scalia responded by saying, “Really?” *Id.*

³⁹⁹ Transcript of Oral Argument on Question 2 at 39, *Obergefell*, 576 U.S. 644 (No. 14-556).

⁴⁰⁰ *See Obergefell*, 576 U.S. 644.

⁴⁰¹ *Id.* at 681.

⁴⁰² Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 454 (2005).

⁴⁰³ *See, e.g.,* Aviel, *supra* note 394, at 721 (arguing in favor of an “interstate recognition scheme with constitutional parameters”); Sanders, *supra* note 395, at 97 (arguing “that a good argument can (and should) be made for applying full faith and credit to marriage”) (emphasis omitted).

⁴⁰⁴ Sanders, *supra* note 395, at 110 (quoting Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39, 57 (1998)); *see id.* (“Marriage and family life were once understood as matters of localism and strict government control, but today they are predominantly understood in terms of private ordering, autonomy, and individual rights.”).

which they currently reside.⁴⁰⁵ Finally, the reason for affording divorce a different analysis under the Full Faith and Credit Clause because it is a “judgment” is increasingly seen as “a matter of formalism rather than a principled distinction based on the Clause’s meaning and purposes.”⁴⁰⁶

Regardless of how that issue is ultimately resolved, the point here is that the migratory divorce era is instructive in informing that future debate. Specifically, when it comes to the role that the Full Faith and Credit Clause plays—not only in the realm of marriage recognition but also in other state law determinations regarding family—the migratory divorce cases provide a rich resource for understanding the contours of that constitutional provision as well as the degree to which it intersects with family law, which, as discussed above, has increasingly taken on an individual rights focus.⁴⁰⁷

D. Achieving Uniformity in the Face of State Sovereignty

Beyond serving as a catalyst for more liberal divorce laws nationwide, one of the most positive legacies of migratory divorce is the creation of the Uniform Law Commission.⁴⁰⁸ As detailed earlier, state concerns over migratory divorce, coupled with the realization that a constitutional amendment was unlikely, led to the establishment of this body.⁴⁰⁹ The hope was that the National Conference might be able to produce a model statute regarding divorce jurisdiction and recognition—one that a critical mass of states might adopt so as to curtail an individual’s ability to obtain a migratory divorce as well as the resulting advantage of doing so. In the end, uniformity would come not from any model statute but the nation’s demand for greater access to divorce, a demand that led to the eventual adoption of no-fault divorce in all fifty states. Nonetheless, two important lessons regarding uniform laws can be gleaned from that history. First, it became clear that where there is widespread disagreement between the states regarding either the existence of a problem or how that problem should best be addressed,⁴¹⁰ uniform laws are unlikely to be effective.

⁴⁰⁵ See *id.* at 111 (“[W]hy is it rational to have two contradictory marriage-recognition regimes in the same country, forcing same-sex couples to live as married for the purpose of one state’s law but unmarried for the purpose of another state’s law?”); see also Mark Strasser, *For Whom Bell Tolls: On Subsequent Domiciles’ Refusing to Recognize Same-Sex Marriages*, 66 U. CIN. L. REV. 339, 372 (1998) (“If the United States is to be more than a loose federation of independent sovereignties, however, states do not and cannot stand in the same relation to each other as they do to foreign countries.”).

⁴⁰⁶ Sanders, *supra* note 395, at 112 (“The doctrine of full faith and credit for divorce was established before the rise of no-fault divorce, when marriage dissolution necessarily involved some allegation of fault and thus adversarial litigation.”).

⁴⁰⁷ See *supra* Section IV.A.

⁴⁰⁸ See DiFonzo & Stern, *supra* note 79, at 567 (“Alarmed by the prevalence of disgruntled spouses taking wing for more legally hospitable habitats, New York initiated the creation of the National Conference of Commissioners on Uniform State Laws.”).

⁴⁰⁹ See Rholetter, *supra* note 84; see generally CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA (Robert E. Emery ed., 2013).

⁴¹⁰ See *supra* Section III.B.

Second, and most relevant here, is the obverse point—when states do agree on the underlying policy goals, uniform laws can offer considerable success when it comes to the law of domestic relations, helping states realize societal benefits that would have otherwise been impossible. Two of the most notable successes in that regard are the Uniform Interstate Family Support Act (UIFSA)⁴¹¹ and the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA).⁴¹² The UIFSA, which was promulgated in 1992, has been adopted in every state and has done much to overcome the jurisdictional hurdles that once thwarted efforts at collecting child support.⁴¹³ At one point, parents encountered considerable difficulties obtaining and enforcing child support orders when their state lacked jurisdiction over the other parent.⁴¹⁴ The UIFSA addressed that problem by creating a two-state proceeding whereby a parent seeking child support would file the action in her jurisdiction, and that court would then transfer the action to one that does have jurisdiction over the other parent.⁴¹⁵ As a result, the UIFSA has been credited with “successfully effect[ing] major changes to child support enforcement and recognition throughout the United States.”⁴¹⁶

Whereas the UIFSA concerns child support, the UCCJEA targets child custody. Prior to the UCCJEA, which was promulgated in 1997,⁴¹⁷ “any state with a substantial interest in the child’s welfare might take jurisdiction of a custody case.”⁴¹⁸ As a result, custody determinations regarding a single child could be spread out over multiple jurisdictions, often leading to conflicting decrees.⁴¹⁹ In addition,

⁴¹¹ See Uniform Interstate Family Support Act § 205 (Unif. L. Comm’n 1992) (amended 2015).

⁴¹² See Uniform Child Custody Jurisdiction & Enforcement Act (Unif. L. Comm’n 1997) (amended 2008).

⁴¹³ See Joseph W. Booth, *A Guide for Assisting Military Families with the Uniform Interstate Family Support Act (UIFSA)*, 43 FAM. L.Q. 203, 215 (2009) (“Because every state has used UIFSA since 1998, multiple orders are rare.”).

⁴¹⁴ See Laura W. Morgan, *Pre-Emption or Abdication? Courts Rule Federal Law Trumps State Law in Child Support Jurisdiction*, 24 J. AM. ACAD. MATRIM. LAWS. 217, 218 (2011) (describing the shortcomings of the legal landscape that predated the UIFSA).

⁴¹⁵ See Uniform Interstate Family Support Act § 203.

⁴¹⁶ Eric M. Fish, *The Uniform Interstate Family Support Act (UIFSA) 2008: Enforcing International Obligations Through Cooperative Federalism*, 24 J. AM. ACAD. MATRIM. LAWS 33, 33 (2011).

⁴¹⁷ See Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101, 130 (2004).

⁴¹⁸ ANN LAQUER ESTIN, *DOMESTIC RELATIONSHIPS: A CONTEMPORARY APPROACH* 940 (2nd ed. 2019).

⁴¹⁹ See Barry B. McGough, Elinor H. Hitt & Katherine C. McGuire, *Domestic Relations*, 68 MERCER L. REV. 107, 109 (2016) (“The UCCJEA was promulgated to address ‘problems of competing jurisdictions entering conflicting interstate child custody orders, forum shopping, and the drawn out and complex child custody legal proceedings often encountered by parties [when] multiple states are involved.’” (quoting *Delgado v. Combs*, 724 S.E.2d 436, 440 (Ga. Ct. App. 2012))).

parents who were unhappy with one state's determination could "seize and run,"⁴²⁰ taking the child to another state in hopes of receiving a more favorable decree. The UCCJEA, which has been adopted in every state but Massachusetts, remedied these problems by establishing a hierarchy of various bases for jurisdiction⁴²¹ and, with limited exceptions, provides exclusive, continuing jurisdiction to the state that made the initial custody determination.⁴²² As a result, the UCCJEA is today considered "one of the more successful uniform acts concerning jurisdictional allocation."⁴²³

The UCCJEA and the UIFSA are but two of the uniform codes promulgated by the National Conference. Others include the Uniform Parentage Act (2002);⁴²⁴ the Uniform Premarital and Marital Agreements Act (2012);⁴²⁵ the Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (2007);⁴²⁶ and the Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (2002).⁴²⁷ Although each has enjoyed varying degrees of success in terms of how widely they have been adopted, there can be no doubt that uniform laws allow for solutions that might otherwise be impossible in the face of state sovereignty. Given that unique utility, there is no doubt that the National Conference will continue to improve upon existing proposals as well as propose new uniform laws to offer solutions better tailored to the evolving nature of the American family and the growing understanding of the legal issues arising from those changes. For instance, J. Thomas Oldham has proposed a "Uniform Equitable Distribution

⁴²⁰ See Patricia M. Hoff, *The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act*, 32 FAM. L.Q. 267, 283 (1998).

⁴²¹ See Rebecca Aviel, *A New Formalism for Family Law*, 55 WM. & MARY L. REV. 2003, 2036 (2014) ("The UCCJEA [puts] the various jurisdictional bases in a hierarchy, rather than treating them as equally available alternatives from which a court could select one or another at its own discretion.").

⁴²² See Kevin Wessel, *Home Is Where the Court Is: Determining Residence for Child Custody Matters Under the UCCJEA*, 79 U. CHI. L. REV. 1141, 1145 (2012) (noting how this feature of the UCCJEA helps prevent forum shopping).

⁴²³ Verity Winship, *Bargaining for Exclusive State Court Jurisdiction*, 1 STAN. J. COMPLEX LITIG. 51, 84 (2012); see also Amy C. Gromek, *Military Child Custody Disputes: The Need for Federal Encouragement for the States' Adoption of the Uniform Deployed Parents Custody and Visitation Act*, 44 SETON HALL L. REV. 873, 901 (2014) ("[D]espite minor linguistic variations in the states' versions, the UCCJEA still has been successful at achieving a high level of uniformity.").

⁴²⁴ See generally Uniform Parentage Act (Unif. L. Comm'n 1973) (amended 2002) (addressing issues related to the status of a nonmarital child).

⁴²⁵ See generally Uniform Premarital and Marital Agreements Act § 2 (Unif. L. Comm'n 2012) (working to establish consistency across a range of agreements between spouses and those who are about to become spouses).

⁴²⁶ See generally Uniform Representation of Children in Abuse, Neglect, and Custody Proceedings Act (Unif. L. Comm'n 2007) (determining who should represent a child and the nature of that representation in a custody or abuse and neglect proceeding).

⁴²⁷ See generally Uniform Interstate Enforcement of Domestic Violence Protection Orders Act (Unif. L. Comm'n 2019) (establishing cross-state enforcement of domestic violence related protection orders).

Jurisdiction Act” to deal with the degree to which divisible divorce promotes forum shopping.⁴²⁸ Similarly, James Dwyer has proposed uniform laws dealing with such issues as “Family Formation” and “Children’s Relationships with Nonparents,” among others.⁴²⁹

As the National Conference continues its work and as family law scholars continue to uncover additional areas in which uniform laws would be particularly effective, the lessons of the migratory divorce era are uniquely instructive. Specifically, it bears remembrance that, first, it was migratory divorce that prompted states to even create and explore this potential solution to such problems.⁴³⁰ Second, in studying this history, there are a number of lessons to be learned in reviewing the proposals directed at ending migratory divorce, why those attempts ultimately failed, and how to avoid those failures going forward.⁴³¹

V. CONCLUSION

When contemporary legal scholars today reference the period of migratory divorce, they have often described it as “little more than a historical curiosity.”⁴³² And, as detailed above, it does indeed represent a fascinating time in American legal history—one that spanned at least a hundred years,⁴³³ was responsible for numerous Supreme Court decisions,⁴³⁴ and was a frequent topic of books, movies, and novels of the time.⁴³⁵ However, the phenomenon of migratory divorce represents so much more. As the United States considered how best to address the societal forces that incentivized countless Americans to leave their homes for months on end simply to try and escape a broken marriage, a number of themes came to the foreground—themes that were instrumental in forming the foundation of the nation’s evolving understanding of the law of domestic relations.⁴³⁶ Thus, keeping in mind the words of Earl Warren, who once remarked that “[a]ll lawyers are . . . in some sense students of legal history,”⁴³⁷ it is the position of this Article that migratory divorce is not simply a historical oddity but instead remains an essential resource for scholars, courts, and policymakers alike as they continue to grapple with the evolving problems facing contemporary family law.

⁴²⁸ See generally J. Thomas Oldham, *Why a New Uniform Equitable Distribution Jurisdiction Act Is Needed to Reduce Forum Shopping in Divorce Litigation*, 49 FAM. L.Q. 359 (2015) (discussing the effects of forum shopping in marriage, divorce, and family-related litigation).

⁴²⁹ See JAMES G. DWYER, *THE RELATIONSHIP RIGHT OF CHILDREN* 253–90 (2006).

⁴³⁰ See *supra* note 409 and accompanying text.

⁴³¹ See *supra* Section III.B.

⁴³² Parnian Toofanian, *Three’s a Crowd? Sherrer v. Sherrer*, 14 J. CONTEMP. LEGAL ISSUES 185, 191 (2004).

⁴³³ See *supra* Section II.B.

⁴³⁴ See *supra* Section III.A.

⁴³⁵ See *supra* notes 127–131 and accompanying text.

⁴³⁶ See *supra* Part IV.

⁴³⁷ Earl Warren, *Introduction*, 1 AM. J. LEGAL HIST. 1, 1 (1957).

