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Suitcase Divorce in the Conflict of Laws: *Simons, Rosenstiel, and Borax*

David P. Currie

Home life as we understand it is no more natural to us than a cage is natural to a cockatoo.

Shaw

The Australians are dead right: divorce ought to be a federal question.¹ In a federal system with such extreme variations among states as we have, on a subject of such intense concern as divorce, the situation is one big mess.² This is not to suggest that the conflict of laws in general is exactly a hotbed of consistency and rationality. But the law of migratory divorce inhabits a looking-glass world in which the usual conflicts principles are distorted beyond recognition. Jurisdiction over the defendant seems to be neither necessary nor sufficient to empower a court to hear a divorce case. Foreign law is never considered, much less applied. A foreign judgment may be collaterally attacked on the issue of domicile, which ordinarily relates to choice of law. Jurisdiction is sustained every day on the basis of testimony that nobody begins to believe. Litigants and lawyers freely engage in conduct that, in Mr. Justice Frankfurter's words, "in any other type of litigation would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it."³ It

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¹ Matrimonial Causes Act, Act No. 104 of 1959 (Aust.).

² See 1 RABEL, *CONFLICT OF LAWS* 421 (2d ed. 1958): "In federations that guarantee mutual recognition of state acts between the single states, it should be presupposed that the aims of the several legislations, varied as they may be, are not fundamentally hostile to each other. In a Union including legislations of New York and Nevada, the Full Faith and Credit Clause cannot work smoothly."

³ *Sherrer v. Sherrer*, 334 U.S. 343, 367 (1948) (dissenting opinion). Compare VON MEHREN & TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 1486 (1965): "Some say this allegation [of domicile in the divorcing State] amounts to perjury; others argue that it is like those allegations made under the common-law forms of action that in time came to be disregarded and did not require proof—a ritual, not a matter of conscience . . ." See also PIKE, *BEYOND THE LAW* 35-55 (1963), quoted in GOLDSTEIN & KATZ, *THE FAMILY AND THE LAW* 89 (1965).

is no secret that Nevada makes divorce law for the whole country. The Constitution is lost in the shuffle, and the law is held up to disrespect.

Recent developments have cast additional darkness into three discrete corners of this perennially gloomy closet of the law, and each deserves comment. *Simons v. Miami Beach First National Bank*⁴ deals with ex parte divorce, in which the issue is the protection of the rights of the absent spouse who is not subject to personal jurisdiction; *Rosenstiel v. Rosenstiel*⁵ deals with the problem of the migratory consent divorce, in which the issue is the protection of the interest of the home state in preserving the marriage; *Estate of Borax v. Commissioner*⁶ concerns the position of foreign divorces in determining marital status for purposes of the federal tax law, where the issue is whether the validity of a divorce is even relevant to the decision.

I. EX PARTE DIVORCE—*Simons v. Miami Beach First National Bank*

The one who goes is happier than those he leaves behind.

Edward Pollock

Sol Simons, who had lived in New York with his wife, moved to Florida, divorced her ex parte, and died. She filed a claim in the Florida court, seeking dower in his Florida property under Florida law. But the divorce was concededly valid; Florida provides dower only for a "widow"; and the Supreme Court held the denial of her claim constitutional.⁷

This decision muddies the waters of ex parte divorce, whose modern source is the first of the famous *Williams* decisions in 1942.⁸ Departing from precedent, the Supreme Court there held that personal jurisdiction over a defendant spouse was not necessary to entitle a Nevada divorce to full faith in other states.⁹ A refusal to recognize divorces valid where granted, the Court said, would not only contravene the language of the Constitution, it would also leave people with different husbands or wives in different states, bastardize children, and perhaps encourage collusive divorces.

⁴ 381 U.S. 81 (1965).

⁵ 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86, *cert. denied*, 86 Sup. Ct. 1024 (1965).

⁶ 349 F.2d 666 (2d Cir.), *cert. denied*, 86 Sup. Ct. 1064 (1965).

⁷ 381 U.S. 81 (1965). A challenge to the divorce court's finding of Florida domicile was abandoned in the Supreme Court. *Id.* at 83.

⁸ *Williams v. North Carolina*, 317 U.S. 287 (1942) (*Williams I*).

⁹ Before *Williams I* the understanding was that full faith was required only to those ex parte divorces granted in the state of "matrimonial domicile," and not to those granted in a state to which the plaintiff had moved alone without changing the marital domicile. The latter, however, were often recognized as a matter of comity. *Haddock v. Haddock*, 201 U.S. 562 (1905); *Atherton v. Atherton*, 181 U.S. 155 (1900). The actual holding in *Haddock* was only that the divorce need not be given effect on the issue of support. See Cook, *Is Haddock v. Haddock Overruled?* 18 IND. L.J. 165, 171-76 (1943).

Given the premise of validity in the divorcing state, *Williams I* is an unexceptionable application of the language and purpose of the full faith and credit clause. But, as Mr. Justice Jackson pointed out in dissent, the premise itself is more debatable.

Earlier decisions, it is true, had not disputed that an ex parte divorce was valid where granted, and the Court in *Williams I* reaffirmed the power of the divorcing state by stressing the latter's "rightful and legitimate concern in the marital status of persons domiciled within its borders."¹⁰ This concern is certainly a material consideration; as the Supreme Court recognized in *McGee v. International Life Ins. Co.*,¹¹ a state's interest in the application of its law to protect its citizens goes a long way toward establishing its jurisdiction over absent defendants in cases not concerning divorce. Indeed, it would not be unreasonable to allow every interested state to assert jurisdiction: because other interested states need not apply foreign law, a state may be unable to effectuate its interest unless it can provide a forum.¹²

Outside the divorce arena, however, it is simply not true that any interested state may assert jurisdiction to affect the rights of absent parties. The Court made clear in *Hanson v. Denckla* that there may be cases in which a state could constitutionally apply its law, but cannot assert jurisdiction.¹³ The test of due process is fairness to the defendant, and fairness is generally said to be lacking where something of value is taken from a defendant who, like the absent spouses in *Williams I*, has had no contacts with the forum state.¹⁴ The Court in *Williams I* made no mention of this well-established principle, and the consequence was Mr. Justice Jackson's anguished protest that under the Court's holding, "settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill."¹⁵

In *Estin v. Estin*,¹⁶ however, the Court held that an ex parte Nevada

¹⁰ 317 U.S. at 298.

¹¹ 355 U.S. 220, 223 (1957).

¹² See van Mehren & Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1130, 1176-77 (1966); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 925 (1960).

¹³ 357 U.S. 235, 253 (1958). See D. Currie, *The Growth of the Long Arm: Eight Years of Extended Personal Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 558.

¹⁴ See generally D. Currie, *supra* note 13, and cases cited therein.

¹⁵ 317 U.S. at 316 (dissenting opinion). See Mayers, *Ex Parte Divorce: A Proposed Federal Remedy*, 54 COLUM. L. REV. 54 (1954); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 971-75 (1960).

¹⁶ 334 U.S. 541, 546-48 (1948); *accord*, *Kreiger v. Kreiger*, 334 U.S. 555 (1948). This result was foreshadowed by concurring opinions in *Esenwein v. Commonwealth ex rel. Esenwein*, 325 U.S. 279, 281, 283 (1945), where the majority upheld a refusal to recognize the divorce itself for lack of jurisdiction.

divorce could not extinguish the absent wife's right to support under a prior decree. *Williams I*, the Court explained, was justified by Nevada's interest in the marital status of its domiciliaries; but New York, the wife's domicile in *Estin*, "was rightly concerned lest the abandoned spouse be left impoverished and perhaps become a public charge." The prior judgment created a "property interest" that could not be destroyed without personal jurisdiction over her. In the later *Vanderbilt* case the Court reached a similar result, although the support obligation had not been reduced to judgment before the divorce.¹⁷ And in *May v. Anderson* the Court extended *Estin* to child custody: Ohio was not required to respect a Wisconsin ex parte judgment giving custody to the father because "a mother's right to custody of her children is a personal right entitled to at least as much protection as her right to alimony."¹⁸

The *Williams I* opinion must be criticized for ignoring the problem of fairness to the absent spouse. The result, however, can be respectably defended. The ultimate question under the due process clause is whether the assertion of jurisdiction is in accord with "traditional notions of fair play and substantial justice."¹⁹ The balance of fairness must be affected not only by the strength of the interest of the state in providing a forum, which the Court stressed in *Williams I*, but also by the degree of injury to the absent defendant. In the light of *Estin*, *Vanderbilt*, and *May*, it is arguable that the absent spouses in *Williams I* were not injured by the Nevada divorces. Their rights to claim custody or support were unaffected, and their "marriages" existed in name only; divorce or no, the state does not force unwilling people to live together. Thus, the divorces served Nevada's interest in freeing the Nevada spouses from impediments to remarriage, and arguably did not inflict substantial harm on the stay-at-home defendants.²⁰

¹⁷ *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418 (1957). This position had been taken by four Justices in the earlier *Armstrong v. Armstrong*, 350 U.S. 568, 575-81 (1956), where the majority held the divorce decree did not purport to affect alimony.

¹⁸ 345 U.S. 528, 534 (1953).

¹⁹ *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

²⁰ Cf. D. Currie, *The Multiple Personality of the Dead: Executors, Administrators, and the Conflict of Laws*, 33 U. CHI. L. REV. 429, 434-35, 450 & n.100 (1966). It has been argued that some spouses may value the marital status more highly than the right to support, see Drinan, *What Are the Rights of an Involuntary Divorcee?* 53 KY. L.J. 209, 214 (1965), and it is also arguable that the availability of Nevada divorce injures the defendant spouse by ameliorating the pressures exerted by strict divorce laws to induce people to try making the best of the match. But the Supreme Court's assessment of the interests, and the consequent doctrine of "divisible" divorce, have many defenders. E.g., GOODRICH, *CONFLICT OF LAWS* 411, 432-33 (3d ed. 1949); Cook, *Is Haddock v. Haddock Overruled?* 18 IND. L.J. 165, 177-82 (1943); Powell, *And Repent at Leisure*, 58 HARV. L. REV. 930, 955 (1945).

Simons, however, upsets the appellation, for it permits a state to inflict serious financial loss on absent spouses with whom it has no contacts. Mr. Justice Harlan, who concurred, viewed the decision as a "withdrawal" from *Vanderbilt*;²¹ Justices Black and Douglas, who also concurred, believed that *Vanderbilt* was distinguishable.²² The Court was awake to the issue, for Mrs. *Simons* had argued that her claim to a share of her husband's estate, like a claim for alimony, was protected by *Vanderbilt*. To describe the Court's disposition of the question as "brusque" is to put it mildly. Here it is in full:

Insofar as petitioner argues that since she was not subject to the jurisdiction of the Florida divorce court its decree could not extinguish any dower right existing under Florida law, *Vanderbilt v. Vanderbilt*, 354 U.S. 416, 418, the answer is that under Florida law no dower right survived the decree. The Supreme Court of Florida has said that dower rights in Florida property, being inchoate, are extinguished by a divorce decree predicated upon substituted or constructive service. *Pawley v. Pawley*, Fla., 46 So. 2d 464.

This was buttressed by a footnote quotation from *Pawley* purporting to distinguish dower from alimony.²³

The Court's conclusion that Florida could constitutionally extin-

²¹ 381 U.S. at 86-88. Mr. Justice Harlan conceded that the result in *Vanderbilt* could be defended if a right to alimony were given by the law of the wife's domicile at the time of divorce, but objected to *Vanderbilt* insofar as it suggested that: "(1) an *ex parte* divorce can have no effect on property rights; (2) a state in which a wife subsequently establishes domicile can award support to her regardless of her connection with the state at the time of the *ex parte* divorce and regardless of the law in her former State of domicile." *Id.* at 87 & n.2. He had dissented in *Vanderbilt* on the same grounds, 354 U.S. at 428.

²² 381 U.S. at 88. Justices Stewart and Goldberg, dissenting, argued that the only issues in the case concerned state law, and therefore that the writ should be dismissed as improvidently granted.

²³ *Id.* at 85 & n.6: "In this, if not in every jurisdiction, right of dower can never be made the subject of a wholly independent issue in any divorce suit. It stands or falls as a result of the decree which denies or grants divorce. It arises upon marriage, as an institution of the law. The inchoate right of dower has some of the incidents of property. It partakes of the nature of a lien or encumbrance. It is not a right which is originated by or is derived from the husband; nor is it a personal obligation to be met or fulfilled by him, but it is a creature of the law, is born at the marriage altar, cradled in the bosom of the marital status as an integral and component part thereof, survives during the life of the wife as such and finds its sepulcher in divorce. Alimony too is an institution of the law but it is a personal obligation of the husband which is based upon the duty imposed upon him by the common law to support his wife and gives rise to a personal right of the wife to insist upon, if she be entitled to, it. It has none of the incidents of, and is in no sense a lien upon or interest in, property. Consequently, the right of the wife to be heard on the question of alimony should not, indeed lawfully it cannot, be destroyed by a divorce decree sought and secured by the husband in an action wherein only constructive service of process was effected."

guish Mrs. Simons' right because Florida had extinguished it sounds remarkably question begging: presumably Florida is not the ultimate judge of its constitutional powers. Yet there are several important factual differences between *Simons* and *Vanderbilt*, which I shall explore individually in an attempt to determine the impact and correctness of *Simons*. Unlike *Vanderbilt*, *Simons* concerned (1) a claim that the state did not wish to recognize; (2) a claim under the laws of the divorcing state; (3) a claim in the courts of the divorcing state; (4) a claim for an estate share instead of for alimony; and (5) a claim to property located in the divorcing state.

A. Overriding the State Law

The Court's statement that Mrs. Simons' right did not survive under Florida law, together with the quoted remark of the Florida court that dower "stands or falls as a result of the decree which denies or grants divorce,"²⁴ points to an important distinction suggested by the *Estin* opinion²⁵ and by no means confined to cases of dower. *Estin*, *Vanderbilt*, and *May* held that a state was *permitted* to grant relief despite a valid *ex parte* divorce; Mrs. Simons argued that the state was *required* to do so.²⁶ The supreme court of Oregon has interpreted *Estin* as leaving the states free to grant or deny alimony as a matter of their own law,²⁷ and considerable support for this view is found in *Estin*'s emphasis on the interest of the wife's state in providing for her support.²⁸ If the issue is one of conflicting state interests, it is certainly material that the state disclaims any interest in granting what the wife requests.

On the other hand, the language of *Estin*, *May*, and *Vanderbilt* is

²⁴ *Ibid.*

²⁵ 334 U.S. at 544. The husband had argued that a divorce terminated the right to support as a matter of New York law. The Court did not pass on this contention because "the highest court in New York has held in this case that a support order can survive divorce . . ." *Ibid.*

²⁶ This seems the main thrust of Justices Black and Douglas' concurrence: "Mrs. Simons' Florida dower was not terminated by the *ex parte* divorce. It simply never came into existence. . . . She simply had her marriage ended by it [the divorce], and for that reason was not a 'widow' within the meaning of the Florida law." 381 U.S. at 88-89.

²⁷ *Rodda v. Rodda*, 185 Ore. 140, 149, 200 P.2d 616, 620 (1949). This view is widely shared. See, e.g., EHRENZWEIG, *CONFLICT OF LAWS* 266 (1962); *RESTATEMENT (SECOND), CONFLICT OF LAWS* § 116, comment g (Tent. Draft No. 1, 1953); Paulsen, *Migratory Divorce: Chapters III and IV*, 24 IND. L.J. 25, 49, 50 (1948); Note, *Divisible Divorce*, 76 HARV. L. REV. 1233, 1238 (1963); 12 STAN. L. REV. 848, 849 (1960); 28 BROOKLYN L. REV. 142, 145 (1961). But see *Bassett v. Bassett*, 141 F.2d 954, 955 (9th Cir. 1944), holding without discussion of the law of the alimony state that a prior support judgment "could not be set aside or affected by a judgment of a court of another state."

²⁸ 334 U.S. at 547.

broad enough to prohibit a state from voluntarily giving support or custody effect to an ex parte decree. "[W]e are aware," the Court said in *Estin*, "of no power which the state of domicile of the debtor has to determine the personal rights of the creditor in the intangible unless the creditor has been personally served or appears in the proceeding."²⁹ In neither *Vanderbilt* nor *May* was the state's interest in giving relief even mentioned; the Court's whole argument was that valuable rights cannot be terminated by a court lacking personal jurisdiction.³⁰

Professor Morris has argued, however, that *Estin* leaves a state free to deny support on the basis of an ex parte divorce. In a state whose law provides that such a divorce terminates the right to support, he urges, a support order gives:

not an absolute but a terminable property right, terminable, that is, on divorce. When the divorce occurred, no property was taken away from her; all that happened was that the condition subsequent took effect.³¹

But to say there has been no taking away of property seems a mere form of words. It is sometimes proper to condition the grant of a privilege upon surrender of a right that cannot be taken away directly, but this should be so only if granting the privilege enhances the state's interest in denying the right.³² The interest in requiring disclosure of associations or beliefs, for example, increases if one is to be given access to military secrets. But this is not the case in Professor Morris' example. Calling alimony a terminable privilege in no way gives the state a greater interest than it would have in authorizing suit to extinguish it in an inconvenient forum. Professor Morris' thesis would

²⁹ *Id.* at 548.

³⁰ 354 U.S. at 418-19; 345 U.S. at 533-34. No particular significance should be attached to the Court's explicit statement in *Vanderbilt*, 354 U.S. at 419, or to its clear implications in *Estin* and *May*, that the reason full faith was not required was because the decrees were "void" as to support or custody. Voluntary recognition of a void decree, it is true, would deny due process; but the question remains whether the Court would have held the decrees void as to these matters if the state had made clear it had no interest in granting relief.

Mr. Justice Jackson, dissenting in *May*, 345 U.S. at 536-42, thought the Court was holding Ohio *prohibited* from recognizing a Wisconsin custody decree because of lack of personal jurisdiction. Mr. Justice Frankfurter, concurring, 345 U.S. at 535-36, thought the decision left Ohio free to do as it pleased and applauded that result. The Court said that Ohio had felt itself "obliged" to accept the decree, and that the question was whether Ohio "must" give the decree full credit.

³¹ Morris, *Divisible Divorce*, 64 HARV. L. REV. 1287, 1296 (1951); accord, Paulsen, *Support Rights and an Out-of-State Divorce*, 38 MINN. L. REV. 709, 712-13 (1954).

³² See French, *Unconstitutional Conditions: An Analysis*, 50 GEO. L.J. 234, 247-48 (1961) (*semble*); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1600-02 (1960). If the

permit a state completely to avoid the requirement of personal jurisdiction by simply declaring all rights given by its laws "terminable" upon the judgment of a court lacking jurisdiction.

The harsh fact is that the termination of the payment of support money inflicts substantial injury, and the unfairness of doing this on the basis of the decree of a court lacking contacts with the victim is not mitigated by the fact that the injury is inflicted by someone other than the divorcing court.³³ "[D]ue process," the Supreme Court has held, "requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process."³⁴

If this argument is sound, it should not matter that Mrs. Simons sought relief in the divorcing state and under its laws. The gist of her complaint was the unfairness of giving financial effect to the ex parte proceeding, and it seems no less unfair for Florida than for New York to give the proceeding that effect.

B. "Dower" and Alimony

Mrs. Vanderbilt sued for alimony; Mrs. Simons for "dower." The Court apparently believed this difference important, for it quoted a passage from a Florida decision purporting to find several distinctions between alimony and dower. Dower, the Florida court said, is inchoate; it stands or falls with the divorce decree; it can never be claimed in a divorce suit; and it has some of the incidents of property. Alimony, on the other hand, is a personal right of the wife and a personal obligation of the husband, based on his duty of support.³⁵

That dower "stands or falls" with the divorce itself suggests the point discussed above; namely, that it matters whether the state wishes

problem is one of unconstitutional conditions, a more traditional formulation might suggest that it is permissible to make a right terminable on the entry of a void decree if this condition serves the legitimate purpose of avoiding complexity in administering the law. Cf. Comment, *Private Suits Against States in the Federal Courts*, 33 U. CHI. L. REV. 331, 341-42 (1966), discussing *Parden v. Terminal Ry.*, 377 U.S. 184 (1964). But if the doctrine of conditions is not to permit the destruction of important rights by changes in nomenclature, the purpose served must be one not so strongly applicable to a direct abolition of the claimed right. And the effort saved by eliminating collateral attack is insufficient to justify dispensing with the requirement of personal jurisdiction directly.

³³ Accord, GOODRICH, CONFLICT OF LAWS 266, 275, 280 (4th ed. Scoles 1964); Note, 48 CALIF. L. REV. 303, 310-11 (1960); cf. *Huber v. Huber*, 26 Misc.2d 539, 541-42, 209 N.Y.S.2d 637, 641 (Sup. Ct. 1960) (tenancy by the entirety—alternative holding).

³⁴ *Griffin v. Griffin*, 327 U.S. 220, 229 (1946), refusing to allow the District of Columbia to grant alimony on the basis of a New York decree rendered without notice.

³⁵ *Pawley v. Pawley*, 46 So. 2d 464, 472-73 & n.2 (1950), quoted at 381 U.S. 85 n.6. The holding in *Pawley* was that alimony, "perhaps unlike the inchoate right of dower" (emphasis in original) could not be denied on the basis of an ex parte divorce. Dower was not in issue.

to recognize the claim or not. The distinction between "personal" and "property" rights will be taken up later.³⁶ It is no distinction that alimony's purpose is the wife's support; the same is true of dower both in its common law form and in the modified version Mrs. Simons sought under Florida law.³⁷ Two possible distinctions remain for discussion here: that dower is "inchoate" and that it cannot be claimed in a divorce suit.

1. *The "Inchoate" Nature of the Claim.* Mrs. Simons' claim at the time of the divorce was certainly inchoate. A wife's enjoyment of common law dower was contingent upon her surviving her husband;³⁸ Mrs. Simons' claim for personal property under the Florida statute was also contingent upon his owning personalty when he died, for Florida gives a wife no interest in personal property conveyed during her marriage.³⁹ Mrs. Simons lacked even an inchoate interest in specific assets. Despite the label "dower," the Florida statute in fact entitled the wife to a statutory share of her husband's estate; thus, Mrs. Simons' position at the time of the divorce was essentially that of an heir apparent.

The Court's reliance on the inchoateness of Mrs. Simons' claim suggests that at the time of the divorce she had no "property" within the meaning of the due process clause. Some judicial and scholarly language would support such an argument. A Rhode Island court was quite explicit: "[A] mere expectancy or possibility, as that of an heir at law or heir in tail, while the ancestor is still living, or that of the husband or wife, as to curtesy or dower, before the death of the other party . . . does not constitute property within the meaning of the constitutional provisions."⁴⁰ If this is true, Mrs. Simons' claim could be destroyed with no semblance of fair procedure.⁴¹

³⁶ See text accompanying notes 38-55 *infra*.

³⁷ See *Adams v. Adams*, 147 Fla. 267, 271-72, 2 So. 2d 855, 857 (1941); 1 AMERICAN LAW OF PROPERTY § 5.3 (Casner ed. 1952). To the extent that *Vanderbilt* and *Estin* are based upon a state's interest in providing for a wife's support after divorce, it seems immaterial whether the husband is alive or dead, and thus this argument is no ground for holding a state less free to grant dower than alimony in these cases.

³⁸ See 1 AMERICAN LAW OF PROPERTY § 5.31. (Casner ed. 1952).

³⁹ "Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her husband, or both, she may elect in the manner provided by law to take dower, which dower shall be one third in fee simple of the real property which was owned by her husband at the time of his death or which he had before the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one third part absolutely of the personal property owned by her husband at the time of his death" FLA. STAT. ANN. § 731.34 (1964).

⁴⁰ *Green v. Edwards*, 31 R.I. 1, 24, 77 Atl. 188, 197 (1910) (dictum). See also 2 COOLEY, CONSTITUTIONAL LIMITATIONS 752 (8th ed. 1927).

⁴¹ See Krauskopf, *Divisible Divorce and Rights to Support, Property and Custody*, 24

But that would be a monstrous conclusion. That Mrs. Simons' claim was an expectancy does not mean it was without value; she is a third of a million dollars poorer as a result of the Supreme Court's decision.⁴² I find no warrant for construing "property"—in a clause embodying a basic principle of fair dealing—so narrowly as to exclude valuable rights simply because they are inchoate. The statements that expectancies are not "property" were made in quite another context, that of the legislature's power to change the laws of descent or of dower without regard for the claims of existent spouses or heirs apparent.⁴³ That power can be amply justified without holding that expectancies are not property: property rights are not immune from a state's legislation designed "to safeguard the vital interests of its people."⁴⁴ The remoteness of a claim is relevant to the balance between public need and private right, but that is not to say that a remote claim may be cut off arbitrarily and without a showing of need.

Nor does it follow that, because an expectancy may be extinguished by general legislation, it may also be destroyed in an unfair judicial proceeding. The right or "privilege" of selling liquor, even that which has already been manufactured, may be denied to everyone in the interest of public health, safety, or morals;⁴⁵ yet the Fifth Circuit has recently held that an individual liquor license cannot constitutionally be denied without a hearing.⁴⁶ The policy considerations of stamping out an entire evil, of equal treatment, and of administrative con-

OHIO ST. L.J. 346, 355-56 (1963), arguing that expectancies of inheritance or of future pension payments are not recognized as property and thus "unquestionably disappear with the end of the marriage." As for dower and curtesy, which she describes as "similar," Miss Krauskopf would permit the state of situs to terminate them or not as it sees fit after an ex parte divorce, though she doubts the power of the divorcing state itself to affect these rights directly. But this seems inconsistent. If inchoate dower is not "property," there is no reason why the foreign decree cannot affect it; full faith to the valid decree would appear to preclude another state from granting dower even if it chose to.

⁴² See Petition for Certiorari, p. 14.

⁴³ See, e.g., upholding such statutes, *Randall v. Krieger*, 90 U.S. (23 Wall.) 137 (1875) (dower); *Ostrander v. Preece*, 129 Ohio St. 625, 196 N.E. 670 (1935) (heirship).

⁴⁴ E.g., *Guaranty Trust Co. v. Henwood*, 307 U.S. 247 (1939) (option to elect among currencies for bond payment); *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434-48 (1934) (mortgage moratorium) (alternative holding); see *Armstrong, "Prospective" Application of Changes in Community Property Control—Rule of Property or Constitutional Necessity?*, 33 CALIF. L. REV. 476, 495-96 (1945), relied on in *Addison v. Addison*, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965) (quasi community property).

⁴⁵ *Mugler v. Kansas*, 123 U.S. 623 (1887).

⁴⁶ *Hornsby v. Allen*, 326 F.2d 605, 609, *adhered to on rehearing*, 330 F.2d 55 (1964). See 1 DAVIS, ADMINISTRATIVE LAW TREATISE § 7.19 (Supp. 1965). By no means all courts are so perceptive. See, e.g., *Michael v. Town of Logan*, 247 Iowa 574, 73 N.W.2d 714 (1955). For general discussion of the problem of due process and "privileges" in licensing, see Comment, *The Use and Misuse of the Right-Privilege Distinction in License Revocation: What's So Hot About Cosmetology School?*, 31 U. CHI. L. REV. 577 (1964).

venience, which justify impairment of existing interests by general legislation, are simply not present when an individual is treated arbitrarily.⁴⁷

This is not to suggest that every prospective heir is entitled to a hearing in every suit against his ancestor, on the ground that depriving the ancestor of property may injure him in the future. As in *Mullane v. Central Hanover Bank*,⁴⁸ the possible contingent beneficiaries or heirs apparent may be so numerous or so difficult to ferret out, or their interests so remote, that a requirement that each be notified and allowed to defend his interest would greatly impede the administration of justice. Moreover, when the ancestor is sued it can usually be assumed that his own self-interest will assure more or less adequate representation of the heirs apparent.⁴⁹ This was hardly the case, however, in *Simons*. It seems unlikely that the Supreme Court would permit a state to dispense with notice if a man sued simply to extinguish his wife's expectancy of a statutory share in his estate. If the Court would not, it must be that the expectancy is property protected by the fair-trial requirements of due process; and one of those requirements is that ordinarily one cannot be deprived of something of value without some connection with the forum state.

⁴⁷ "The potential social undesirability of the product may warrant absolutely prohibiting it, or . . . imposing restrictions to protect the community from its harmful influences. But the dangers do not justify depriving those who deal in liquor, or seek to deal in it, of the customary constitutional safeguards." *Hornsby v. Allen*, 326 F.2d 605, 609 (5th Cir. 1964). There are cases holding that serious consequences may be judicially or administratively imposed upon individuals without a full hearing. In addition to the licensing cases, *supra* note 46, see, e.g., *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953) (exclusion of entering alien); *Williams v. New York*, 337 U.S. 241 (1949) (sentencing); *Hyser v. Reed*, 318 F.2d 225 (D.C. Cir. 1963) (revocation of parole), criticized in 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* § 7.16 (Supp. 1965). But cf. *Fleenor v. Hammond*, 116 F.2d 982 (6th Cir. 1941) (conditional pardon cannot be revoked without hearing). Professor Davis, giving as examples executive pardons and the discharge of cabinet officers, suggests there is a place for a doctrine of "privileges" that can be denied without traditional procedures; he would limit this to matters involving "clearly an act of grace" wherein the matter is "altogether committed" to a branch of government other than the courts. 1 DAVIS, *ADMINISTRATIVE LAW TREATISE* §§ 7.11, 7.20, especially at 454, 507-08 (1958). Destruction of a wife's expectancy cannot be defended on this ground, nor by an argument stressing the necessity for broad discretion as perhaps in sentencing or parole. The *Mezei* case is quite intolerable, but it is no more closely in point than the solid authority holding that aliens already in this country are entitled to due process. See, e.g., *United States ex rel. Kwong Hai Chew v. Colding*, 344 U.S. 590 (1953).

⁴⁸ 339 U.S. 306 (1950).

⁴⁹ This seems adequate to explain such decisions as *Long v. Long*, 99 Ohio St. 330, 124 N.E. 161, (1919), and *Weaver v. Gregg*, 6 Ohio St. 547 (1856), holding that a wife with inchoate dower need not be made a party to suits to condemn or to partition her husband's land. Both these reasons are given to justify the doctrine of "virtual representation" of unascertained owners of future interests. See 1 *AMERICAN LAW OF PROPERTY* §§ 4.85, 4.89 (Casner ed. 1952).

Finally, to deny Mrs. Simons' claim because her interest was not "property" would produce some glaring anomalies. A wife claiming a survivor's right to community property acquired during marriage, or to property held in fee in tenancy by the entirety, would presumably be protected, for both such estates are said to be present and vested.⁵⁰ Yet the differences between such estates and the statutory widow's portion or dower are not conspicuously relevant. In essence the California wife is entitled to take a share of her husband's earnings on the latter's death or divorce, and to dispose of a portion of those earnings by will. Like the wife with an expectancy of an estate share, she has no right of present enjoyment; except for the requirement of her consent to transfers of realty or home furnishings and to gifts in general, the property is under the husband's complete control.⁵¹ These limitations are not dissimilar in essence to the common law protection of the wife's dower in real estate conveyed without her consent during marriage;⁵² and that the community wife in addition is given what amounts to a general testamentary power of appointment⁵³ does not seem especially material to the question whether she may be deprived of the quite distinct right of survivorship without a fair trial. As for the tenant by the entirety, it is true that the married women's statutes in a number of states have given the wife a present right of enjoyment;⁵⁴ but that right could be protected without holding, as a New York court did in *Huber v. Huber*, that an ex parte divorce does not transform a tenancy by the entirety into a tenancy in common.⁵⁵ The court in *Huber* was correct in protecting a spouse's right to succeed to the entire estate on his mate's death, but not because his interest was vested. Rather, it was correct because, as in *Simons*, there was no constitutional justification for depriving the absent spouse of a valuable claim without a fair hearing.

2. *The Argument that Dower Cannot Be Claimed at Divorce.* "Dower," said the Florida court in *Pawley*, "can never be made the subject of a wholly independent issue in any divorce suit."⁵⁶ Mesdames

⁵⁰ See, e.g., *Huber v. Huber*, 26 Misc. 2d 539, 541, 209 N.Y.S.2d 637, 641 (Sup. Ct. 1960); CAL. CIV. CODE § 16(a); 2 AMERICAN LAW OF PROPERTY §§ 6.6 (community property), 7.20 (entireties) (Casner ed. 1952). See also *Keenan v. Keenan*, 40 Nev. 351, 164 Pac. 351 (1917), refusing to partition community property on the basis of an ex parte Idaho divorce.

⁵¹ CAL. CIV. CODE §§ 146, 172, 172a, 201.

⁵² After the husband's death the wife may recover half of an unconsented gift of community property. *Trimble v. Trimble*, 219 Cal. 340, 26 P.2d 477 (1933); cf. 1 AMERICAN LAW OF PROPERTY §§ 5.31, 5.32 (Casner ed. 1952) (dower).

⁵³ She lacks even that in New Mexico. N.M. STAT. ANN. § 29-1-8 (1953).

⁵⁴ See 2 AMERICAN LAW OF PROPERTY § 6.6 (Casner ed. 1952).

⁵⁵ 26 Misc. 2d 539, 209 N.Y.S.2d 637 (Sup. Ct. 1960); accord, *Anello v. Anello*, 22 App. Div. 2d 694, 253 N.Y.S.2d 759 (1964).

⁵⁶ 46 So. 2d at 472 n.2, quoted at 381 U.S. 85 n.6.

Estin, May, and Vanderbilt were protected because it was unfair to make them argue for support or custody in a forum with which they had insufficient contacts; but Mrs. Simons, it might be argued, could not complain since she could not have got dower even if she had appeared. Nor could she contend, as could the earlier plaintiffs, that it was unfair to require her to submit her claim under the law of the divorcing state; for Mrs. Simons in the post-divorce proceeding chose to make a claim under that law. In short, she was not disadvantaged because of the remoteness of the divorce court, and there is no warrant in the decisions for placing her in a more advantageous position than a wife who was subject to personal jurisdiction.

If this argument holds water, it casts additional doubts on the already questionable decision in *Williams I*. The only plausible justification for *Williams I*—short of a reconstruction of the whole law of personal jurisdiction—is the argument that a spouse whose property and custody rights are protected loses nothing by an ex parte divorce. *Simons*, by holding that the divorce may destroy the wife's right to a share of her husband's estate, knocks the props from under this justification.

But the argument that Mrs. Simons was not disadvantaged by the lack of personal jurisdiction is fallacious. Her lack of contacts deprived her of a fair chance to protect her interest by opposing the divorce itself, and she should have the right to challenge the divorce as it relates to inheritance or dower in a later proceeding. Arguably, this should be the limit of her right: to grant her an estate share despite a holding that the divorce was valid would put her in a better position than if she had been subject to personal jurisdiction. But the proper standard of comparison is not a Florida wife; rather, it is a New York wife over whom Florida has no jurisdiction. For the Florida suit disadvantaged Mrs. Simons not only by making it inconvenient for her to contest the divorce, but also by subjecting her to Florida divorce law. In the absence of Florida's jurisdiction, she could have preserved her Florida dower simply by remaining in New York, unless her husband could have divorced her there on the then sole ground of adultery.⁵⁷ It may be fair for Florida to take jurisdiction, as in *Williams I*, for the single purpose of allowing remarriage. But it is decidedly unfair for it to do so as regards inheritance.

C. *Florida Assets: Jurisdiction in Rem?*

The property in which Mrs. Simons sought "dower" was intangible

⁵⁷ N.Y. Sess. Laws 1962, ch. 313, § 7, since amended by N.Y. Sess. Laws 1966, ch. 254, §§ 2-5, to include additional grounds. N.Y. DOM. REL. LAW §§ 170-77. The Florida divorce was apparently granted on the ground of cruelty. See Petition for Certiorari, pp. 3, A5.

property said to be located in Florida.⁵⁸ This suggests that Florida may have had power to cut off her interest in it even without personal jurisdiction over her and even if her claim is "property" within the due process clause. The black letters tell us that a state has jurisdiction "in rem," without regard to the contacts of interested persons, to dispose of property within its borders—to foreclose liens and mortgages, to escheat, to cancel or reform deeds, to remove clouds or quiet titles.⁵⁹ Having jurisdiction over all Mr. Simons' property, one can argue, Florida had power to extinguish the claims of Mrs. Simons or of anyone else to it, just as it has power to determine the rights of absent beneficiaries or creditors in estate or insolvency proceedings concerning local property.⁶⁰

On the other hand, it is equally well established that the presence of property does not give a state power to extinguish "personal" claims against an individual without jurisdiction over the creditor. The much criticized *Dunlevy* case held that a debtor could not interplead rival claimants to a fund within the state without personal jurisdiction, because interpleader was a proceeding in personam rather than in rem;⁶¹ in *Estin v. Estin* the Court held that Nevada could not terminate a wife's claim for alimony under a prior judgment because her claim was in personam and personal jurisdiction was required.⁶²

Thus, the test has often been a mechanical one: claims to local property may be cut off without personal jurisdiction; claims against the individual debtor may not. But Mrs. Simons' claim is not easy to categorize. It is not a claim for a sum of money as such, being tied to the husband's property as a measure and a source; however, she has no claim to individual pieces of property, and all may be transferred before death at the expense of her interest. Commentators have pointed to the conceptual impossibility of distinguishing between interpleader and foreign attachment in terms of actions in rem and in personam.⁶³ It seems to me Mrs. Simons' claim could similarly be fitted into either category in order to explain a desired result.

But the talismanic labels "in rem" and "in personam" are rapidly

⁵⁸ See Petition for Certiorari, p. 14; Brief for Respondent, p. 2.

⁵⁹ See *Arndt v. Griggs*, 134 U.S. 316 (1890); 1 BEALE, CONFLICT OF LAWS 435-49 (1935); GOODRICH, CONFLICT OF LAWS 102-04 (4th ed. Scoles 1964); RESTATEMENT (SECOND), CONFLICT OF LAWS §§ 101, 102 (Tent. Draft No. 4, 1957).

⁶⁰ See GOODRICH, *supra* note 59, at 349.

⁶¹ *New York Life Ins. Co. v. Dunlevy*, 241 U.S. 518 (1916).

⁶² 334 U.S. 541, 548-49 (1948).

⁶³ See, e.g., Hazard, *A General Theory of State-Court Jurisdiction*, 1965 SUP. CT. REV. 241, 268, 278-81; *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 957-60 (1960).

giving way to a general test of fairness in terms of state interests and minimum contacts with interested parties.⁶⁴ Much of the traditional in rem jurisdiction can still pass muster under such an approach. Many of the modern long arm statutes provide for jurisdiction "in personam" over nonresidents in actions arising out of the ownership of property in the state, and this can often be justified by the interest of the state in affording a forum for the application of its laws and by the defendant's voluntary association with the state via owning property there.⁶⁵ The "in rem" label is not necessary to justify jurisdiction to extinguish the claims of nonresidents to local land in, for example, suits to partition or escheat, to foreclose mortgages, to sell for unpaid taxes, or to remove clouds from title.⁶⁶ Therefore, if Mrs. Simons had claimed an interest in particular Florida land as a tenant in common, Mr. Simons could have cut it off by a Florida suit to quiet or remove a cloud from title under not only an in rem classification, but also a test of fairness. But the actual case was different in two respects: she claimed no particular asset, and the property was intangible.

Now it is true that jurisdiction in rem is said to extend to personal as well as to real property, and that intangibles may be included⁶⁷

⁶⁴ See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312-13 (1950); *Atkinson v. Superior Court*, 49 Cal. 2d 338, 346-48, 316 P.2d 960, 966 (1957); *D. Currie, Executors, Administrators, and the Conflict of Laws*, 33 U. CHI. L. REV. 429, 448-49 (1966); *von Mehren & Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1135-36, 1164-66 (1966); authorities cited note 63 *supra*. The principal fly in the ointment is the unfortunate *Hanson v. Denckla*, 357 U.S. 235 (1958), which makes a point of discussing jurisdiction in rem and in personam quite separately.

⁶⁵ E.g., ILL. REV. STAT. ch. 110, § 17 (1963). See *D. Currie, The Growth of the Long Arm: Eight Years of Extended Personal Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533, 579-80.

⁶⁶ However, the common practice of foreign attachment to satisfy debts unconnected to the use or ownership of local property or to activities in the state is open to serious question. In the first place, it is likely that the state's interest in applying its law, an important predicate for its taking the case, is lacking; second, notions of fair play suggest a limit to the risk one should be said to have assumed by undertaking the obligations of property ownership. As a state may exact taxes on local but not on foreign activities as a cost of doing local business, see *Western Union Tel. Co. v. Kansas*, 216 U.S. 1 (1910); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1605-09 (1960), so it seems fair that it may assert judicial power over local but not over foreign activities as a cost of owning local assets. Cf. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952), holding that more local business is required to subject a foreign corporation to suit on a cause of action unrelated to its local business than on one arising therefrom. See *D. Currie, supra* note 65, at 584.

⁶⁷ See *GOODRICH, CONFLICT OF LAWS* 104-06 (general), 351-57 (decedent's estate) (4th ed. Scoles 1964). The *Restatement Second* takes an apparently somewhat restricted view of this jurisdiction over intangibles. See *RESTATEMENT (SECOND), CONFLICT OF LAWS* §§ 98, 103 (document), 104 (corporate share), 108 (garnishment of debtor, see *Harris v. Balk*, 198 U.S. 215 (1905)) (Tent. Draft No. 4, 1957). See also *von Mehren and Trautman, Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1157 (1966).

(assuming the troublesome problems of locating them have been surmounted).⁶⁸ But at least we are out from under the umbrella of the land taboo and the complex of interests, real or imagined, which surrounds the problems of land in the conflict of laws.⁶⁹ Moreover, in dealing with personal property one is confronted with an interesting exception to the traditional in rem theory: a state ordinarily "does not exercise judicial jurisdiction over a chattel brought into its territory without the consent of the owner."⁷⁰ Although Professor Beale was shouted down in asserting that it is jurisdictional,⁷¹ this exception is a rudimentary expression of that doctrine of fair play which is now basic to the question of judicial power. The state's interest in determining title to or disposing of local property⁷² is not necessarily enough; it is generally also essential, as the Supreme Court said in *Hanson v. Denckla*, "that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state"⁷³ It is one thing to cut off a claimant who has voluntarily sent property into the state—or to sue him there for tort if it explodes after he sends it; it is another to take his property away if he had nothing to do with its going there. The long arm statutes sometimes make this distinction explicit in dealing with injuries suffered in the forum state from activities elsewhere: there is jurisdiction only if there was a reasonable expectation that the offending article would reach the forum state.⁷⁴

⁶⁸ The possibility of multiple liability arising from conflicting determinations of situs, and therefore of jurisdiction, led the Supreme Court to invalidate an attempted escheat of intangibles in *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71 (1961). But Mrs. Simons apparently did not challenge the Florida situs of her husband's property. See Brief for Respondent, p. 2.

⁶⁹ See generally Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095 (1965). Specifically, we are insulated from any argument that the situs must have jurisdiction because other states are precluded from determining title to foreign land by the lamentable "local action" rule, to which the Supreme Court has given recent and entirely unnecessary support. See *Durfee v. Duke*, 375 U.S. 106, 115 (1963) (dictum); B. Currie, *Full Faith and Credit, Chiefly to Judgments: A Role for Congress*, 1964 SUP. CT. REV. 89, 108.

⁷⁰ RESTATEMENT (SECOND), CONFLICT OF LAWS § 98, comment g (Tent. Draft No. 4, 1957).

⁷¹ See *Weissman v. Banque de Bruxelles*, 254 N.Y. 488, 173 N.E. 835 (1930) (dictum); 1 BEALE, CONFLICT OF LAWS 299-300, 441 (1935). *Contra*, RESTATEMENT (SECOND), *supra* note 70, § 98, comment g; Note, *The Power of a State to Affect Title in a Chattel Atypically Removed to It*, 47 COLUM. L. REV. 767, 771-73 (1947), and authorities cited.

⁷² See *Arndt v. Griggs*, 134 U.S. 315, 321 (1890); Note, *supra* note 71, 47 COLUM. L. REV. at 773.

⁷³ 357 U.S. 235, 253 (1958).

⁷⁴ *E.g.*, N.C. GEN. STAT. § 55-145(3) (1960); WIS. STAT. ANN. § 262.05(4)(6) (Supp. 1963). See also *People v. One 1953 Ford Victoria*, 48 Cal. 2d 595, 311 P.2d 480 (1957), applying the same principle of reasonable expectations in the closely analogous area of choice of law. See generally D. Currie, *supra* note 65, at 548-51.

This distinction is directly relevant to Mrs. Simons' case. Had she lived with her husband in Florida, or taken her property there, she would have, in the Supreme Court's language, voluntarily taken advantage of the privilege of conducting activities there, and it would have been fair to subject her to any suit arising out of her activities or the presence of her property there. But that was not shown to be the case. For all that appears, Mrs. Simons, like the owner of a car that has been stolen and taken to another state, never associated herself with Florida at all. Her husband went to Florida alone, apparently taking the property with him.⁷⁵ The *Hanson* test of fairness to non-residents was not met, and the fact that the suit could be said to concern a right to property in Florida does not seem to me to mitigate the unfairness of subjecting her to suit there to take away her interest.

Therefore, even if Mrs. Simons' claim, like traditional dower, constituted a restraint on the alienability of specific assets, Florida's interest in facilitating transferability could have been amply served by an action in New York, and the fairness of suing her in Florida would have appeared dubious. And because Mrs. Simons had no claim to particular assets, even that interest was lacking. Her husband's power to dispose of his Florida property was complete; the only risk was, as in the case of alimony, that, if the claim were not extinguished, he or his estate might later be made poorer. The Supreme Court in *Estin* held that this was no reason for excusing the requirement of an absent claimant's contact with the forum state,⁷⁶ and it is no better reason here.

There are cases in which a state may fairly extinguish claims of absent persons with no contacts—for example, estate proceedings and insolvency. It is clear enough that, if Mrs. Simons had failed to appear in Florida after her husband's death, she would have been cut off from Florida assets by the discharge of his executors.⁷⁷ But this would have been equally true of clearly "personal" alimony or contract claims, which could not have been cut off in an ordinary proceeding. The extraordinary powers of probate and insolvency courts derive from the necessity in such proceedings to make a final disposition of the property as against possibly numerous, scattered, and unascertainable claimants.⁷⁸ Mr. Simons' divorce suit, however, presented no such

⁷⁵ Either literally or by moving his domicile, under the ponderous slogan "*mobilia sequuntur personam*."

⁷⁶ 334 U.S. 541 (1948).

⁷⁷ See GOODRICH, *CONFLICT OF LAWS* §49 (4th ed. Scoles 1964); D. Currie, *supra* note 64, at 451.

⁷⁸ Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) (settlement of trustee's account). See Fraser, *Jurisdiction by Necessity—An Analysis of the Mullane Case*,

necessity. Especially since no particular assets were encumbered by Mrs. Simons' claim, there was no more need to extinguish it without the contacts ordinarily required than there was to extinguish Mrs. Estin's claim for alimony—and the latter the Supreme Court held Nevada could not do.

D. Conclusion

It must be apparent that I find the problem in *Simons* a most intricate and refractory one and the Supreme Court's disposition of it something less than exhaustive. I am inclined to think the decision was wrong, both in principle and on authority. I do not think *Vanderbilt* can be adequately distinguished because the claim was for "dower," because the property was in the divorcing state, or because the claim was contrary to state law. But if *Simons* is instead a proper corollary to *Williams I*, then *Williams I* ought to be overruled.

Of more practical importance is the question of the probable impact of *Simons* on future cases. Despite Mr. Justice Harlan's exuberant observation that the Court was retreating from *Vanderbilt*, neither he nor any other member of the Court took issue with the essential principle announced there that the state of the wife's domicile is free to award alimony after an ex parte foreign divorce purporting to cut off her rights. It is possible to read the majority opinion in *Simons* as holding that this principle does not apply to rights that are inchoate at the time of the divorce, but I would not so read it. The main focus of the majority opinion, as well as of that of Justices Black and Douglas, seems to be upon the fact that Florida law did not recognize a right to dower following an ex parte divorce. The Court certainly did not say that New York would have been powerless to grant the widow a statutory share had it chosen to do so, and the argument denying New York that power—that inchoate rights are not "property"—has an out-of-place ring in today's Supreme Court.⁷⁹ In contrast, the argument that a state is free to recognize or to ignore an ex parte divorce, insofar as property matters are affected, is an attractive one. Further, it has considerable support from the courts and the writers, and it is assisted by the emphasis placed in *Estin* upon the interest of the wife's state of domicile in providing for her support. My prediction is that the

100 U. PA. L. REV. 305, 311 (1951). Nor was jurisdiction over Mrs. Simons necessary, as often in interpleader cases, in order to protect her husband from having to pay the same debt twice. See *Atkinson v. Superior Court*, 49 Cal. 2d 338, 316 P.2d 960 (1957). If, as respondent argued, Brief, p. 53, successive marriages should subject Mr. Simons' estate to more than one dower claim, that would but be the consequence of assuming obligations to several wives, as commonly occurs with alimony.

⁷⁹ Cf. *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963).

Court will continue to permit the states to assert this interest, by granting alimony, widows' allotments, dower, or what-have-you, but that it will not require the states to make such awards against their will.⁸⁰

II. DIVORCE BY CONSENT—*Rosenstiel v. Rosenstiel*

"If everybody minded their own business," the Duchess said, in a hoarse growl, "the world would go round a deal faster than it does."

"Which would not be an advantage," said Alice.

Lewis Carroll

Nobody, it seems, ever denied that Mr. and Mrs. Kaufman were New Yorkers by citizenship, domicile, and residence; and New York at all relevant times permitted divorce only for adultery.⁸¹ Nothing daunted, Mr. Kaufman paid an hour's visit to Juarez, Mexico; his wife's attorney appeared to admit everything; and they emerged with a divorce based on "incompatibility and ill treatment." Still in New York, Mrs. Kaufman became Mrs. Rosenstiel; but a few years later Mr. Rosenstiel obtained an annulment from a New York trial court on the ground that his wife's Mexican divorce was invalid. The Appellate Division reversed, and its decision was affirmed by the Court of Appeals.⁸² Recognition of a bilateral Mexican divorce, said the state's highest court, "offends no public policy of this State." Two judges disagreed.

The problem in *Rosenstiel* was not the knotty one of protecting an absent spouse against an unfair assertion of jurisdiction, but rather the analytically simpler one of collusion and false conflicts in the

⁸⁰ Even if the Court should hold that the principles underlying *Simons* preclude a state from recognizing dower or other inchoate rights following an ex parte divorce, a state would presumably remain free to protect the wife's continuing need for support by ordering alimony with the express provision that payments shall continue after the husband's death.

The possible in rem justification for the Court's decision was neither argued nor adverted to in the opinion, and its possible persuasiveness to the Court is difficult to assess. See, however, Mr. Justice Harlan's statement that "If Mr. Vanderbilt owned property in New York at the time of the *ex parte* divorce, New York might arguably be free to hold that ownership of New York property carries with it the obligation to support one's wife, at least to the extent of the value of that property." 381 U.S. at 87 n.2. The issue is important, because the wife's state, following either the policy of looking out for its widows or the traditional rule that interests in a decedent's personal property are governed by the law of his last domicile, RESTATEMENT, CONFLICT OF LAWS § 303 (1934), might attempt to award her an interest in property in the divorcing state.

⁸¹ N.Y. Sess. Laws 1962, ch. 313, § 7, since amended by N.Y. Sess. Laws 1966, ch. 254, § 2, to include additional grounds. N.Y. DOM. REL. LAW § 170.

⁸² *Rosenstiel v. Rosenstiel*, 43 Misc. 2d 462, 251 N.Y.S.2d 565 (Sup. Ct.), *rev'd*, 21 App. Div. 2d 635, 253 N.Y.S.2d 206 (1964), *aff'd*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

choice of law. Here modern history begins with the Supreme Court's second *Williams* decision.⁸³

A. *The Constitution and Choice of Divorce Law: Williams II*

Mr. Williams and Mrs. Hendrix had spent the requisite six weeks in a Nevada motel, married each other, and hastened back into the waiting arms of the North Carolina prosecutor. In its first decision, dealing with the ex parte aspect of the divorces, the Supreme Court had assumed the parties had actually moved to Nevada.⁸⁴ But North Carolina held the Nevada domicile a sham and again convicted them of bigamy; the Supreme Court affirmed. Domicile of at least one party, wrote Mr. Justice Frankfurter, was a requisite of divorce jurisdiction; the full faith and credit clause did not preclude the state of North Carolina, which had not been a party to the ex parte proceeding, from collaterally attacking Nevada's jurisdiction; and there was plenty of evidence to support the finding that Mr. Williams and his second wife had never intended to stay in Nevada.

Williams II, unlike *Williams I*, was basically a good decision. The divorces had been granted on grounds not recognized in North Carolina,⁸⁵ and they were just as offensive to North Carolina's policy as if they had been granted at home. For North Carolina would have refused to divorce Mr. Williams and his intended wife, not in order to give local judges more golf time or to keep their hands pure, but in order to preserve marriages.⁸⁶ To require North Carolina to recognize the divorces, as Mr. Justice Jackson said, would have been to make the state "powerless to protect either its own policy or the family rights of its people."⁸⁷ Nevada, on the other hand, was simply meddling. Its only interest in divorcing North Carolinians was the parasitic one (candidly admitted in the analogous case of the Virgin Islands⁸⁸) of

⁸³ 325 U.S. 226 (1945).

⁸⁴ 317 U.S. 287 (1942); see part I *supra*.

⁸⁵ See *State v. Williams*, 224 N.C. 183, 187, 29 S.E.2d 744, 747 (1944).

⁸⁶ Grounds for divorce are limited, the North Carolina court has said, because with specific exceptions "the lawmaking power has adhered to the obligation of the marriage vow, that the parties 'take each other for better or for worse, to live together in sickness and in health till death do them part.'" *Lee v. Lee*, 182 N.C. 61, 63-64, 108 S.E. 352, 353 (1921). Similarly, a statute excluding admissions of adultery in divorce suits was said to be "designed to . . . prevent collusion" and to be based in part upon "that interest which society has at stake in the preservation of the marriage relations of its members." *Hooper v. Hooper*, 165 N.C. 605, 609, 81 S.E. 933, 935 (1914); *Perkins v. Perkins*, 88 N.C. 41, 43 (1883).

⁸⁷ *Williams v. North Carolina (I)*, 317 U.S. 287, 312 (1942) (dissenting). See also D. Currie, *Flags of Convenience, American Labor, and the Conflict of Laws*, 1963 SUP. CT. REV. 34, 83-87.

⁸⁸ "It is estimated that over \$300,000 a year is spent within the Virgin Islands by

making money by subverting another state's laws—an interest that cannot be recognized without destroying the principle that each state is entitled to manage its own affairs. In divorcing Mr. Williams and Mrs. Hendrix, Nevada frustrated the interest of North Carolina without advancing any legitimate interest of its own. It therefore deprived the absent spouses of liberty or property without due process of law and denied full faith and credit to the laws of North Carolina.⁸⁹

B. *Validity and Recognition*

But there were three things seriously wrong with *Williams II*. The first was the Court's meticulous failure, in the face of separate opinions raising the issue,⁹⁰ to hold that the divorces were void in Nevada as well as in North Carolina. Mr. Justice Frankfurter did say that domicile was a question of "jurisdiction" and that North Carolina might inquire into Nevada's "power to pass on the merits."⁹¹ But he also said that, because North Carolina's judgment was supported by adequate evi-

persons who have been using the facilities of our divorce law to put their homes in order. Unfortunately, because of an error in the draft of the original law . . . it now becomes necessary for us to consider another amendment which is designed to enhance this u-coming [sic] business." Proceedings and Debates, 17th Legislative Assembly of the Virgin Islands, 3d Sess. 46-47 (1953) (remarks of Mr. Rohlsen), reported in *Granville-Smith v. Granville-Smith*, 349 U.S. 1 (1955).

⁸⁹ See *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 976 n.388 (1960). Judge Hastie has suggested that due process, *Alton v. Alton*, 207 F.2d 667, 685 (3d Cir. 1953), and Mr. Justice Jackson that full faith, *Full Faith and Credit—The Lawyer's Clause of the Constitution*, 45 COLUM. L. REV. 1, 14 (1945), may forbid applying the divorce law of a disinterested jurisdiction. Recent Supreme Court decisions have refused to require one interested state to defer to another, e.g., *Crider v. Zurich Ins. Co.*, 380 U.S. 39 (1965); *Clay v. Sun Ins. Office*, 377 U.S. 179 (1964); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); but they have not impaired the principle that full faith, *Order of United Commercial Travelers v. Wolfe*, 331 U.S. 586 (1947); *Broderick v. Rosner*, 294 U.S. 629 (1935), and due process, *Hartford Acc. & Indem. Co. v. Delta & Pine Land Co.*, 292 U.S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930), at times require application of foreign law. If this is ever true, it must be in cases in which the forum has no interest in applying its own law, see B. CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 289 & ch. 5 (1963); and the Court in upholding choices of law against constitutional challenge continues to emphasize the interest served by the chosen law. The invocation of due process to strike down unreasonable choices of law is analogous to its use to limit the unreasonable extension into other states of a state's power to tax, *Thomas v. Virginia*, 364 U.S. 443 (1960), *reaffirming* *Blodgett v. Silverman*, 277 U.S. 1 (1928); *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1953), or to hear cases, *Hanson v. Denckla*, 357 U.S. 235 (1958). If marriage is viewed as comprising nonwaivable rights, even the consenting defendant is deprived of liberty or property without due process by a divorce contrary to the law of the only interested state.

⁹⁰ Mr. Justice Murphy, concurring, defended the decision because it left Nevada with power to divorce anyone for any cause, so far as validity in Nevada was concerned. 325 U.S. at 239. Mr. Justice Rutledge, dissenting, was critical of the decision for the same reason. *Id.* at 244, 257.

⁹¹ 325 U.S. at 229.

dence, it could not be upset "even if we also found in the record of the court of original judgment warrant for its finding that it had jurisdiction,"⁹² and the Supreme Court of Nevada has stressed this unfortunate aspect of *Williams II* in holding a Nevada divorce that had been refused recognition elsewhere nevertheless valid in Nevada.⁹³

Thus, the Court in *Williams II* ignored the only really good point it had made in *Williams I*: that the validity of a divorce must be the same in every state.⁹⁴ If Mr. Williams and his charming friend really moved to Nevada, applying Nevada law served Nevada's interest in freeing her people from the restraints of a dead marriage, and the command of the Constitution, supported by sound policy, is that the divorce must be respected in other states. If, on the other hand, as seems obvious from the reported facts, they went to Nevada only to get divorced and to return, the application of Nevada law was as unconstitutional for Nevada's purposes as for North Carolina's.⁹⁵ This difficulty, however, appears to have been set right by the Court's later holding in *Sherrer v. Sherrer*, for if, as *Williams II* suggests, a divorce valid where granted may nevertheless be denied recognition elsewhere, a decision upholding the divorce court's jurisdiction should not have been held, as it was in *Sherrer*, to preclude attack on the question of recognition.⁹⁶

C. Domicile and Jurisdiction.⁹⁷ *Alton v. Alton*

The second unfortunate aspect of *Williams II* was its statement that domicile is indispensable to jurisdiction to divorce.⁹⁸ The Third Circuit has taken this quite seriously. A Virgin Islands statute conferred divorce

⁹² *Id.* at 234. For Mr. Justice Frankfurter, at least, the omission was deliberate; he later said explicitly: "[A] divorce may satisfy due process requirements, and be valid where rendered, and still lack the jurisdictional requisites for full faith and credit to be mandatory," *Sherrer v. Sherrer*, 334 U.S. 343, 368 n.16 (1948) (dissenting opinion); see 15 STAN. L. REV. 331, 338-39 (1963).

⁹³ *Colby v. Colby*, 78 Nev. 150, 158, 369 P.2d 1019, 1023 (1962); see note 136 *infra*.

⁹⁴ 317 U.S. 287, 293-95, 299-302 (1942); *accord*, 63 COLUM. L. REV. 560, 568 (1963). *Contra*, 39 CORNELL L.Q. 293, 300-01 (1954).

⁹⁵ The finding of ultimate constitutional facts is no novelty for the Court. See, e.g., *Watts v. Indiana*, 338 U.S. 49, 51-52 (1949) (Frankfurter, J.) (involuntariness of confession).

⁹⁶ 334 U.S. 343 (1938); see 40 N.Y.U.L. REV. 992, 995-96 (1965). This last point was made by Mr. Justice Frankfurter, 334 U.S. at 367 n.16 (dissenting opinion).

⁹⁷ See generally *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 966-71, 975-76 (1960).

⁹⁸ 325 U.S. at 229; *accord*, RESTATEMENT (SECOND), CONFLICT OF LAWS § 111 (Tent. Draft No. 1, 1953); STUMBERG, CONFLICT OF LAWS 293 (3d ed. 1963). *But see* EHRENZWEIG, CONFLICT OF LAWS 238-42 (1962). See also GOODRICH, CONFLICT OF LAWS 256, 258 (4th ed. Scoles 1964), predicting that divorce based on residence would be upheld by the Supreme Court.

jurisdiction after six weeks' presence by the plaintiff, the defendant appearing or being personally served. In *Alton v. Alton* the court struck it down under the due process clause.⁹⁹

My objection is not that the court of appeals extended the principle of *Williams II* to encompass validity as well as recognition, for I agree the two should be congruent. But, as Judge Hastie demonstrated in his outstanding dissent,¹⁰⁰ the problem is not jurisdiction so much as choice of law. The danger, the majority agreed,¹⁰¹ was that the Virgin Islands might divorce nonresidents for simple incompatibility, contrary to the policy of their home states. What the majority overlooked was that the paramount interest of the domicile is protected by the constitutional requirement that its law be applied in any forum.¹⁰² To forbid the Virgin Islands to divorce nonresidents in accordance with the law of their home states may be not only unnecessary, but also harsh, for there may be many people—servicemen, students, government employees, for example—who are not trying to evade the application of the proper law, but for whom it would be most inconvenient to return home to obtain a divorce.¹⁰³ Outside the swamp of divorce, it is common for a disinterested forum to entertain an action based on foreign law. *Alton* is a strange bedfellow for the Supreme Court's twin decisions that, because of the constitutional policy of "maximum enforcement in each state of the obligations or rights created or recognized by the statutes of sister states," neither the forum nor the state that created the cause of action may forbid suit in a convenient forum.¹⁰⁴

Nevertheless, the command of *Hughes v. Fetter* that states with no interest in the merits must entertain actions based on foreign law is not an absolute one. First, it seems reasonably clear that a state may decline to provide a forum in order to further a legitimate policy promoting the orderly and efficient administration of its courts.¹⁰⁵ Ad-

⁹⁹ 207 F.2d 667 (1953).

¹⁰⁰ *Id.* at 684-85.

¹⁰¹ *Id.* at 666-67.

¹⁰² See 39 CORNELL L.Q. 293, 298 (1954).

¹⁰³ See *Gould v. Gould*, 235 N.Y. 14, 138 N.E. 490 (1923). New Yorkers who had lived in France for five years were divorced in France under New York law. New York recognized the divorce. Several states have statutes to deal with the soldier problem, see CHEATHAM, GRISWOLD, REESE & ROSENBERG, *CASES ON CONFLICT OF LAWS*, 855-56 (5th ed. 1964); Leflar, *Conflict of Laws and Family Law*, 14 ARK. L. REV. 47 (1960), but they have been treated as permitting application of forum law as well. Residence may indeed be a sufficient basis to sustain a policy of relief from the restraint of marriage; but there may also be cases short of such substantial connection where the parties' convenience justifies providing a forum for applying another state's law.

¹⁰⁴ *Hughes v. Fetter*, 341 U.S. 609, 612 (1951); *Tennessee Coal, Iron & R.R. v. George*, 233 U.S. 354 (1914); see B. CURRIE, *op. cit. supra* note 89, at ch. 6.

¹⁰⁵ See B. CURRIE, *op. cit. supra* note 89, at 360 & ch. 6. A state may avoid the unreason-

mittedly, this was not the case in *Alton*, for Barkis himself could not have been more willing than the Virgin Islands to try foreign divorce cases, though the intention plainly was that local law would be applied. But if a state were to refuse to hear convenient and timely divorce cases based on foreign law, the question would arise whether the national policy of enforcing foreign rights is overcome by a state policy such as the prevention of perjury in the courts,¹⁰⁶ or perhaps by an antipathy to the particular grounds of the foreign law.¹⁰⁷

More important for our purposes are those cases in which courts have declined or have been forbidden to entertain foreign cases because of the nature of the subject matter.¹⁰⁸ Under present law the risk of

able burden of litigating stale foreign claims by applying its own short statute of limitation, *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1952); see B. CURRIE, *op. cit. supra* note 89, at 266, and of litigating inconvenient ones by invoking *forum non conveniens*, see *Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950) (state courts may invoke doctrine to dismiss FELA claim supremacy clause ordinarily requires them to take); *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 508 (1947) (doctrine approved for federal courts); *Broderick v. Rosner*, 294 U.S. 629, 643 (1935) (dictum); B. CURRIE, *op. cit. supra* note 89, at 325; RESTATEMENT (SECOND), CONFLICT OF LAWS § 117e (Tent. Draft No. 4, 1957). Though the forum in *Wells* was also the defendant's principal place of business, the Court did not rely on this fact; the decision should and probably would have been the same had the forum been wholly without contacts save as forum.

¹⁰⁶ See B. CURRIE, *op. cit. supra* note 89, at 356-58, suggesting that New York might constitutionally refuse to entertain foreign actions of the types outlawed by its heart-balm statute in order to prevent its courts from being used as "instruments of extortion and blackmail." See also B. CURRIE, *Ehrenzweig and the Statute of Frauds: An Inquiry into the "Rule of Validation,"* 18 OKLA. L. REV. 243, 248-49 (1965), doubting that such a policy is expressed by the Statute of Frauds. In any state that grants divorces only for fault, however, the policy of preventing fraud is too imperfectly observed at home to avoid the conclusion that the state is discriminating against foreign causes of action.

¹⁰⁷ "Public policy" is usually invoked by a state interested in the merits to justify its departure from mechanical choice-of-law rules. See Paulsen & Sovern, "Public Policy" in *the Conflict of Laws*, 56 COLUM. L. REV. 969 (1956). Beyond this, it is often stated that no court need enforce a foreign right that is contrary to "some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal." *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198, 202 (1918); see RESTATEMENT, CONFLICT OF LAWS, § 612 (1934). Even a disinterested court might legitimately decline to demean itself by enforcing a contract to murder or a Nazi racial decree, see *Holzer v. Deutsche Reichsbahn-Gesellschaft*, 277 N.Y. 474, 14 N.E.2d 798 (1938), but any exception to full faith and credit carved on this basis must be narrow indeed if it is not to swallow the rule. A state does not injure its divorce policy by applying more lenient foreign law to divorce nonresidents, for they are not within that policy; nor do I think disagreement over divorce policy rises to the level at which the court by applying foreign law so compromises itself as to injure its own standing.

¹⁰⁸ Some exceptions to the principle of transitory actions are disappearing for want of justification: (1) The local action rule respecting trespass to land. *Livingston v. Jefferson*, 15 Fed. Cas. 660 (No. 8511), (C.C.D. Va. 1811); RESTATEMENT (SECOND), CONFLICT OF LAWS § 117i (Tent. Draft No. 4, 1957); see *id.* comment a, describing the rule as a pointless vestige of the days when all actions were local because jurors were expected to have personal knowledge of the facts; *Developments in the Law—State-Court Jurisdiction*, 73

error in applying foreign law cannot alone prevent the ordinary action from being treated as transitory, because the Supreme Court held in *Tennessee Coal, Iron & R. R. Co. v. George*¹⁰⁹ that a state may not confine personal injury actions to its own courts. But the case for keeping litigation at home is strengthened when, as under the federal labor laws¹¹⁰ and most workmen's compensation laws,¹¹¹ the general courts of the enacting sovereign are also excluded in order to promote uniform and expert enforcement; when, as in criminal sentencing, the effectuation of vital policy is entrusted in large part to the discretion of knowledgeable and sympathetic judges;¹¹² when, as in maritime in rem and limitation suits and bankruptcy, the controversy is made both

HARV. L. REV. 909, 980-83 (1960). (2) Tax laws. See the excellent discussion in *State ex rel. Oklahoma Tax Comm. v. Rodgers*, 238 Mo. App. 1115, 193 S.W.2d 919 (1946), enforcing a foreign tax claim; B. CURRIE, *op. cit. supra* note 89, at 342-44; cf. *Milwaukee County v. M.E. White*, 296 U.S. 268 (1935), requiring enforcement of a sister state tax judgment. (3) Laws "penal" only in that they provide damages not proportioned to harm. See *Doggrell v. Southern Box Co.*, 208 F.2d 310 (6th Cir. 1953), refusing to enforce a foreign law holding incorporators liable as partners when articles were not properly filed. A dissent argued (quite rightly except as to defendants within the state's policy of encouraging investment or as to those for whom the forum was inconvenient) that this refusal violated the full faith and credit clause. See B. CURRIE, *op. cit. supra* note 89, at 337-42; GOODRICH, *CONFLICT OF LAWS* 18-20 (4th ed. Scoles 1964). Despite the Court's disclaimer of an intention to affect interstate cases, the decision in *Testa v. Katt*, 330 U.S. 386 (1947), that a state may not refuse to enforce federal penal (noncriminal) laws, seems of considerable significance here. For, absent a policy relating to court administration, a state with no interest in the merits must defer to other state laws under the full faith clause just as it must defer to federal under the supremacy clause.

¹⁰⁹ 233 U.S. 354 (1914).

¹¹⁰ But see Michelman, *State Power to Govern Concerted Employee Activities*, 74 HARV. L. REV. 641, 652-55 (1961), arguing that labor pre-emption has been carried too far in damage cases.

¹¹¹ See *Crider v. Zurich Ins. Co.*, 348 F.2d 211 (5th Cir. 1965) (Alabama will not enforce Georgia statute); 2 LARSON, *WORKMEN'S COMPENSATION* § 84.20 (1952). On an earlier appeal in *Crider*, 380 U.S. 39 (1965), the Supreme Court, answering a question not properly in the case, deftly disposed of the annoying problem of *Pearson v. Northeast Airlines*, 309 F.2d 553 (2d Cir. 1962), by upholding Alabama's power to compensate her injured residents by applying Georgia law without its limitations. The more interesting question, presented but not decided, was whether *Hughes* and *George* together required Alabama to enforce Georgia law contrary to the wishes of both states, and despite Georgia's policy of centralizing compensation cases in an expert tribunal.

¹¹² But enforcement of foreign criminal laws is not unknown. The federal courts in civil rights and federal officer cases exercise jurisdiction over state law crimes, 28 U.S.C. §§ 1442, 1443 (1964); see *Georgia v. Rachel*, 382 U.S. 808 (1966); *Tennessee v. Davis*, 100 U.S. 257 (1880), and it has been urged that much federal criminal litigation should be left to the states. See FRANKFURTER & LANDIS, *THE BUSINESS OF THE SUPREME COURT* 293 (1928); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 398-99 (1953). Interstate enforcement, however, is complicated by the common provision for jury trial where the offense was committed. See *State ex rel. Oklahoma Tax Comm. v. Rodgers*, 238 Mo. App. 1115, 193 S.W.2d 919 (1946).

difficult and important by the presence of multiple parties;¹¹³ when, as in state habeas for federal prisoners, there is thought to be substantial hostility in other jurisdictions toward important policies of the enacting sovereign;¹¹⁴ or when, as the ALI has suggested is the case with patents, copyright, and antitrust, the sovereign has an interest that is "more important than the wishes of the parties."¹¹⁵ In general it may be said that the case for exclusive jurisdiction is at its height when error is unusually likely or unusually serious.¹¹⁶

Several of the factors suggested above apply to divorce cases. First, statutes confining divorce jurisdiction to specialized courts in the home state itself¹¹⁷ increase the degree of expertise lost by allowing foreign suits. There may be discrepancies between theory and practice in the administration of the divorce law, and custom may be as important as reported decisions in determining what constitutes "extreme cruelty." The judge may also be accorded considerable leeway to be exercised in the light of his familiarity with local practice; in the Altons' home state of Connecticut, for example, he is said to have "discretion" whether or not to grant a divorce if cause is shown.¹¹⁸ Moreover, divorce is unusual in that the state's policy of preserving marriages is likely

¹¹³ See D. Currie, *Federalism and the Admiralty: "The Devil's Own Mess,"* 1960 SUP. CR. REV. 158, 169-70.

¹¹⁴ *Tarble's Case*, 80 U.S. (13 Wall.) 397 (1871) (military recruitment); *Ableman v. Booth*, 62 U.S. (21 How.) 506 (1859) (fugitive slaves). But see Arnold, *The Power of State Courts to Enjoin Federal Officers*, 73 YALE L.J. 1385 (1964), suggesting that an absolute prohibition was not required to protect federal interests.

¹¹⁵ ALI, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 60 (Tent. Draft No. 4, 1966). Because the parties are often truly adversary, because those not parties are not bound by the decision, because the field is not a hotbed of federal-state antagonism, and because of decisions permitting states to determine even the validity of patents when raised defensively, see *Pratt v. Paris Gas Light & Coke Co.*, 168 U.S. 255 (1877); HART & WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 754-58 (1953), I doubt the strength of this consideration in patent and copyright cases.

¹¹⁶ Cf. the various provisions made for avoiding error in the extremely sensitive field of federal injunctions against state officials, e.g., 28 U.S.C. §§ 1341, 1342 (1964) (tax and utility-rate injunctions); 28 U.S.C. § 2281 (1964) (see D. Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964)); 28 U.S.C. § 2283 (1964) (anti-suit injunctions, see Comment, *Anti-Suit Injunctions Between State and Federal Courts*, 32 U. CHI. L. REV. 471 (1965)); *Railroad Comm. v. Pullman Co.*, 312 U.S. 496 (1941) (abstention).

The doctrine that one state will not interfere with the internal affairs of another's corporations "enjoys less force" than in the past, RESTATEMENT (SECOND), CONFLICT OF LAWS § 117e (Tent. Draft No. 4, 1957), and the ALI relegates it to a mere facet of forum non conveniens, *id.* comment d. The doctrine can be abused to defeat ordinary transitory actions, but a foreign court's "detailed and continued supervision" might subtly infringe the incorporating state's policy as well as burden the forum. *Ibid.*

¹¹⁷ E.g., R.I. GEN. LAWS § 10-3 (Supp. 1965). See *State v. Zittel*, 94 R.I. 325, 180 A.2d 455, 457 (1962) (dictum).

¹¹⁸ *Kelsall v. Kelsall*, 139 Conn. 163, 168, 90 A.2d 878, 881 (1952).

not to be adequately safeguarded by either of the parties: the foreign divorce in which both husband and wife seek to circumvent that policy is the prototype, not the exception. This makes it the more important, if that policy is to be served and error avoided, that the suit be tried before a judge fully cognizant of that policy and, even if not sympathetic, responsive to institutional pressures to enforce it. Connecticut, in this vein, has made it the court's duty to protect the state's interest if the litigants do not,¹¹⁹ and several states go further and require or permit the state's attorney to intervene for this purpose.¹²⁰ Such protection as this would be hard to duplicate in another jurisdiction, especially in one steeped in a sharply contrasting tradition.

A further difficulty is presented by the increasing number of statutes providing for conciliation services designed to head off unnecessary divorces.¹²¹ To ask the Virgin Islands to provide such services for Connecticut people against its wishes would be excessive;¹²² to permit the Islands to divorce them without benefit of conciliation would thwart Connecticut policy. Moreover, even if the Islands chose to make this service available to nonresident divorce litigants, the plainly free-wheeling, discretionary nature of conciliation makes it quite unlikely that the service rendered would be more than a rough approximation of what would have been done at home.

Accordingly, even within the confines of the *George* case, a good argument could be made for permitting—indeed requiring—the Virgin Islands to defer to an expression by Connecticut of its opposition to foreign suits based on Connecticut divorce laws. Arguably, too, *George* itself should be overruled: even in the ordinary personal injury action a disinterested state has no legitimate interest in flooding its courts with inconvenient cases, while the state that created the right may have a respectable policy, corresponding to that underlying *forum non conveniens*, in favor of keeping its cases in convenient courts.¹²³ The

¹¹⁹ See *Casale v. Casale*, 138 Conn. 490, 86 A.2d 568 (1952).

¹²⁰ *E.g.*, ORE. REV. STAT. § 107.040 (1963): "The district attorney, so far as may be necessary to prevent fraud or collusion in the suit, shall control the proceedings on the part of the defense and in case the defendant does not appear therein or defend against the same in good faith, shall make a defense therein on behalf of the state." See *Smythe v. Smythe*, 80 Ore. 150, 149 Pac. 516 (1915).

¹²¹ *E.g.*, N.Y. DOM. REL. LAW § 215. See GOLDSTEIN & KATZ, *THE FAMILY AND THE LAW* 140-62 (1965).

¹²² See RESTATEMENT (SECOND), *CONFLICT OF LAWS* § 117f (Tent. Draft No. 1, 1953); *cf.* *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359, 362-64 (1952) (FELA jury if state had abolished juries—dictum).

¹²³ The anomaly of the *George* decision is heightened by contrast to the established principle that a court may localize an action by enjoining the plaintiff from suing in another jurisdiction. See Comment, *Forum Non Conveniens, Injunctions Against Suit and Full Faith and Credit*, 29-U. CHI. L. REV. 740 (1962). The contrast is ameliorated somewhat by the common, and probably erroneous, holding that such injunctions are not

principal purpose of the full faith and credit clause, insofar as foreign laws are concerned, is to require disinterested states to defer to interested ones. It is not clear that the clause embodies in addition a policy favoring transitory actions in opposition to the wishes of the only interested state.¹²⁴

But that is not to say, as the court of appeals said, that domicile is a "jurisdictional" requirement. If the Islands are to be forbidden to enforce Connecticut divorce laws, this is out of deference to Connecticut localizing policy. If there is no such policy, the Islands may (and must under *Hughes v. Fetter*, unless their refusal is supported by a policy of efficient court administration) entertain the suit and apply the law of the domicile. Whether such a procedure would have offended Connecticut's substantive or the Island's procedural policy the court made no effort to ascertain.

D. Collateral Attack: Sherrer and Other Bêtes Noires

The third difficulty with *Williams II* could not be attributed to the opinion itself, much less to its author. The difficulty was that *Williams'* salutary and refreshing principle was rendered virtually impotent by later decisions from which Mr. Justice Frankfurter dissented with vigor.

The villain of the piece was *Sherrer v. Sherrer*, which with its entourage made clear that the divorcing state might preclude a spouse who had appeared or who was subject to personal jurisdiction from later challenging the decree in any state, even for lack of domicile.¹²⁵ This decision was in complete accord with contemporary notions of full

entitled to full faith and credit. *E.g.*, *James v. Grand Trunk Western R.R.*, 14 Ill. 2d 356, 152 N.E.2d 858 (1958). And the contrast may be justified in part by the greater specificity of the injunction, assuring that only appropriate cases are localized.

¹²⁴ See B. CURRIE, *op cit. supra* note 89, at 322-25. The RESTATEMENT (SECOND), CONFLICT OF LAWS § 1171 & comment a (Tent. Draft No. 4, 1957), accepts *George* because "otherwise the plaintiff would be remediless if the defendant were to remove both himself and his property from the state where the cause of action arose." This danger is vanishing before the rush of long arm statutes, see D. Currie, *The Growth of the Long Arm: Eight Years of Extended Personal Jurisdiction in Illinois*, 1963 U. ILL. L.F. 533; in any event it seems to be the business of the state that created the cause of action.

¹²⁵ *Cook v. Cook*, 342 U.S. 126, 127 (1951); *Johnson v. Muelberger*, 340 U.S. 581, 587 (1951); *Rice v. Rice*, 336 U.S. 674 (1949) (dictum); *Coe v. Coe*, 334 U.S. 378 (1948); *Sherrer v. Sherrer*, 334 U.S. 343 (1948). In *Rice* collateral attack was allowed because there had been neither personal jurisdiction nor appearance; in *Cook* the case was remanded to ascertain whether there had been either. Domicile was denied by the answer in *Sherrer*, and admitted in *Coe*; in *Johnson* the merits were contested and domicile ignored. Dicta in *Rice*, *Johnson*, and *Cook* are explicit that personal service is enough without an appearance. Mr. Justice Frankfurter thought *Sherrer* a departure from precedent, viewing *Davis v. Davis*, 305 U.S. 32 (1940), as based on the Supreme Court's finding domicile in the divorcing state. *Sherrer v. Sherrer*, *supra* at 358 n.1 (dissenting opinion). In this he seems to have been mistaken, for the Court in *Davis* expressly said the issue had been litigated and was thus foreclosed. 305 U.S. at 40.

faith and *res judicata* outside the divorce field, for the Supreme Court had sensibly held that, for jurisdictional issues as well as others, one opportunity to litigate is quite enough.¹²⁶ But *Sherrer* ignored the peculiar nature of divorce proceedings: by cutting off the possibility of attack by the party most likely to challenge the divorce later on, the Court destroyed an important means of protecting the home state's interest in preserving its marriages.

The doctrine of quasi estoppel, often invoked by state courts to prevent collateral attack by one who procured, connived at, or took advantage of a foreign divorce,¹²⁷ is unfortunate for the same reason,¹²⁸ despite its appeal to basic notions that one ought not be allowed to blow hot and cold or to benefit from one's own deceptions. The Supreme Court has only made matters worse by extending *Sherrer* to prohibit even those who were not parties, but who are barred by the law of the divorcing state, from attacking a bilateral divorce.¹²⁹ Nor is this rule confined to persons who might be held in privity with the spouses; in *Johnson v. Muelberger* the Court held that even "strangers" might be precluded from collateral attack, and eminent writers have concluded even the home state itself cannot challenge a foreign divorce unless it was rendered *ex parte*.¹³⁰

¹²⁶ E.g., *Durfee v. Duke*, 375 U.S. 106 (1963) (full faith), where subject-matter jurisdiction had been litigated; *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 378 (1940) (*res judicata* between federal courts), where it had not. The RESTATEMENT (SECOND), CONFLICT OF LAWS § 403d, comment d (Tent. Draft No. 10, 1964), states that whether the issue has been litigated is relevant in determining whether it will be foreclosed, and certainly the policy against litigating an issue twice is inoperative if jurisdiction has been defaulted. But *res judicata* also embodies a policy against piecemeal litigation that is applicable whenever, as in *Johnson v. Muelberger* and *Chicot County*, the merits have been litigated; and a policy in favor of expediting final settlement of disputes that applies even to a judgment defaulted as to both merits and jurisdiction. As with matters going to the merits, jurisdictional issues ought generally to be foreclosed if there has been an adequate opportunity to litigate them. See *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 997-98 (1960).

¹²⁷ E.g., *Krause v. Krause*, 282 N.Y. 355, 26 N.E.2d 290 (1940).

¹²⁸ See Comment, *Recognition of Foreign Divorce Decrees*, 32 U. CHI. L. REV. 802, 814 (1965). Estoppel may be justified if the interests of innocent third parties would be affected. *Ibid.*

¹²⁹ *Cook v. Cook*, 342 U.S. 126 (1951) (subsequent spouse); *Johnson v. Muelberger*, 340 U.S. 581 (1951) (daughter by prior marriage).

¹³⁰ See EHRENZWEIG, CONFLICT OF LAWS 253 (1962); GOODRICH, CONFLICT OF LAWS 259 & n.30 (4th ed. Scoles 1964). *Contra*, von Mehren, *The Validity of Foreign Divorces*, 45 MASS. L.Q. 23, 29 (1960); Cavers, Book Review, 47 CALIF. L. REV. 414, 417 (1959). See *Sutton v. Leib*, 342 U.S. 402, 408 (1952) (dictum): "If the Nevada court had had jurisdiction by personal service in the state or appearance . . . , its decree of divorce would have been unassailable in other states."

I am not persuaded that attack by the state is foreclosed. First, while reserving the question of a state's power to disregard a finding made after active contest, the Court in

Further, even if *Johnson* has not foreclosed attack by the state, prosecuting Nevada divorcees for bigamy is a little like going after butterflies with an elephant gun. It takes a small town scandal, such as that in *Williams*, to provoke prosecution, and the threat is too remote to deter. The upshot of *Sherrer* and *Johnson* thus seems to be, as others have said,¹³¹ that by appearing in a foreign court a husband and wife can obtain a virtually unchallengeable divorce on grounds not recognized by their home state.¹³²

Williams II stressed that: "those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy and has no means, certainly no effective means, to protect that interest against the selfish action of those outside its borders." *Williams v. North Carolina*, 325 U.S. 226, 230 (1945). Moreover, in *Johnson* the Court suggested that a daughter might be barred because she had only an "expectancy" in her father's estate at the time of the divorce and therefore lacked standing ever to contest the decree, 340 U.S. at 688; this cannot be true of the state, which traditionally has standing to attack a divorce in order to vindicate its interest in preventing bigamy. Further, Professor Ehrenzweig has observed that barring those neither party nor privy cannot be justified by traditional in rem theory, for "the very essence of in rem jurisdiction . . . is the actual situs of the res within the court's jurisdiction, and this is lacking in the absence of bona fide domicile." EHRENZWEIG, *CONFLICT OF LAWS* 252 (1962). See, e.g., *Riley v. New York Trust Co.*, 315 U.S. 343 (1942); *Baker v. Baker, Eccles & Co.*, 242 U.S. 394 (1917), permitting persons not personally served to challenge collaterally the basis of jurisdiction in rem.

A Florida court, in *Simons v. Miami Beach First Nat'l Bank*, 157 So. 2d 199, 200 (Fla. App. 1963), *aff'd on other grounds*, 381 U.S. 81 (1965), discussed in Part I of this paper, has even extended res judicata to ex parte divorces, barring a spouse who was not subject to personal jurisdiction and who did not appear from collaterally attacking a finding of domicile because she could have raised the issue by defending the original suit. This is contrary to the usual doctrine in cases not involving divorce, see *York v. Texas*, 137 U.S. 15, 20 (1890) (which unfortunately permitted a state to forbid special appearances on the mistaken assumption that collateral attack was an adequate substitute); *Developments in the Law—State-Court Jurisdiction*, 73 HARV. L. REV. 909, 991 (1960), and highly questionable in policy, for even *Williams I* in divorce cases does not make it fair to summon an absent defendant to an inconvenient forum unless the plaintiff lives there, and to require a defendant to appear in an inconvenient forum in order to object to it to some extent undermines the jurisdictional limitation—though the burden is obviously less than that of defending the merits. See *ibid.* Arguably, the Florida rule violates the due process clause because it affords inadequate opportunity to object to an unconstitutional assertion of jurisdiction. If not, Florida's decision in *Simons*, combined with Mr. Ehrenzweig's expansive view of *Johnson v. Muelberger*, gives the divorce mills power to wipe *Williams II* off the books altogether.

¹³¹ E.g., EHRENZWEIG, *CONFLICT OF LAWS* 237, 243 (1962); GOODRICH, *CONFLICT OF LAWS* 259 (4th ed. Scoles 1964); Merrill, *The Utility of Divorce Recognition Statutes in Dealing with the Problem of Migratory Divorce*, 27 TEXAS L. REV. 290, 308-09 (1949); Comment, *supra* note 128, 32 U. CHI. L. REV. at 811.

¹³² It may still be possible to base collateral attack upon a Nevada divorce on the traditionally acceptable ground of fraud. See the commendable opinion in *Staedler v. Staedler*, 6 N.J. 380, 78 A.2d 896 (1951), holding *Sherrer* inapplicable to fraud cases and refusing to estop a participant in the fraud; von Mehren, *The Validity of Foreign Divorces*, 45 MASS. L.Q. 23, 28 (1960); 1949 WIS. L. REV. 173, 180. But success on this ground appears unlikely. Later cases have modified this doctrine even in New Jersey. See

Even if domicile is deemed a matter of choice of law rather than of jurisdiction, precedents denying collateral attack are distinguishable. The first Mr. Justice White, dissenting in *Fauntleroy v. Lum*, complained that to forbid collateral attack upon an erroneous application of foreign law would "endow each State with authority to overthrow the public policy and criminal statutes of the others, thereby depriving all of their lawful authority."¹³³ He was wrong in that case, for the adversary nature of a contract dispute and the availability of direct review in the Supreme Court give substantial assurance that the policies of the interested state will be respected. In such a case, if a defendant chooses not to appeal, it is easy to argue that it is more important to end litigation than to give him a second chance. But this justification vanishes in the ordinary foreign divorce case, since both plaintiff and defendant will be doing their level best to frustrate the home state's interest.¹³⁴ The rule should fall with its justification. To forbid collateral attack on a Nevada divorce is to use the full faith and credit clause to destroy its own principle that each state is entitled to manage its own affairs.

The virtue of this argument is also its price: the uncertainty permitted by collateral attack will discourage Nevada divorces,¹³⁵ but it will also destroy the finality of all decrees in a field where uncertainty is especially damaging. But if people want security in their marital status, they should not obtain illegal divorces, and they should keep careful proof of residence in obtaining legal ones. *Sherrer* ought to be overruled; any interested party should be permitted collaterally to attack a divorce, ex parte or bilateral, on the ground of an unconstitutional choice of law.¹³⁶

EHRENZWEIG, *CONFLICT OF LAWS* 254-55 (1962). Further, the availability of collateral attack usually depends upon the law of the state from which the judgment is taken, and Nevada considers perjury as to domicile "intrinsic" fraud for which collateral attack is disallowed. *Colby v. Colby*, 78 Nev. 150, 369 P.2d 1019, 1021 (1962); see EHRENZWEIG, *op. cit. supra*, at 255; 63 COLUM. L. REV. 560, 561, 566 & n.43 (1963). *Sherrer* makes it seem improbable that the Supreme Court would hold this limitation on attack unconstitutional.

¹³³ 210 U.S. 230, 239 (1908).

¹³⁴ See VON MEHREN & TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 1525 (1965).

¹³⁵ See Comment, *supra* note 128, 32 U. CHI. L. REV. at 811 n.47.

¹³⁶ Collateral attack on an unconstitutional choice of law in divorce could be justified either on the theory that in rare cases a state may refuse to recognize even a valid decree contrary to its interests, see *Magnolia Petroleum Co. v. Hunt*, 320 U.S. 268, 273 (1943) (dictum); *Milwaukee County v. M.E. White Co.*, 296 U.S. 430, 440-41 (1935) (dictum); *Yarborough v. Yarborough*, 290 U.S. 202, 215 (1933) (Stone, J., dissenting); Reese & Johnson, *The Scope of Full Faith and Credit to Judgments*, 49 COLUM. L. REV. 153, 163 (1949), or, preferably, by holding that in the light of the inability of a spouse to divest himself of marital rights by consent a state denies him due process if, without domicile, it forbids collateral attack even in the state of divorce. The latter route would have the advantage of preserving the identity of effect in various states that it seems the

E. Foreign-Country Divorces: Rosenstiel

It is bad enough that a state is forbidden to enforce its valid laws by the full faith and credit clause as interpreted in *Sherrer v. Sherrer*. But the decision of the Court of Appeals in *Rosenstiel v. Rosenstiel* was doubly inexcusable, for the court chose to nullify New York statutes without pretense of constitutional compulsion.

No legislator in his right mind would propose a statute embodying

purpose of the full faith and credit clause to provide. This theory would not necessarily permit collateral attack on issues other than choice of law, for if a state has an interest in terminating a marriage it may surely provide for any degree of consent or waiver by the spouse it chooses.

The effect to be given in other states to a judgment refusing to recognize a foreign divorce for lack of domicile was considered in *Sutton v. Leib*, 342 U.S. 402 (1952), and *Colby v. Colby*, 78 Nev. 150, 369 F.2d 1019 (1962). Both concerned Nevada divorces that had been successfully challenged in collateral proceedings elsewhere. In *Sutton* the Supreme Court held that a third state was required to respect an annulment of a subsequent marriage based on the ineffectiveness of the divorce; in *Colby* Nevada refused to set aside its divorce in deference to a separation decree with the same basis. The court in *Colby* attempted to distinguish *Sutton*, arguing that the plaintiff in *Sutton* (a subsequent spouse) had not been a party to the divorce and that in *Sutton* "the Supreme Court did not indicate that Mr. Henzel's divorce was not valid in Nevada." *Id.* at 157, 369 P.2d at 1023 (emphasis in original). But the first ground is irrelevant and the second erroneous. The absent spouse in *Colby* was not bound by the Nevada decree either, since he had not appeared or been subject to personal jurisdiction, and if Mrs. Sutton had been a party the later New York decree annulling her marriage would still have been entitled to recognition. *Cf.* *Treines v. Sunshine Mining Co.*, 308 U.S. 66 (1939). As for the Nevada court's second distinction, the Supreme Court in *Sutton* went out of its way to suggest that the divorce was invalid in Nevada: "[A]s to the New York decree annulling the marriage, New York had such jurisdiction of the parties and its decree is entitled to full faith throughout the Nation, in Nevada as well as in Illinois. The New York invalidation of the Nevada divorce stands in the same position. As Mrs. Henzel was neither personally served in Nevada nor entered her appearance, the Nevada divorce decree was subject to attack and nullification in New York for lack of jurisdiction over the parties in a contested action." 342 U.S. at 408-09. *Accord*, 31 GEO. WASH. L. REV. 648, 650-51 (1963). Any argument that Nevada owed no more faith to the Maryland decree than Maryland owed to the Nevada misses the whole point of *Sherrer*, for the former had been contested and the latter had not. See 15 STAN. L. REV. 331, 335 (1963). *But see* *Rocker v. Celebrezze*, 358 F.2d 119, 123 (2d Cir. 1966); *Wondsel v. Commissioner*, 350 F.2d 339 (2d Cir. 1965), agreeing with *Colby*.

Both in *Sutton* and in *Colby* the proceedings challenging the Nevada divorces seemed truly adverse. In *Sutton*, indeed, the wife, who had not gone to Nevada, filed for separate maintenance only one month after the divorce. The decree invalidating the divorce was thus correctly recognized in *Sutton* and erroneously denied recognition in *Colby*. But it should not be concluded that in every proceeding to set aside a divorce, as contrasted with the divorce suit itself, there is no danger of collusion. For collusive proof that an earlier divorce was invalid may be an attractive means of avoiding a subsequent marriage that has gone sour.

The argument here advanced would not permit collateral attack on choice of law in such areas as usury, gambling, infancy, or coverture; for despite the policy in such matters to override the parties' joint intention, and the consequent frequency of attempts to contract for application of foreign law, the filing of a coercive action after breach assures adversary litigation.

New York divorce law after *Rosenstiel*: "New Yorkers may not obtain a divorce in this State except for adultery,¹³⁷ nor may they contract to dissolve the marriage;¹³⁸ however, they may obtain a divorce in any other jurisdiction on any ground they choose."¹³⁹ Those who believe it wise to permit escape from unhappy marriages would not impose the irrelevant condition of filing suit outside the state; those who believe that changing partners is immoral and bad for the children would not make it so ridiculously easy.

It has been argued that the availability of only one divorce ground in New York is the result of historical accident rather than of conscious policy. The legislature, it is said, enacted the statute allowing divorce for adultery in response to a petition seeking a legislative divorce on that ground; other grounds were neither allowed nor forbidden, but simply not considered.¹⁴⁰ The same cannot be said of the statute outlawing contracts to dissolve the marriage.¹⁴¹ But it can be respectably argued that New York's legislative policy is to allow divorce for adultery; to forbid it by mere mutual consent; but to leave to the courts whether or not to create additional grounds in between. The New York courts, however, have not so interpreted the statutes. They have refused to grant divorces without adultery, and they have declared very plainly that they read the legislation as expressing a policy opposing divorce in other cases.¹⁴² Moreover, "incompatibility" as administered in *Juarez* seems indistinguishable from divorce by mere consent;¹⁴³ even if New York read its statutes to permit divorce

¹³⁷ N.Y. Sess. Laws 1962, ch. 313, § 7, since amended by N.Y. Sess. Laws 1966, ch. 254, § 2, to include additional grounds. N.Y. DOM. REL. LAW § 170.

¹³⁸ N.Y. GEN. OBLIGATIONS LAW § 5-311.

¹³⁹ *Rosenstiel v. Rosenstiel*, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965).

¹⁴⁰ See 1966 N.Y. JOINT LEGISLATIVE COMMITTEE ON MATRIMONIAL AND FAMILY LAWS REP. 21 (testimony of Dr. Nelson M. Blake).

¹⁴¹ See N.Y. GEN. OBLIGATIONS LAW § 5-311.

¹⁴² See *Weiman v. Weiman*, 295 N.Y. 150, 154, 65 N.E.2d 754, 755-56 (1946), forbidding waiver of a new trial following appeal in a divorce case as "opposed to a strong public policy which favors the continuity of marriage"; *Hubbard v. Hubbard*, 228 N.Y. 81, 85, 126 N.E. 508, 509 (1920) (dictum), declaring New York's policy, before *Williams I*, of refusing to recognize foreign ex parte divorces of New Yorkers on grounds unknown to New York: "The reason for the stated policy of this state is its statutory adoption of the rule that there may be of right but one sufficient cause, to wit, adultery, for absolute divorce The policy of this state . . . exists to promote the permanency of the marriage contracts and the morality of the citizens of the state."

The breakdown of this policy can be seen as early as 1938. See *Glaser v. Glaser*, 276 N.Y. 296, 12 N.E.2d 305 (1938). See also *In the Matter of Rhineland*, 290 N.Y. 31, 36, 47 N.E.2d 681, 684 (1943). However, it was asserted vigorously in *Caldwell v. Caldwell*, 298 N.Y. 146, 81 N.E.2d 60 (1948).

¹⁴³ See *Caldwell v. Caldwell*, 298 N.Y. 146, 81 N.E.2d 60 (1948), holding Mexican divorces obtained without personal appearance contrary to the policy of the statute prohibiting contracts to divorce. One writer protests that the policy of this statute extends only to contracts and not to decrees based on mere consent, 29 ALBANY L. REV. 328, 332 (1965), but the two cannot be distinguished in principle.

for any ground beyond the wishes of the parties, the divorce in *Rosenstiel* could not pass muster.

If New York's public policy is to be found in the statutes, the court's statement that recognition of the Mexican incompatibility decree "offends no public policy of this state" cannot bear scrutiny. But it is common knowledge that a great many New Yorkers found the single-ground divorce law a bit archaic; perhaps the court did not believe the statutes really represented public policy. This tack derives considerable support from Professor Bickel's thesis that continued non-enforcement drains a statute of its force.¹⁴⁴ Nevertheless, it engenders severe risks of error and of abuse.

To begin with, I am at a loss to see how the judges are to ascertain that a statute no longer commands majority support. The infrequency of bigamy prosecutions following foreign divorces does not prove that most New Yorkers would allow divorce by consent, for many who would refuse such divorces might shrink from the harshness of criminal sanctions. Imperfect as the legislative process may be as a mirror of public opinion, it is less so than the judicial process, which is largely insulated from political pressures. Moreover, in our scheme of things we rely on the legislature to express what the people want. It is true that in New York's case the one-ground divorce law expressed the feelings of nineteenth century New York and is not necessarily responsive to those of today. But it is not every hundred-year-old statute that has lost its community support. To require reenactment of all laws after twenty years, or after forty, would be either to impose a significant burden on the legislatures or to encourage wholesale use of the rubber stamp, the period chosen being in any case highly arbitrary; while the slippery nature of sorting out those statutes which time and change have rendered untrustworthy counsels against an *ad hoc* approach. I think it would weaken the legislature's sense of responsibility, endanger the principle of representative government, and violate New York's doctrine of the separation of powers for the courts to disregard statutes they feel do not reflect current majority opinion. If the New York Court of Appeals disagrees, it ought to apply the principle frankly and permit consent divorces in New York. But if, as I suspect, the court would stop short of adopting a principle of desuetude that would permit it to nullify archaic statutes in domestic cases, it seems equally inappropriate for it to permit the same result by the manufacture of transparent foreign contacts.

¹⁴⁴ BICKEL, *THE LEAST DANGEROUS BRANCH* 148-56 (1962). He finds this principle incipient in Mr. Justice Frankfurter's opinion (for four of the nine participating Justices) in *Poe v. Ullman*, 367 U.S. 497 (1961), where the Court refused to determine the constitutionality of Connecticut's birth control statute.

In justification of its decision the Court of Appeals in *Rosenstiel* cited *Gould v. Gould*,¹⁴⁵ in which New York had recognized a French divorce of New York domiciliaries. But that decision, as the court conceded, was not exactly "a clear precedent," for the French court had applied the New York adultery statute, and a divorce based on New York law cannot easily be said to violate New York policy. Moreover, the court made no attempt to distinguish or to discredit its earlier unanimous decision in *Caldwell v. Caldwell*,¹⁴⁶ although two protesting opinions considered it controlling. In *Caldwell* neither husband nor wife had bothered to go to Mexico, the divorce having been granted after attorneys had appeared in court for both parties. The court held the divorce contrary to public policy and refused even to apply the usual "estoppel" doctrine that precludes people from attacking divorces they themselves have obtained. I am wholly unable to see why it is material to New York policy whether husband and wife have spent an hour in Juarez or not; I think the reason the court did not distinguish *Caldwell* was that it was indistinguishable. The court indeed implicitly admitted this, for it argued that Mexican divorces should be recognized because they were no more offensive to policy than Nevada's: "[O]ur public interest is not affected differently by a formality of one day than by a formality of six weeks."

In an ideal world I think New York would not recognize fraudulent Nevada divorces either. It recognizes them now because it has to, but that does not require it to recognize Mexican divorces, which are outside the full faith and credit clause. The court seems to have been suggesting that Nevada divorces so thoroughly vitiate New York's policy of protecting marriage that there is no point in preserving the remains. There is something to be said for this position, especially since a law forbidding divorce except after six weeks in Nevada discriminates sharply against the poor. But the same objection can be levelled against *Rosenstiel* itself, for the decision does not go nearly far enough to eliminate economic discrimination. Requiring people to make a senseless trip to Mexico, or even to hire Mexican lawyers to file suit for them in Juarez, is completely without rational basis, serves only to limit divorce to people of means, and therefore invites challenge as a denial of equal protection of the laws.¹⁴⁷

¹⁴⁵ 235 N.Y. 14, 138 N.E. 490 (1923).

¹⁴⁶ 298 N.Y. 146, 81 N.E.2d 60 (1948).

¹⁴⁷ Cf. *Harper v. State Bd. of Elections*, 383 U.S. 663 (1966). It can also be argued that making foreign divorces available to the rich retards enactment of laws making local divorces available to all, because it lessens pressure for amendment. See von Mehren, *The Validity of Foreign Divorces*, 45 Mass. L.Q. 23, 35 (1960).

The final consideration suggested by the court in defense of its *Rosenstiel* decision was that "many thousands" of New Yorkers had been affected by the consistent course of lower court decisions recognizing bilateral Mexican divorces.¹⁴⁸ The implication is that it would have been unfair to people who had obtained such divorces in reliance on the lower court decisions for the Court of Appeals to refuse recognition. Stability is certainly important in the law: the careful citizen ought to be able to determine legal consequences with reasonable certainty before he takes the plunge. But it seems extreme for a court to invoke the reliance principle to foreclose examination of lower court decisions it has never approved. It is fair to say that the Court of Appeals ought to have taken up the issue long before in order to set right a growing number of mistaken decisions below. But it does not seem fair to argue that the court's failure to do so implied approval of those decisions. For ever since *Caldwell v. Caldwell*¹⁴⁹ in 1948 it had been plain for any lawyer to see that Mexican mail-order divorces were contrary to public policy. Since the two are indistinguishable in principle, I do not think anyone had a right to expect the Court of Appeals to deal differently with Mexican divorces on personal appearance.¹⁵⁰

But if the court was unwilling to inflict the penalties of a lawyer's incautious optimism upon his client, Chief Judge Desmond and Judge Scileppi suggested an alternative remedy that the majority did not deign to discuss: prospective overruling. This technique is not without its difficulties. Chief Judge Desmond would have disapproved future Mexican divorces without setting aside the decree in *Rosenstiel*. Judge Scileppi argued that this procedure would require the court to comment on an issue not relevant to disposition of the case and would give a party no incentive to appeal the upholding of precedent; he preferred to set aside the divorce in the case before him, but otherwise

¹⁴⁸ *E.g.*, *Kantrowitz v. Kantrowitz*, 21 App. Div. 2d 654, 249 N.Y.S.2d 723 (1964). The Court of Appeals cited 19 cases decided over 25 years.

¹⁴⁹ 298 N.Y. 146, 81 N.E.2d 60 (1948).

¹⁵⁰ Against this authority, the earlier dictum of the Court of Appeals that "it is no part of the public policy of this State to refuse recognition to divorce decrees of foreign states when rendered on the appearance of both parties, even when the parties go from this State to the foreign state for the purpose of obtaining the decree and do obtain it on grounds not recognized here," in the *Matter of Rhinelander*, 290 N.Y. 31, 36-37, 47 N.E.2d 681, 684 (1943), seems a weak reed. The holding in *Rhinelander* was a refusal to set aside a support agreement following an ex parte divorce on the ground of public policy. *Glaser v. Glaser*, 275 N.Y. 296, 12 N.E.2d 305 (1938), in which the court made similar remarks in upholding a Nevada divorce, was based on a finding of Nevada domicile.

to deny the decision retroactive effect.¹⁵¹ Judge Scileppi's argument may be a bit intellectually untidy, but it may offer the best alternative to judicial paralysis on the one hand and wholesale frustration of legitimate expectations on the other. And in any case I do not think the court was justified in allowing fears of upsetting people's past plans to interfere with a correction of the law for the future.

In brief, the *Rosenstiel* decision left New York with a divorce law that could satisfy nobody, and it did so at great cost to the proper relationship between the courts and the legislature.

F. *A Sequel and a Conclusion*

It is headline material that the New York legislature, not long after *Rosenstiel*, finally got around to amending the divorce statute.¹⁵² Several additional grounds have been provided, including cruelty, abandonment, and two years' separation pursuant to a separation agreement or decree. The new statute will greatly alleviate, although because of the requirement of either fault or substantial delay it will not eliminate, the problem of foreign divorces for New Yorkers. As it now stands, the statute represents a fairly decent balance between the severity of chaining people to dead marriages and the irresponsibility of making families as easy to dissolve as bouillon cubes. The unfortunate fact is that the *Sherrer* and *Rosenstiel* decisions, if adhered to, make it next to impossible for New York to enforce its hard-fought and careful decision.

There is a provision in the new New York divorce statute that attempts to limit the availability of foreign divorces. It provides, in substance, that a person who lived in New York both shortly before and shortly after the divorce, or who maintained a New York place of residence the whole time, will have an uphill job of proving he was domiciled somewhere else at the time of the divorce.¹⁵³ Nice try; but

¹⁵¹ See *Molitor v. Kaneland Community Unit*, 18 Ill. 2d 11, 17, 27-28, 163 N.E.2d 89, 97 (1959). See generally HART & SACKS, *THE LEGAL PROCESS* 620-37 (Tent. ed. 1958). Prospective overruling of the Scileppi variety is advocated by Professor Leach in his entertaining vignette on *Rosenstiel*. See Leach, *Divorce by Plane-Ticket—With a Side-Order of Jurisprudence*, 14 KAN. L. REV. 549, 552, 558-59 (1966).

¹⁵² N.Y. DOM. REL. LAW § 170.

¹⁵³ N.Y. DOM. REL. LAW § 250:

Divorces obtained outside the state of New York. Proof that a person obtaining a divorce in another jurisdiction was (a) domiciled in this state within twelve months prior to the commencement of the proceeding therefore, and resumed residence in this state within eighteen months after the date of his departure therefrom, or (b) at all times after his departure from this state and until his 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.

this will be no help at all against either *Sherrer* or *Rosenstiel*. For the former permitted colluding spouses to foreclose any effective inquiry into domicile by both appearing in Nevada, and the latter upheld a Mexican divorce upon the explicit hypothesis that the parties were domiciled in New York.

One might argue that by providing a statutory test for determining domicile the legislature indicated an intent to make domicile necessary for divorce. But there is a more persuasive reason why the Court of Appeals ought to decline to follow *Rosenstiel* in future cases under the amended statute: it can no longer be argued, as at the time of *Rosenstiel*, that the statute does not express the public policy of New York, or that it does not embody a policy in favor of preserving marriages that do not meet its specifications for divorce. The legislature is no longer in default, and for the court to nullify its efforts would amount not to filling a vacuum of responsibility, as in *Rosenstiel* itself, but rather to open defiance. I do not think *stare decisis* or reliance upon *Rosenstiel* a serious obstacle, since *Rosenstiel* was decided in an entirely different context; it could arguably be said then, but it cannot now, that Mexican consent divorces are no affront to New York policy.

New York courts are free to stop recognizing Mexican divorces in violation of New York policy, but, thanks to the Supreme Court, there is nothing they can do about Nevada divorces.¹⁵⁴ For the full faith and credit principle that each state shall mind its own business has broken down in divorce. Although the second *Williams* decision laudably embraced that principle, the enormous temptation to collusion would make enforcement most difficult at best, and the *Sherrer* line of decisions has made it impossible.

Nevada will not help; her disregard for the Constitution is deplorable,¹⁵⁵ but it is unrealistic to expect a state to take extraordinary precautions against little white lies in order to rid itself of a gold mine. But Congress, I think, can play a constructive role. I do not suggest

The section is taken from the Uniform Divorce Recognition Act § 2, 9 U.L.A. 457, 470 (1965). New York omits § 1, which provides that a foreign divorce of spouses domiciled in the enacting state is entitled to no effect. The Uniform Act, with some variations, has been enacted in ten states. See 9a U.L.A. 457 (1965). It is an adequate expression of common sense, and it should prove useful in *ex parte* and foreign country situations or if the state is permitted to attack bilateral sister state decrees.

¹⁵⁴ They may enjoin New Yorkers from suing in Nevada. See *Rosenbaum v. Rosenbaum*, 309 N.Y. 371, 130 N.E.2d 902 (1955) (dictum). The case holds no injunction will be granted against an *ex parte* Mexican divorce, for the divorce will be void and legal remedies adequate. But this remedy requires a New York plaintiff willing to block the divorce; it is no answer to the problem of collusion.

¹⁵⁵ See STUMBERG, *CONFLICT OF LAWS* 303 (3d ed. 1963).

that Congress can overrule the Court on a matter of constitutional interpretation, but Congress has express authority to implement the full faith and credit clause by legislation, and its conception of the proper balance between the principles of finality and of state autonomy is entitled to great respect.¹⁵⁶ I should like to see a statute forbidding any state or territory to divorce people on grounds not recognized by their former home jurisdiction unless one or both of the parties has resided in the divorcing state for a substantial specified period, such as one year.¹⁵⁷ This would eliminate the element of intention to remain, thereby reducing the opportunities for cheating (intention is a particularly safe thing to fib about, for nobody can really prove what you were thinking). Of course, the lack of adversaries makes it possible to concoct a false case of twelve months' stay in Nevada too, and if this were the easiest way to get a divorce it might well become standard practice. But Congress could make this somewhat less likely by declaring that any divorce obtained in violation of the residence requirement would be wholly void and subject to attack by any interested person at any time. No legislation can wholly prevent lying about residence to obtain a paper divorce, just as no legislation can prevent people from establishing and dissolving family relationships without formalities. But there are a great many people who go to great lengths to avoid the latter alternative because they are unwilling to ignore the law completely.

III. DIVORCE AS AN INCIDENTAL QUESTION:

Borax v. Commissioner

Husband: 1. obs: husbandman [one that plows and cultivates land] 2a: a married man . . . b: a man who on the basis of his tribal or societal institutions is considered to be married . . . 3a archaic: the manager of another's property . . . 4: one that uses thriftily or saves for future use.

N. Webster

¹⁵⁶ See Corwin, *The "Full Faith and Credit" Clause*, 81 U. PA. L. REV. 371, 388 (1933); Mayers, *Ex parte Divorce: A Proposed Federal Remedy*, 54 COLUM. L. REV. 54, 59-60 (1954), arguing that under this power Congress may overrule *Williams I*; cf. *The Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851), where the Supreme Court altered its view of the constitutional limits of admiralty jurisdiction in response to a statute, even in the absence of explicit congressional interpretative power; *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (fourteenth amendment); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (fifteenth amendment).

¹⁵⁷ See LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 424-25 (1947). Probably some requirement of presence in the state ought to be added, although it might be difficult to administer, in order to forestall proof of "residence" by absentee ownership. And special provision should be made to assure a "home" to people who never live a year in the same place.

The Uniform Annulment of Marriage and Divorce Act of 1907 would have forbidden divorce except for adultery or bigamy unless one of the parties had resided in the state for two years. It was adopted by only three states. See 1 RABEL, *CONFLICT OF LAWS* 414-15 & n.4, 438, 495-96 (2d ed. 1958), advocating such a requirement.

The final saga in this trilogy is the interesting tale of Herman Borax. Herman and his wife Ruth were New Yorkers, but one fine day Herman trotted off without her to Chihuahua and returned with a divorce and a new wife, the latter alliteratively named Hermine. Ex parte Mexican divorces are too much for even New York courts to stomach, and Ruth obtained a declaration that the divorce was invalid. Herman and Hermine were not a bit flustered. They went right on filing joint tax returns on his income, taking dependency exemptions for her children and parents, and deducting alimony paid to Ruth. The Commissioner of Internal Revenue, however, took umbrage. The first two of these tax-saving devices, he thought, were available only to husbands and wives, and the last only to men validly divorced; Herman and Hermine, he maintained, did not fill these bills. The Second Circuit Court of Appeals disagreed: although every court in the country would be required to respect the New York judgment holding the divorce invalid,¹⁵⁸ Herman was effectively divorced from Ruth and married to Hermine for federal tax purposes.¹⁵⁹ Judge Friendly dissented.¹⁶⁰

It is a common consequence of laws restricting marriage and divorce that people who have lived for years as man and wife are denied benefits such as social security,¹⁶¹ workmen's compensation,¹⁶² and recovery for wrongful death.¹⁶³ For the courts often construe statutes speaking of the "widow" or "surviving spouse" to refer only to lawful marriages; a defective marriage or divorce in the pedigree means no compensation for the loss of support. *Borax* is illustrative of the difficulties engendered in other areas by the sad state of American divorce law, and it demonstrates the fallibility of the assumption that such statutory terms as "husband and wife" invariably require a tedious investigation into the legality of a marriage.

A. Alimony

In 1917 the Supreme Court held that alimony received by a divorcee was not taxable as her income, in part because the husband was not entitled to a deduction for paying it.¹⁶⁴ Congress reacted to this in 1942 by making some alimony payments taxable to the wife and deducti-

¹⁵⁸ *Sutton v. Leib*, 342 U.S. 402 (1952).

¹⁵⁹ 349 F.2d 666 (1965); *accord*, *Wondsel v. Commissioner*, 350 F.2d 339 (2d Cir. 1965) (1954 Code).

¹⁶⁰ 349 F.2d at 676-77.

¹⁶¹ *E.g.*, *Di Giovanni v. Ribicoff*, 288 F.2d 158 (D.C. Cir. 1961).

¹⁶² *E.g.*, *Mainor v. Midvale Co.*, 192 Pa. Super. 367, 162 A.2d 27 (1960).

¹⁶³ *E.g.*, *Beebe v. Moormack Lines*, 59 F.2d 319 (5th Cir. 1932).

¹⁶⁴ *Gould v. Gould*, 245 U.S. 151 (1917).

ble by the husband,¹⁶⁵ the hope being to place the burden on "the spouse actually receiving or actually entitled to receive" the money rather than on the husband, who, especially in light of the increased rate of tax during wartime, often "would not have sufficient income left after paying alimony to meet his income tax obligations."¹⁶⁶

The committee reports underscored, however, the statute's clear requirement that there be "a decree of divorce or of separate maintenance," and the courts consequently denied that alimony paid pursuant to separation agreements in the absence of a court decree were deductible.¹⁶⁷ The reports suggest no reason for this limitation; some have surmised that Congress was deterred from including support payments not related to decrees because of "the possibility of income tax evasion and the difficulty of disproving the *bona fides* of an informal separation."¹⁶⁸

Herman Borax was paying alimony, and he had a Mexican divorce decree; but the divorce had been declared null by a New York court.¹⁶⁹ The Tax Court had earlier held that a Mexican divorce that Mexico had set aside did not qualify,¹⁷⁰ and in *Borax* it held the same reasoning applicable.¹⁷¹ But the Second Circuit in reversing was not the first to hold that an invalid divorce is sufficient to shift the tax burden to the wife. The Third Circuit in *Feinberg v. Commissioner* had allowed a husband to deduct alimony payments although his wife had had his

¹⁶⁵ INT. REV. CODE OF 1939, §§ 22(k), 23(u); INT. REV. CODE OF 1954, §§ 71, 215.

¹⁶⁶ *Lerner v. Commissioner*, 195 F.2d 296, 298 (2d Cir. 1952); H.R. REP. NO. 2333, 77th Cong., 2d Sess. 46, 71-72 (1942); S. REP. NO. 1631, 77th Cong., 2d Sess. 83-84 (1942). There was also concern because income from some alimony trusts was taxable to the wife and income from others to the husband. See SURREY & WARREN, *FEDERAL INCOME TAXATION* 1094 (1960); Gornick, *Alimony and the Income Tax*, 29 CORNELL L.Q. 28, 29-36 (1943).

¹⁶⁷ E.g., *Smith v. Commissioner*, 168 F.2d 446 (2d Cir. 1948); Charles L. Brown, 7 T.C. 715 (1946).

¹⁶⁸ *Smith v. Commissioner*, 168 F.2d 446, 448 (2d Cir. 1948); G.C.M. 25250, 1947-2 CUM. BULL. 32, 33; Gornick, *supra* note 166, at 40. After adoption of the split-income provision for husbands and wives in 1948, the danger of sham separation agreements in order to lower tax rates disappeared, and Congress extended the section to tax wives on alimony paid under a written agreement or a support decree as well, INT. REV. CODE OF 1954, §§ 71, 215; see *Mavity v. Commissioner*, 341 F.2d 865, 868 (2d Cir. 1965); SURREY & WARREN, *FEDERAL INCOME TAXATION* 1098 (1960), because "a voluntary separation is as deserving of this type of treatment as is a separation by court decree." *Mavity v. Commissioner*, *supra*, at 870; see S. REP. NO. 1622, 83d Cong., 2d Sess. (1954).

¹⁶⁹ There had also been a New York decree reforming the amount payable under a separation agreement, but the Tax Court had held this was not a decree of "separate maintenance" because no grounds for a separation had been alleged and because New York refuses decrees to people who have separated by contract. The decree, the Tax Court said, must be one altering the marital status. *Herman Borax*, 30 T.C. 817 (1958).

¹⁷⁰ *Estate of Daniel Buckley*, 37 T.C. 664 (1962).

¹⁷¹ *Ruth Borax*, 40 T.C. 1001 (1963).

ex parte divorce set aside: "The mere fact that the marital domicile of the parties did not recognize the Florida divorce does not render it a nullity for federal income tax purposes."¹⁷² And in so holding the Third Circuit relied upon a 1947 memorandum from the General Counsel of the Internal Revenue Service, which declared that alimony was deductible even if a foreign divorce would probably be struck down by the home state.¹⁷³

The Tax Court in *Borax* thought both the General Counsel's memorandum and *Feinberg* distinguishable. The General Counsel, said the Tax Court, based his ruling "primarily upon the fact that both parties had relied in good faith on the validity of the Mexican divorce." The Third Circuit opinion in turn relied heavily on the General Counsel's ruling, so that court too "must therefore have felt that both parties were relying in good faith on the Florida divorce decree, which we do not find to be the situation here." The Tax Court concluded that "the statute contemplates a decree of divorce which creates a valid status of divorce between the parties or at least a decree upon which both parties in good faith rely."

It is true that the General Counsel's opinion was influenced by his finding that both parties had relied upon the divorce in good faith. But it is hardly fair to say the same of *Feinberg*: the wife in that case, like Ruth Borax, had not relied upon the divorce at all, but had had it set aside. Moreover, the General Counsel gave an additional reason for allowing the deduction. The reason for requiring a decree at all is to prevent sham arrangements designed to avoid taxes; this policy is satisfied by a void decree because "even though a husband and wife might execute a separation agreement as an income-splitting device, it is doubtful that a husband and wife would go through the form of a Mexican divorce for such purpose."

Allowing Herman to deduct alimony served the legislative policy of taxing the person enjoying income; the language of the decree requirement was satisfied, as there was in fact a "divorce decree"; and if the General Counsel's assessment is correct, the purpose of the requirement was satisfied as well. Moreover, the Second Circuit's decision, unlike that of the Tax Court, is in accord with Congress' apparent reluctance to require ticklish determinations of good faith in each case; it also promotes the same policy by avoiding the troublesome inquiry into the validity of foreign divorces. Finally, if good faith in the particular case is to be the test, as the Tax Court has suggested, the purpose

¹⁷² 198 F.2d 260, 263 (1952).

¹⁷³ G.C.M. 25250, 1947-2 CUM. BULL. 32.

of the decree requirement is quite clearly met here. The dissolution was plainly no sham, since Ruth attacked the decree and Herman took up with another woman. Therefore, it seems wholly consonant with the policy of the alimony provision to hold that "divorce" does not refer to marital status under state law.¹⁷⁴

B. *The Joint Return*

The privilege of filing a joint return affords a considerable tax break to many a "husband and wife," for they may minimize the effect of progressive rates by paying twice the tax that would be charged on half their combined incomes.¹⁷⁵ The Code contains an incomplete definition: "An individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married."¹⁷⁶ The Tax Court has consistently held that "husband and wife" are those who are legally married under state law, unless separated by a court decree;¹⁷⁷ and the Regulations allow joint returns by spouses who do not live together or who have obtained an interlocutory divorce.¹⁷⁸

The split-income provision was enacted in 1948 for the stated purpose of eliminating the inequitable advantage that prior law had afforded to couples living in community-property states.¹⁷⁹ Earlier the Supreme Court had held that because a husband's earnings under the community system belonged half to his wife, half should be treated

¹⁷⁴ The argument in an earlier section of this paper suggests that to impose tax upon a wife on the basis of an ex parte divorce may deprive her of property without due process of law. See Part I *supra*; cf. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957). This argument was rejected by *Simons v. Miami Beach First Nat'l Bank*, 381 U.S. 81 (1965).

¹⁷⁵ INT. REV. CODE OF 1939, § 12(d); INT. REV. CODE OF 1954, § 2(a).

¹⁷⁶ INT. REV. CODE OF 1939, § 51(b)(5)(B); INT. REV. CODE OF 1954, § 6013(d).

¹⁷⁷ E.g., *John J. Untermann*, 38 T.C. 93 (1962); *Albert Gersten*, 28 T.C. 756 (1957), *aff'd on this issue*, 267 F.2d 195 (9th Cir. 1959); *Marriner S. Eccles*, 19 T.C. 1049, *aff'd per curiam*, 208 F.2d 796 (4th Cir. 1953).

¹⁷⁸ Treas. Reg. § 1.6013-4(a) (1965). If the statutory requirement relates to the finality of family breakdown it may be rational to distinguish between interlocutory divorces and decrees of separate maintenance: "An interlocutory decree under [Colorado law] . . . is intended to encourage a reunion of the parties—a healing of the breach—a period during which the parties may become reconciled; while separate maintenance . . . is intended to effect a permanent status—a final divorce from bed and board." *Commissioner v. Evans*, 211 F.2d 378, 380 (10th Cir. 1954), refusing to tax a wife on alimony incident to an interlocutory divorce.

¹⁷⁹ See *Hofferbert v. Marshall*, 200 F.2d 648, 650 (4th Cir. 1952); H.R. REP. NO. 1274, 80th Cong., 2d Sess. 24 (1948); Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1103-06 (1948). There was also concern because of confusion and inequality caused by attempts to split income by agreement in common law states, attempts that were more successful with investment income than with earned income. See BITTKER, *FEDERAL INCOME, ESTATE, AND GIFT TAXATION* 280-82 (2d ed. 1958).

as her income;¹⁸⁰ with progressive tax rates, it was reckoned that spouses whose income consisted of the husband's \$25,000 salary paid forty per cent more taxes if their state did not recognize community property.¹⁸¹ Such states as Pennsylvania and Michigan suddenly perceived the virtues of the community-property system,¹⁸² and Congress reacted by extending the benefits of divided income to husbands and wives in every state.

The congressional policy of equal treatment does not carry us very far toward determining who is entitled to file a joint return. Since the purpose of the provision was to afford all taxpayers the income-splitting benefits already available in community-property states, it might seem plausible to define "husband and wife" as those people who could have split their income in a community-property state—that is, those whose earnings would have been community property.¹⁸³ This test is unworkable, however, because the community-property states differ among themselves in determining when a community exists.¹⁸⁴ But, significantly, it is clear that such a definition would not limit the joint return to lawful spouses, since the community states give a full portion to the person who mistakenly believes himself married.¹⁸⁵

¹⁸⁰ *Poe v. Seaborn*, 282 U.S. 101 (1930).

¹⁸¹ See H.R. REP. NO. 1274, 80th Cong., 2d Sess. 22 (1948).

¹⁸² See BITTKER, *supra* note 179, at 280.

¹⁸³ See *Commissioner v. Stockly*, 221 F.2d 745, 747 (3d Cir. 1955): "Since it already was lawful for a married couple in a community property state to split any longterm income which they allocated to prior years under Section 107(a), the purpose of Section 12(d) is effectuated by permitting the same procedure in a case such as we have before us." See also 18 STAN. L. REV. 750, 754 (1966).

¹⁸⁴ In California, for example, if a wife abandons her husband the earnings of both are separate property. CAL. CIV. CODE §§ 169, 175; see *Spreckels v. Spreckels*, 116 Cal. 339, 342, 48 P. 228, 229 (1897). In New Mexico, absent a separation decree, they are community. See N.M. STATS. § 57-3-7 (1953); *Loveridge v. Loveridge*, 52 N.M. 353, 198 P.2d 444 (1948); CLARK, COMMUNITY PROPERTY AND THE FAMILY IN NEW MEXICO 19 (1956). Moreover, it is clear that Congress did not choose to tie income-splitting to the cumbersome process of classifying property as separate or community, for the committee reports are explicit that the advantages of the joint return extend to separate income as well as to community. H.R. REP. NO. 1274, 80th Cong., 2d Sess. 23 (1948); S. REP. NO. 1013, 80th Cong. 2d Sess. 24 (1948).

¹⁸⁵ Whether Herman and Hermine's earnings would have been community property depends upon whether they honestly believed they were married. See, e.g., *Vallera v. Vallera*, 21 Cal.2d 681, 684, 134 P.2d 761, 762 (1943). There is no assurance that all eight community-property states would agree as to the bone fides of their belief. In Louisiana it has been said that there is a putative marriage, and thus community property, if the parties had no "certain knowledge" of an impediment to marriage, *Howard v. Ingle*, 180 So. 248, 252 (La. App. 1938); in California it has been said that there must be "a diligent attempt to meet the requisites of a valid marriage," *Miller v. Johnson*, 214 Cal. App. 2d 123, 126, 29 Cal. Rptr. 251, 253 (1963), and that in most cases

Geographical equality could alternatively have been achieved by taxing the earner rather than the owner of income.¹⁸⁶ But implicit in the proposal for joint returns was the view that the family constituted an economic unit, that all husbands and wives with equal total income ought to be taxed equally because it is economically immaterial whether the money is earned or owned by one or by both spouses.¹⁸⁷ Judged by this policy, the Second Circuit's decision in *Borax* makes very good sense. Herman and Hermine were living together as man and wife, and they were no less an economic unit because he had not been lawfully divorced. Indeed, if "husband and wife" mean lawful spouses, a man may file joint returns with his first wife after he has illegally cast her off and taken up with another—a procedure in very poor accord with the policy of treating economic units as taxable ones.¹⁸⁸

Neither geographical equality nor treatment of the family as a taxable unit required giving husband and wife the advantage of reduced tax rates; one unsuccessful bill with both these purposes would have taxed their aggregate income at the same rate as if it had been earned by a single individual.¹⁸⁹ Congress seems never really to have decided that married couples are deserving of special treatment. Rather, confronted by a tax advantage in community-property states, it achieved

in which a de facto wife has been awarded a community share "the marriage proved invalid only because of some essential fact of which she was unaware," *Vallera v. Vallera*, 21 Cal. 2d 681, 684, 134 P.2d 761, 762 (1943). In Texas a marriage ceremony is required for a putative marriage, *In re Greathouse's Estate*, 184 S.W.2d 317 (Tex. Civ. App. 1944); in California it is not, *Santos v. Santos*, 32 Cal. App. 62, 89 P.2d 164 (1939).

In *Miller v. Johnson*, *supra*, the court refused a community share to a woman who had secured a unilateral "divorce" from a Tijuana "office" which had a sign on the door, "Divorces and Marriages." Whether Hermine could be found honestly to have believed Herman free to marry is debatable. She married him in Juarez in August 1952, two weeks after he had obtained a unilateral Juarez court divorce that was clearly invalid in New York. *Imbrioscia v. Quayle*, 303 N.Y. 841, 104 N.E.2d 378 (1952). The extent of her knowledge of the particulars of his divorce is not reported.

¹⁸⁶ See TREASURY DEPT. STUDY, *THE TAX TREATMENT OF FAMILY INCOME* (1947), *Hearings Before House Comm. on Ways & Means on Revenue Revisions, 1947-48*, 80th Cong., 1st Sess., pt. 2, at 844 (1947), in SURREY & WARREN, *FEDERAL INCOME TAXATION* 1052-53 (1960), detailing the history of proposals to tax community-property income to the spouse who manages and controls it.

¹⁸⁷ See TREASURY DEPT. STUDY, *supra* note 186, in BITTKER, *FEDERAL INCOME, ESTATE & GIFT TAXATION* 280, 281 (1958); Surrey, *Federal Taxation of the Family—The Revenue Act of 1948*, 61 HARV. L. REV. 1097, 1114 (1948).

¹⁸⁸ Yet one court has implied that he may. See *Gersten v. Commissioner*, 267 F.2d 195, 200 (9th Cir. 1959), holding, contrary to *Borax*, that he may not file jointly with the second wife. See also Treas. Reg. § 1.6013-4(a) (1965): "[T]he mere fact that spouses have not lived together during the course of the taxable year shall not prohibit them from making a joint return."

¹⁸⁹ See H.R. REP. NO. 1040, 77th Cong., 1st Sess. (1941), in SURREY & WARREN, *FEDERAL INCOME TAXATION* 1054-56 (1960).

equality by giving all spouses the same advantage because it was politically more feasible to reduce taxes than to raise them.¹⁹⁰ But, arguably, it is the job of the courts to make sense out of statutes, and it may not always be amiss to look beyond legislative history for policy considerations capable of aiding in interpretation. The joint return has been defended on the ground that a married man deserves to pay lower taxes than a single man with the same income because his expenses are greater; the splitting of income is said to compensate for the inadequacy of the present system of personal exemptions in reflecting this disparity in the middle-income brackets.¹⁹¹ If, despite Congress' preoccupation in 1948 with community property, the split-income provision can be seen as implementing a policy of taxation according to ability to pay, legal marriage is unnecessary; the man with a woman and six kids to support is no better able to pay high taxes just because he is not lawfully married.

To define "husband and wife" as lawful spouses, therefore, would be inconsistent with the avowed legislative purpose of eliminating the discriminatory effect of community property, with the underlying assumption that the family is an economic unit, and with the plausible suggestion that husband and wife deserve a tax break because of their high cost of living. These considerations suggest that spouses who have permanently separated ought not to be allowed to file jointly and that people who live together without being technically married ought to be. Several objections, however, might be raised against defining "husband and wife" to mean a man and woman who maintain a common household. The most serious of these are that such a definition would contravene the policy of the state marriage laws and that it would be difficult to administer.

As the experience of Selective Service has recently demonstrated, one

¹⁹⁰ See the discussion of legislative history in Surrey, *supra* note 187, at 1105.

¹⁹¹ See Pechman, *Income Splitting*, in HOUSE COMM. ON WAYS & MEANS, 86TH CONG., 1ST SESS., 1 TAX REVISION COMPENDIUM 473 (1959), reprinted in SURREY & WARREN, *FEDERAL INCOME TAXATION* 1069-72 (1960), suggesting this and other justifications for split income and finding all wanting; BITTKER, *FEDERAL INCOME, ESTATE & GIFT TAXATION* 280-88 (1958), considering income splitting and dependency exemptions in the context of ability to pay. Congress recognized the relevance of this policy of taxation according to ability to pay when it extended partial benefits of income splitting to unmarried "heads of households" in 1951 because in such cases income "is likely to be shared with the child to the extent necessary to maintain the home, and raise and educate the child." H.R. REP. NO. 586, 82ND CONG., 1ST SESS. 11 (1951). Further, "the hardship appears particularly severe in the case of the individual with children to raise who, upon the death of his spouse, finds himself in the position not only of being denied the spouse's aid in raising the children, but under present law also may find his tax load heavier." *Ibid.* See Pechman, *Individual Income Tax Provisions of the 1954 Code*, 8 NAT'L TAX J. 114, 126-31 (1955).

effect of conferring special benefits on married couples is to make marriage more attractive. If it is fair to attribute to the split-income provision a purpose to encourage marriage,¹⁹² presumably "husband and wife" are the legally married. Short of this, it is arguable that people who have obtained invalid divorces ought to be denied the joint return in order to bolster the otherwise ineffective enforcement of strict divorce laws. Finally, to give tax advantages to men and women living together illicitly might tend to encourage relationships forbidden by state law;¹⁹³ it is in recognition of the undesirability of construing the tax code to frustrate state policy that the Supreme Court has disallowed business-expense deductions for criminal fines¹⁹⁴ and that the Tax Court has refused to allow exemptions for dependents with whom the taxpayer is living unlawfully.¹⁹⁵

Several replies can be offered. First, the policy of taxing man and wife as an economic unit, which would be frustrated by a test of legal marriage, can be more closely identified with actual legislative intention than can a policy of encouraging marriage. Second, denial of the joint return may impose a considerable hardship on people who honestly believe they are married, especially if taxes for past years are in question; this hardship may be wholly disproportionate to the offense for which they are to be punished. Third, it is difficult to believe that denial of the joint return will be of much efficacy in eliminating illegal divorces. One suspects that regardless of the federal tax laws, people will go right on traveling to Juarez so long as the trip makes bigamy tolerable to the conscience.¹⁹⁶ In addition, the Supreme

192 Cf. INT. REV. CODE OF 1954, § 170 (deduction for charitable contributions). See S. REP. NO. 1584, 82d Cong., 2d Sess. 2 (1952), justifying an increase in the maximum allowable deduction: "Your committee believes that it is to the best interest of the community to encourage private contributions to these institutions and it is believed that this amendment will provide some assistance in this respect."

193 See 52 VA. L. REV. 141, 148-49 (1966).

194 *Tank Truck Rentals Inc. v. Commissioner*, 356 U.S. 30 (1958).

195 E.g. *Leon Turnipseed*, 27 T.C. 758 (1957). Congress has since written this decision into the statute, INT. REV. CODE OF 1954, § 152(b)(5), specifically to exclude an exemption for "an individual who is a 'common-law wife' where the applicable State law does not recognize common-law marriages." H.R. REP. NO. 775, 85th Cong., 1st Sess. 8 (1957). This amendment argues powerfully for disallowance of the joint return under present law, and it may not be improper to consider it as bearing on the interpretation of prior law as well. See Comment, *State Domestic Relations Law and Federal Tax Policy*, 66 COLUM. L. REV. 150, 164-65 (1966), criticizing on this ground *Borax* and especially its companion case *Wondsel*, which arose under the 1954 Code and which allowed an exemption for an illegal "spouse." The comment doubts the wisdom of § 152(b)(5).

196 See Comment, *supra* note 195, 66 COLUM. L. REV. at 155-56 (1966), arguing that "domestic relations involve too many personal factors for tax results to be legitimately considered the *sine qua non* of action," and that in this area a tax decision may have no substantial effect on state policy.

Court has emphasized that the income tax is "a tax on net income, not a sanction against wrongdoing,"¹⁹⁷ with exceptions only if the threat to state policy is direct and immediate.¹⁹⁸ To have allowed deduction of criminal fines would have been substantially to dilute the punishment. On the other hand, although some people who are unable to marry might enter into illicit relationships in order to split their incomes, the affront to state policy is at least less glaring.¹⁹⁹

The second substantial argument against defining "husband and wife" as those who live together is the difficulty of administration. Not every transient liaison constitutes an economic unit, and not every couple with separate addresses represents a dead marriage. Further, although it would not be without precedent,²⁰⁰ a test in terms of intention to establish a permanent relationship would require a slippery factual inquiry. But the desirability of a simple test does not suggest that "husband and wife" should mean lawful spouses. In the first place, a written separation agreement is quite as lucid a benchmark of the broken marriage as is a court decree, and it comports better with the policy of taxing the family as a unit.²⁰¹ Moreover, and more important,

¹⁹⁷ *Commissioner v. Tellier*, 383 U.S. 687, 691 (1966).

¹⁹⁸ *Tank Truck Rentals, Inc. v. Commissioner*, 356 U.S. 30, 35 (1958).

¹⁹⁹ One latter-day rationalization for the split-income provision is that to tax married couples as if one spouse had earned the total would make a man and a woman with equal incomes pay more tax after marriage than before. See Pechman, *supra* note 191, in SURREY & WARREN, *FEDERAL INCOME TAXATION* 1070 (1960). This tells us only that "husband and wife" are those people who would have been required to aggregate their incomes had Congress adopted a different solution to the community-property problem. The best argument that can be drawn from this is that to require only legal spouses to aggregate income might have encouraged illegal arrangements; since the premise is that "husband and wife" who may split income are the same "husband and wife" who would hypothetically have been required to pay additional taxes, this argument somewhat undercuts the suggestion that the split-income provision should be limited to lawful spouses in order to encourage marriage.

²⁰⁰ A House committee in 1941 proposed a bill requiring joint returns, without a break in rates, for husbands and wives who "have not separated with intent to abandon permanently the marital relationship." See H.R. REP. NO. 1040, 77th Cong., 1st Sess., in SURREY & WARREN, *FEDERAL INCOME TAXATION* 1054 (1960). This is also the test employed in California to determine when a wife's earnings are separate property because she is living "separate and apart from" her husband. *Makeig v. United Security Bank & Trust Co.*, 112 Cal. App. 138, 296 Pac. 673 (1931).

²⁰¹ However, negative inference from the provision that spouses separated under "a decree of divorce or of separate maintenance" are not "husband and wife" probably requires allowance of joint returns despite a separation agreement, for this definition was taken from the alimony provision with the direction that it be uniformly construed in all applications, see S. REP. NO. 1013, 80th Cong., 2d Sess. 50 (1948), and alimony deductions without a court decree were clearly forbidden. See p. 66 *supra*. Uniform construction here promotes simplicity, but it is unfortunate in terms of substantive policy. Insistence on a decree prevents fraudulent agreements designed to obtain alimony deductions, but it makes no sense in income-splitting, because nobody would drum up a

the legality of a marriage often depends upon the past intention of one of the parties to continue living in the state that granted him an earlier divorce, and proof of that intention seems just as elusive and tedious as proof of an intention to establish a permanent man-and-wife relationship.

Finally, as Judge Marshall indicated, the Second Circuit decision in *Borax* draws support from the legislative direction that a "decree of divorce" sufficient to permit alimony deductions should also dissolve a marriage for purposes of the joint return,²⁰² since, as I have suggested above, the decree in *Borax* seems to satisfy the alimony provision.²⁰³

Significantly, both opinions in *Borax* rejected the Tax Court's position that only those legally married may file joint returns. Judge Marshall thought legality irrelevant to tax policy; Judge Friendly, believing that Congress did not intend that the Commissioner and the courts "should set themselves up as domestic relations tribunals," would have allowed the return if New York had not already declared the divorce null. Both opinions suggest simple tests that avoid embroiling the courts and the taxpayers in the uncertainties and complexities of the law of foreign divorce: Judge Friendly would accept any divorce that has not been set aside, and Judge Marshall apparently would accept any divorce at all.²⁰⁴ The simplicity of both tests is consistent with the general policy of certainty in the tax law, and neither the language nor the purpose of the statute seems to compel the sacrifice of this policy to a test based on the legality of the marriage.²⁰⁵

false separation in order to lose the benefit of the joint return. It makes even less sense now that a decree is no longer required for alimony deductions, yet § 71 of the 1954 Code clearly contemplates that separated spouses may file joint returns.

²⁰² See note 201 *supra*.

²⁰³ See p. 67 *supra*. The joint return was not a new idea in 1948; prior law had allowed "a husband and wife living together" to file a joint return, aggregating their incomes and deductions, without the benefit of reduced rates. INT. REV. CODE OF 1939, § 51(b). The committee reports suggest no reason for eliminating the words "living together" when the split-income provision was adopted, and the omission is consistent with inadvertence or with a belief that the words were redundant, as well as with an intention to change the law. The earlier provision may also be based on the premise that husband and wife are an economic unit, and decisions construing it, or its legislative history, might prove helpful.

²⁰⁴ At least if it is not "totally alien" to the concept of divorce in the tax law and if it has not been set aside by the divorcing court itself, see *Estate of Daniel Buckley*, 37 T.C. 664 (1962), which refused to give such a divorce effect under the alimony provisions. The *Borax* opinion left the effect of such decrees open.

²⁰⁵ Judge Friendly's collateral estoppel argument is not unanswerable. It assumes that the issue in the tax case was the same as the issue in *Mrs. Borax'* suit to annul the divorce, and this in turn depends upon the view that "husband and wife" refers to marital status under state law—a view that the court rejected.

C. *The Dependency Exemptions*

From 1944 to 1954 the tax code allowed exemptions only for dependents who were within prescribed degrees of relationship by blood, marriage, or adoption. Among the acceptable classes were a "stepson or stepdaughter," a "father-in-law," and a "mother-in-law" of the taxpayer.²⁰⁶ The Second Circuit allowed Herman Borax exemptions for Hermine's parents and for her children by a prior marriage, although Herman and Hermine were not legally married.

The Tax Court's position was that nobody has a "mother-in-law" unless he is legally married.²⁰⁷ Had Herman and Hermine filed separate returns, it would have been necessary to ask why Congress inaugurated in 1944 a policy of limiting exemptions to persons related to the taxpayer, and on this the committee reports give no assistance.²⁰⁸ But at all relevant times the Regulations provided that in the case of a joint return the dependent need not be related to the spouse who provides support: "It is sufficient if the prescribed relationship exists with respect to either spouse."²⁰⁹ Thus, the Second Circuit was correct in allowing Herman Borax exemptions for Hermine's parents and children if it was right in allowing the joint return—and I have indicated above that I believe there is strong support for that holding.

D. *Conclusion*

Whether the Second Circuit was right or wrong in allowing Herman and Hermine Borax the tax advantages of marriage despite the invalidity of his Mexican divorce is a difficult question for tax experts to resolve. What is important for our purposes is that the question is indeed basically one of tax law, not of conflicts. The ultimate issue is whether Herman and Hermine owed the Government more tax dollars; the validity of the divorce is relevant only if the tax statute is construed to make the contested tax benefits dependent upon legal marriage.²¹⁰ Whether right or wrong, *Borax* is a healthy decision from the point of view of the conflict of laws, for the court recognizes that statutory terms such as "husband and wife" do not necessarily require a determination of the validity of foreign divorce.

²⁰⁶ INT. REV. CODE OF 1939, § 25(b)(3).

²⁰⁷ Estate of Daniel Buckley, 37 T.C. 664, 673 (1962).

²⁰⁸ See H.R. REP. NO. 1365, 78th Cong., 2d Sess. (1944); S. REP. NO. 885, 78th Cong., 2d Sess. 6 (1944).

²⁰⁹ Treas. Reg. § 29.25-3(d)(5) (1949); § 39.25-2(e) (1953); § 1.152-2(d) (1965).

²¹⁰ See generally the excellent Comment, *supra* note 195, 66 COLUM. L. REV. at 150-53 (1966).

IV. CONCLUSION

As the Great Firewater Experiment demonstrated, a law that outlaws what a great many honest people believe is necessary or desirable cannot be enforced. A divorce law that condemns people to the choice between lifelong celibacy and crime because of a past mistake is not one that people are likely to abide by.²¹¹ So long as divorce is permitted on any ground, it will prove impossible to ferret out all instances of collusion in the home courts. So long as a Reno or a Juarez can be found to issue scraps of paper declaring foreign marriages dissolved, laws will be unable to plug the dikes. And if all jurisdictions were suddenly to abolish divorce, people would simply change partners without formality, as many of the poor do now. Not only does prohibiting divorce fail to eliminate it; prohibition is a far less effective means of preserving families than a more realistic divorce law coupled with such devices as reasonable delays and marriage counseling to save those marriages which are not beyond repair.

The considerations developed in this article furnish an additional argument against the perpetuation of strict divorce laws. The practice of foreign divorce often creates uncertainty and hardship; it puts severe strains on our system for accommodating conflicting state interests; and it breeds disrespect for the law. These disadvantages are illustrated by *Simons v. Miami Beach First National Bank*, which permits a wife to be deprived of a fat slice of her husband's estate by a judicial proceeding in which she had no fair opportunity to participate; by the *Rosenstiel* and *Sherrer* decisions, which expose the law to ridicule for its irrationality, distort the relationship between courts and legislature, and present the spectacle of a federation in which the states are powerless to enforce their own laws; and by the Tax Court's opinion in *Borax*, which would have denied a man and woman advantages for which they appeared qualified in terms of tax policy—all because of the necessity for foreign divorces.

One is tempted to explain some of the Supreme Court's decisions allowing migratory divorce as expressions of the social desirability of providing an escape hatch for people who have the misfortune to live under intolerably strict divorce laws.²¹² If these laws are wholly unreasonable, the Court could strike them down under the due process clause. This prospect seems quite improbable, however; both because

²¹¹ See Harper, *The Myth of the Void Divorce*, 2 LAW & CONTEMP. PROB. 335, 346 (1935).

²¹² Cf. Lorenzen's most unfortunate remark: "Approval of the decision in *Williams v. North Carolina II* depends in the first place upon one's personal reaction to divorce." LORENZEN, *SELECTED ARTICLES ON THE CONFLICT OF LAWS* 403 (1947).

the Court is reluctant to risk getting burned again by invoking substantive due process and because rational arguments can be made that statutes limiting divorce protect the integrity of the family. Short of unconstitutionality, it is the Court's business to accommodate state interests, not to frustrate them; nothing in the Constitution or in any proper theory of judicial and legislative powers gives the Court authority to create national divorce policy.²¹³ Judicial nullification of restrictive divorce laws might alleviate considerable hardship in the short run, but it could only serve to weaken our institutions in the end.²¹⁴

New York has shown the way to improve this sorry situation by adopting its highly sensible new divorce law. It would not be surprising, however, if some states were to decline to follow suit. Therefore, I think a strong argument can be made that the integrity of our federal system, and perhaps of our legal system as a whole, demands a national law of divorce. The prospect ought to excite no clamor over the invasion of states' rights: the states do not make their own divorce laws now, and it surely must be less offensive in a nation based on representative government that Congress make divorce laws for the whole country than that Nevada make them. It would be stretching the present powers of Congress to enact a divorce law, and I do not predict that the Constitution will be soon amended to authorize one. But until all the states see the light or divorce becomes a national subject, the conflict of laws respecting divorce will be a perpetual eyesore.

²¹³ See VON MEHREN & TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS*, 1487, 1490, 1526 (1965).

²¹⁴ See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 10-16 (1959).