Divorce, Domicile, and the Constitution

Mark Strasser
Capital University

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Constitutional Law Commons, and the Family Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol108/iss2/4

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
DIVORCE, DOMICILE, AND THE CONSTITUTION

Mark Strasser

TABLE OF CONTENTS

INTRODUCTION ...................................................................................................................... 302
I. DIVORCE AND INTERSTATE RECOGNITION ...................................................................... 302
   A. Granting Divorces .................................................................................................. 303
   B. Divorce and Full Faith and Credit ........................................................................ 306
   C. The Post-Haddock Jurisprudence ........................................................................ 316
   D. Continued Clarification of the Jurisprudence .................................................... 325
II. STATE COURTS AND THE DOMICILE REQUIREMENT ......................................................... 327
   A. Military Divorces ................................................................................................ 328
   B. Same-Sex Divorce Litigation .............................................................................. 331
CONCLUSION ......................................................................................................................... 333

1 Trustees Professor of Law, Capital University Law School, Columbus, Ohio.
INTRODUCTION

For over one hundred and thirty years, the United States Supreme Court has addressed the federal issues implicated in divorce, sometimes addressing state powers over divorce where only one of the parties is domiciled in the jurisdiction and at other times addressing the conditions under which divorces granted in one jurisdiction must be recognized in another. The Court’s understanding of the Constitution’s dictates on these issues has changed dramatically over time, although the Court has consistently interpreted the Constitution to require that at least one of the parties be domiciled in a state in order for a court in that jurisdiction to have the power to grant a divorce. Several state courts have issued divorce decrees while knowing that neither of the interested parties was domiciled in the state, predicting that the Court would modify the jurisprudence if given the opportunity. But such a prediction, if in error, could cause havoc in a number of families, and the Court should decide this issue at its earliest opportunity if only to reduce the number of families at risk of being torn asunder by an adverse ruling.

Part I of this article discusses the constitutional requirements for courts to have jurisdiction to grant divorce decrees and the conditions under which such decrees will trigger full faith and credit guarantees. Part II discusses the practices in some states, where courts (sometimes authorized by local law) have been issuing divorce decrees even where the (purported) constitutional requirements have not been met. The article concludes that while states may have good reasons for permitting courts to grant a divorce to individuals not domiciled there, states doing so put potential future families at risk in ways that the interested individuals likely neither understand nor appreciate. For the sake of those individuals and society as a whole, the Court must clarify the jurisprudence at its earliest opportunity.

I. DIVORCE AND INTERSTATE RECOGNITION

When individuals are born in a state and live and die in that same state, that state’s law governs the individuals’ marriages and divorces.\(^2\) When

\(^2\) The Restatement (First) of Conflict of Laws reads as follows:

A marriage which is against the law of the state of domicile of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:

(a) polygamous marriage,
(b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
(c) marriage between persons of different races where such marriages are at the domicil regarded as odious,
(d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.

RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 132 (AM. LAW INST. 1934).

The Second Restatement similarly reads as follows:

A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state.
individuals are born in one state, marry in another, and then settle (possibly for only awhile) in a third, however, a more nuanced approach is required to determine which jurisdiction's law governs the parties' possible divorce. The Court has long struggled to explicate the Constitution's limitations on which states may grant divorces and the conditions under which such divorces are entitled to full faith and credit, often raising at least as many questions as had been answered.

A. Granting Divorces

When two individuals who are domiciled in one state both marry and divorce there, that state's law governs. More difficult issues arise, however, when two individuals marry and live in one state but then one of the parties seeks a divorce in another. The Court's understanding of the Constitution's approach to these kinds of cases has evolved over several decades, although some issues still require clarification.

*Maynard v. Hill* suggests some of the issues that can arise when the validity of a divorce is called into question. David and Lydia Maynard married in Vermont and then moved to Ohio. David left Lydia in Ohio with their two children, Henry and Frances, and went out west in search of better opportunities. He settled in Washington territory "as a married man, [on] a tract of land of 640 acres." That same year, he was granted a divorce from Lydia by the legislature, and, within four weeks of the divorce, he married Catherine Brashears.

---

which had the most significant relationship to the spouses and the marriage at the time of the marriage.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (AM. LAW INST. 1971).

3 RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 70 (AM. LAW INST. 1971) ("A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses both of whom are domiciled in the state.").

4 See, e.g., id. § 71 ("A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the state."); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 111 (AM. LAW INST. 1934) ("A state cannot exercise through its courts jurisdiction to dissolve a marriage when neither spouse is domiciled within the state."). But see RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 72 (AM. LAW INST. 1971) ("A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses, neither of whom is domiciled in the state, if either spouse has such a relationship to the state as would make it reasonable for the state to dissolve the marriage.").


6 Id. at 191–92 ("In 1828 David S. Maynard and Lydia A. Maynard intermarried in the State of Vermont, and lived there together as husband and wife until 1850, when they removed to Ohio.").

7 See id. at 192.

8 Id.

9 Id. ("On the 22d day of December, 1852, an act was passed by the Legislative Assembly of the Territory, purporting to dissolve the bonds of matrimony between him and his wife.").

10 Id. at 193 ("On or about the 15th of January, 1853, the husband thus divorced intermarried with one Catherine T. Brashears, and thereafter they lived together as husband and wife until his death.").
Lydia, who did not even have notice of the divorce until months after it had been awarded,\textsuperscript{11} claimed that the divorce was void.\textsuperscript{12} But if the divorce was void and her marriage to David was still valid when the interest in the 640 acres vested by virtue of the land having been cultivated for the requisite number of years,\textsuperscript{13} then she was entitled to her share of the land.\textsuperscript{14}

When the land had been cultivated for the required period, the Secretary of the Interior decided that David Maynard was entitled to his share of the land, but that neither Lydia (the first wife who was divorced before the interest in the land vested) nor Catherine (the second wife who was not married to David at the beginning of the relevant period as defined by law) was entitled to a portion of the land.\textsuperscript{15} Because neither of the women had an interest in the land, it "was treated as public land"\textsuperscript{16} and was eventually acquired by Hill and Lewis.\textsuperscript{17}

Lydia, whom David had predeceased by six years, died in 1879.\textsuperscript{18} The couple's children, Henry C. Maynard and Frances J. Patterson,\textsuperscript{19} were Lydia's heirs and they sought to force Hill and Lewis to convey to them the deed to the contested property.\textsuperscript{20}

The Maynard Court understood that an important issue was whether a divorce granted by a legislature was valid.\textsuperscript{21} But unpacking that issue required examination of several issues, some (but not others) of which were addressed by the Court. For example, the Court simply did not address whether Lydia's allegation that she had not received actual or constructive notice of the divorce, if true, was a basis upon which the divorce should be nullified. Instead, the Court focused on whether a

\textsuperscript{11} Id. ("The complaint alleges that no cause existed at any time for this divorce; that no notice was given to the wife of any application by the husband for a divorce, or of the introduction or pendency of the bill for that act in the Legislative Assembly; that she had no knowledge of the passage of the act until July, 1853; . . . ").

\textsuperscript{12} Id. (arguing that the act granting the divorce "is absolutely void; and that the parties were never lawfully divorced").

\textsuperscript{13} See id. at 214 ("[T]hat act conferred the title of the land only upon the settler who at the time was a resident of the Territory, or should be a resident of the Territory before December 1, 1850, and who should reside upon and cultivate the land for four consecutive years.").

\textsuperscript{14} See id. at 194 ("On a subsequent hearing before the register and receiver, the first wife appeared, and they awarded the east half of the claim to her and the west half to the husband."); id. at 214 ("But it is contended that Lydia A. Maynard, the first wife of David A. Maynard, was entitled, notwithstanding the divorce, to the east half of the donation claim.").

\textsuperscript{15} Id. at 194 ("But the Secretary also held that, at the time of the alleged divorce, the husband possessed only an inchoate interest in the lands, and whether it should ever become a vested interest depended upon his future compliance with the conditions prescribed by the statute; that his first wife accordingly possessed no vested interest in the property. He also held that the second wife was not entitled to any portion of the claim, because she was not his wife on the first day of December, 1850, or within one year from that date, which was necessary, to entitle her to one-half of the claim under the statute; . . . ").

\textsuperscript{16} Id. ("[T]he east half of the claim was treated as public land, and was surveyed and platted as such under the direction of the Commissioner of the General Land Office.").

\textsuperscript{17} Id. at 194–95.

\textsuperscript{18} Id. at 192 ("David S. Maynard died intestate in the year 1873, and Lydia A. Maynard in the year 1879.").

\textsuperscript{19} Id. ("[The plaintiffs], Henry C. Maynard and Frances J. Patterson, are their children . . . ").

\textsuperscript{20} Id. at 195 ("[The plaintiffs] pray that the defendants may be . . . directed to convey the lands to them by a good and sufficient deed; . . . ").

\textsuperscript{21} Id. at 203 ("[T]he act of the Legislative Assembly of the Territory of Oregon of the 22d of December, 1852, declaring the bonds of matrimony between David S. Maynard and his wife dissolved, valid and effectual to divorce the parties . . . [?]").
legislature rather than a judge could issue a divorce, suggesting that the resolution of that matter cannot be determined "by reference to the distinctions usually made between legislative acts and such as are judicial or administrative in their character, but by an examination of the subjects upon which legislatures had been in the practice of acting with the consent and approval of the people they represented."\textsuperscript{22} If there has been a "long acquiescence in repeated acts of legislation on particular matters," then there "is evidence that those matters have been generally considered by the people as properly within legislative control."\textsuperscript{23} Where the people had expressed their will through such acquiescence, "[s]uch acts are not to be set aside or treated as invalid, because upon a careful consideration of their character doubts may arise as to the competency of the legislature to pass them."\textsuperscript{24} Thus, the Court rejected that the Maynards' divorce was void and of no legal effect merely because it had been granted by a legislative body rather than a judge.\textsuperscript{25}

The Court explained that it was not as if legislatures lacked familiarity with domestic relations issues:

Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature. That body prescribes the age at which parties may contract to marry, the procedure or form essential to constitute marriage, the duties and obligations it creates, its effects upon the property rights of both, present and prospective, and the acts which may constitute grounds for its dissolution.\textsuperscript{26}

Yet, the Court's point that the legislature sets the requirements for marriage and divorce as a general matter does not establish that the legislature should be deciding whether a particular person should be awarded a divorce, especially if that person's spouse is not available to present his or her defense. Nonetheless, historically, almost all of the state legislatures had granted divorces,\textsuperscript{27} so it could not be argued that this was the kind of act that legislatures were ill-suited to perform. Further, the legislature's having exercised its power in this case had a variety of legal consequences, and the Court was wary of upsetting a variety of settled expectations, such as "[r]ights acquired[] or obligations incurred," merely because of "differences of opinion as to the department of government to which the acts [issuing divorces] are properly assignable."\textsuperscript{28} The Court noted that considerations of reasonable and settled expectations had "special force . . . when the validity of acts dissolving the bonds of matrimony is assailed, the legitimacy of many children, the peace of many families, and the settlement of many estates depending upon its being sustained."\textsuperscript{29}

\textsuperscript{22} \textit{Id.} at 204.
\textsuperscript{23} \textit{Id.}
\textsuperscript{24} \textit{Id.}
\textsuperscript{25} \textit{See id.} at 204–06.
\textsuperscript{26} \textit{Id.} at 205.
\textsuperscript{27} \textit{Id.} at 206 ("[L]egislative divorces have been granted, with few exceptions, in all the States.").
\textsuperscript{28} \textit{Id.} at 204.
\textsuperscript{29} \textit{Id.} at 204–05.
For example, if the divorce was declared invalid, Henry and Frances would presumably have not only been entitled to the land owned by Hill and Lewis but also to the land owned by Catherine Maynard, which she had acquired by virtue of having been Maynard’s widow.30

The Maynard Court chose not to address the problem posed by Lydia Maynard’s allegedly not having received any notice that her husband was seeking a divorce.31 The Court instead waited until later cases to discuss the kind of notice that is due in order for a divorce to qualify for full faith and credit guarantees.

B. Divorce and Full Faith and Credit

In Atherton v. Atherton, the Court addressed whether constructive notice would suffice to establish the validity of a divorce and make that decree subject to full faith and credit guarantees.32 Peter and Mary Atherton married in New York but then moved to Kentucky where they lived with his parents.33 They had a child,34 but shortly afterward Peter was allegedly “cruel and abusive,” causing Mary to take their child and move back to New York.35 When leaving, she made quite clear that she had no intention of ever returning to live with him in Kentucky.36

When Mary had been absent for more than a year, Peter filed for divorce.37 Pursuant to local law, a local attorney chosen by the court sent a notice to the post office near where Mary lived explaining that Peter was seeking a divorce and outlining what she might do in response.38 The attorney asked that the letter be returned to him if it could not be delivered to her.39 As he explained to the court, the attorney neither heard from her nor received the letter in return mail.40 Because the local procedures for giving Mary constructive notice had been followed,41 the court granted Peter a divorce, finding that Mary had abandoned him.42

---

30 See Mark Strasser, Marriage, Divorce, and Domicile, 85 UMKC L. Rev. 145, 159 (2016) (“[If] the divorce were nullified, Catherine would not have been entitled to the western half of the land, which became hers upon David’s death.”).
31 But see Chavez-Rey v. Chavez-Rey, 213 So. 2d 596, 599 (Fla. Dist. Ct. App. 1968) (“The appellee had neither actual nor constructive notice of the divorce action pending against her. Therefore, the court had no jurisdiction over her, and the divorce decree was void.”).
33 Id. at 155 (“On October 17, 1888, the parties were married at Clinton, Oneida County, New York, the plaintiff being a resident of that place, and the defendant a resident of Louisville, Kentucky. Immediately after the marriage, the parties went to and resided at Louisville, in the house with the defendant’s parents . . . .”).
34 Id. (“[T]he parties . . . had a child born to them on January 8, 1890 . . . .”).
35 Id. at 155–56.
36 Id. at 156 (“When she so left him and went to Clinton, she did so with the purpose and intention of not returning to the State of Kentucky, but of permanently residing in the State of New York; and this purpose and intention were understood by the defendant at the time . . . .”).
37 Id. at 158 (“[T]he defendant, Mary G. Atherton, without fault upon the part of the plaintiff, abandoned him, and that said abandonment has continued without interruption from that time to this, and at the filing of the petition herein had existed for more than one year; . . . .”).
38 See id. at 161.
39 Id.
40 Id.
41 See id. at 161, 172–73.
42 Id. at 172–73.
In the meantime, Mary had filed for a divorce from Peter in New York.\textsuperscript{43} In his answer to her suit, he not only denied that he had ever been cruel but also asserted that he had already obtained a divorce.\textsuperscript{44} The New York court reasoned that it did not have to give full faith and credit to the divorce judgment from Kentucky because Mary had never been personally served and, in addition, had never authorized anyone to represent her in the Kentucky proceeding.\textsuperscript{45} Further, Mary was now a New York rather than a Kentucky domiciliary.\textsuperscript{46} The \textit{Atherton} Court held that because Kentucky had always been the husband's domicile and had in addition been the marital domicile, the constructive service sufficed to give the Kentucky court the power to grant the divorce.\textsuperscript{47} Because the service was adequate\textsuperscript{48} and likely gave her actual notice of the Kentucky proceeding,\textsuperscript{49} New York's failure to recognize the Kentucky decree violated full faith and credit guarantees and thus the New York divorce decree could not stand.\textsuperscript{50} Once Kentucky had granted Peter the divorce, the marriage was over and thus there was no marriage for the New York court to dissolve. The \textit{Atherton} Court explained:

\begin{quote}
The purpose and effect of a decree of divorce from the bond of matrimony, by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law.\textsuperscript{51}
\end{quote}

It was unclear how significant a role was played by Kentucky having been the marital domicile. The majority had noted that Kentucky had been the only state that had been the marital domicile,\textsuperscript{52} and Justice Peckham had argued in dissent that if Peter had "been guilty of such misconduct and cruelty towards his wife as entitled her to a divorce, she had a legal right for that reason to leave him and to acquire a separate domicil, even in another State."\textsuperscript{53} Further, if she had rightfully "acquire[d] a separate domicil in New York State,"\textsuperscript{54} Justice Peckham argued that "the Kentucky court did not obtain jurisdiction over her as an absent defendant, by

\begin{itemize}
\item \textsuperscript{43} \textit{Id.} at 155.
\item \textsuperscript{44} \textit{Id.} at 157.
\item \textsuperscript{45} \textit{Id.} at 159.
\item \textsuperscript{46} \textit{Id.}
\item \textsuperscript{47} \textit{Id.} at 171–73; see also Comment, \textit{Jurisdiction in Divorce Proceedings}, 12 \textsc{Yale L.J.} 385, 386 (1903) ("Thus, it was held in \textit{Atherton v. Atherton}, 181 U. S. 155, that where the plaintiff has a bona fide domicil in the State of the matrimonial domicil, that State has such jurisdiction of the subject matter,—though the defendant is served with constructive notice only,—as to require other States to recognize the divorce granted, as valid and binding on both parties.").
\item \textsuperscript{48} \textit{Atherton}, 181 U.S. at 172.
\item \textsuperscript{49} Cf. \textit{id} ("It may be doubted whether this negatives her having received, or had knowledge of, the letter sent to her by the attorney in Kentucky, January 5, 1893, six days before she began her suit in New York.").
\item \textsuperscript{50} \textit{Id.} at 173.
\item \textsuperscript{51} \textit{Id.} at 162.
\item \textsuperscript{52} \textit{Id.} at 171 ("[T]he divorce in Kentucky was by the court of the State . . . which was the only matrimonial domicil of the husband and wife.").
\item \textsuperscript{53} \textit{Id.} at 173 (Peckham, J., dissenting).
\item \textsuperscript{54} \textit{Id.}\end{itemize}
publication of process or sending a copy thereof through the mail to her address in New York."55 One cannot tell whether the Atherton Court upheld the Kentucky divorce because Mary Atherton had never proved that she had justifiably abandoned her husband or if, instead, constructive notice sufficed to make the valid divorce decree subject to full faith and credit guarantees, notwithstanding that she had rightfully acquired a separate domicile in New York. Clarification of these issues was left for another day.

Bell v. Bell involved somewhat similar facts, although there were some important differences.56 The Bells had married in Bloomington, Illinois, and had thereafter lived in New York.57 Mary Bell went to visit her mother in Bloomington, and at that time Frederick had May's belongings packed up, readying them to be sent to Mary's mother's home.58 Mary went back to Buffalo with her mother for a few days and then returned to Illinois, although Mary always claimed that her domicile was in Buffalo.59

Frederick sought a divorce in Pennsylvania on the ground of desertion after claiming to have resided there for a year.60 While Mary was not served personally,61 she learned through the mail of the impending divorce action.62 She neither appeared in person nor through an attorney, and her husband was awarded the divorce.63

Mary sued Frederick for divorce in New York, claiming that he had committed adultery.64 In response, he claimed that the Pennsylvania divorce was entitled to full faith and credit.65 But the Bell Court noted that Frederick had sworn that he was a New York domiciliary a mere ten weeks before he had claimed to have been residing in Pennsylvania for the past year.66 The Court explained that "[n]o valid divorce from the bond of matrimony can be decreed on constructive service by the courts of a State in which neither party is domiciled,"67 which meant that the Pennsylvania "decree of divorce was entitled to no faith and credit in New York or in any other State."

55 Id.
56 See generally Bell v. Bell, 181 U.S. 175 (1901).
57 Id. at 176 ("The parties were married at Bloomington in the State of Illinois on January 24, 1878, and thereafter lived together as husband and wife at Rochester, and afterwards at Buffalo, in the State of New York.").
58 Id. ("The plaintiff went to Bloomington on a visit to her mother. In her absence, the defendant packed up her wearing apparel and other property in trunks, and had them put in the stable, preparatory to sending them to her at Bloomington.").
59 Id.
60 Id.
61 Id.
62 Id.
63 Id.
64 Id. at 175.
65 Id. at 177.
66 Id. at 178 ("Some ten weeks before he filed his petition in Pennsylvania, he described himself, under oath, in a petition for the probate of a will in Erie County in the State of New York, as a resident of that county; and [n]o evidence was offered that he actually changed his domicil from New York to Pennsylvania."); see also id. at 177–78 ("[B]y the law of Pennsylvania every petitioner for a divorce must have had a bona fide residence within the State for one year next before the filing of the petition.").
67 Id. at 177.
68 Id. at 178.
The Bell Court’s conclusion that the divorce was not entitled to full faith and credit was unobjectionable, although the Court’s having framed its conclusion in such a careful way made it potentially misleading. Suppose, for example, that service had been actual rather than constructive. Would the decree be subject to full faith and credit even though neither of the parties had been domiciled in Pennsylvania?

Streitwolf v. Streitwolf helped clarify the Court’s position. The Court held that a divorce decree granted in North Dakota was not entitled to full faith and credit because neither the husband nor the wife had ever been domiciled there, even though the wife had been personally served with notice of her husband’s filing for divorce in North Dakota. In this case, the wife neither appeared nor hired an attorney to represent her in North Dakota.

Together, Bell and Streitwolf stand for the proposition that an ex parte divorce decree issued in a state where neither of the parties is domiciled is not subject to full faith and credit guarantees, whether the notice afforded to the opposing party is actual or constructive. Guidance about how ex parte divorces should be treated may not be particularly helpful, however, when analyzing whether other divorces trigger full faith and credit guarantees. Suppose, for example, that an attorney was hired to represent the party opposing the divorce in a jurisdiction where, allegedly, neither party was domiciled. The Court addressed this issue in Andrews v. Andrews, although there were some complicating factors that made the implications of the decision somewhat more difficult to understand.

69 See id. ("[The court in Pennsylvania had no jurisdiction of the husband’s suit for divorce, because neither party had a domicil in Pennsylvania . . . ").
71 See id. at 179. ("[The husband had no bona fide domicil in the State of North Dakota, when he obtained a divorce there, and it is not pretended that the wife had an independent domicil in North Dakota, or was ever in that State. The court of that State, therefore, had no jurisdiction.")
72 Id. at 179.
73 Compare Andrews, 188 U.S. at 14, 39 (1903) (noting that “the decrees of divorce which were under consideration in Bell v. Bell and Streitwolf v. Streitwolf were rendered in ex parte proceedings”), abrogated by Sherrer v. Sherrer, 334 U.S. 343 (1948); see also Sheila Jordan Cunningham, Jurisdiction in the Ex Parte Divorce: Do Absent Spouses Have a Protected Due Process Interest in Their Marital Status?, 13 MEM. ST. U. L. REV. 205, 221 n.105 (1983) ("[D]ivorce decrees granted ex parte by a forum in which neither spouse was domiciled were not entitled to full faith and credit." (first citing Streitwolf, 181 U.S. at 183; and then citing Bell, 181 U.S. at 177)).
74 Cf. Andrews, 188 U.S. at 39 ("But it is said that the decrees of divorce which were under consideration in Bell v. Bell and Streitwolf v. Streitwolf were rendered in ex parte proceedings, the defendants having been summoned by substituted service, and making no appearance; hence, the case now under consideration is taken out of the rule announced in those cases, since here the defendant appeared and consequently became subject to the jurisdiction of the court by which the decree of divorce was rendered.").
75 Id. at 16–18.
Charles and Kate Andrews had married in Boston and lived together in Massachusetts.\textsuperscript{78} They had marital difficulties and Kate sought separate maintenance, although that suit was later dismissed in December 1890 after the parties reached their own agreement.\textsuperscript{79}

The following summer, Charles went to South Dakota.\textsuperscript{80} He had no business there other than to obtain a divorce from Kate,\textsuperscript{81} and boarded in a hotel rather than leasing an apartment or buying a home.\textsuperscript{82} He did, however, vote in a state election while he was there,\textsuperscript{83} and voting in a local election is traditionally one of the indicia of having acquired a domicile.\textsuperscript{84}

Kate received notice of his filing for divorce, and she engaged local counsel to contest the suit.\textsuperscript{85} She denied that he was a South Dakota domiciliary and, in addition, denied that she had deserted him.\textsuperscript{86} She contended instead that he had been cruel to her.\textsuperscript{87}

Charles and Kate reached an agreement whereby in exchange for a sum of money she agreed to permit him to obtain a divorce on the ground of desertion.\textsuperscript{88} Kate instructed her attorney to withdraw her appearance, and Charles was granted a divorce.\textsuperscript{89} Within days of being awarded the divorce, Charles left the state to return to Massachusetts, where he lived until his death.\textsuperscript{90} Shortly after his return to Massachusetts, he met Annie whom he subsequently married.\textsuperscript{91} They had two children together.\textsuperscript{92}

Annie had no knowledge that the South Dakota divorce might be subject to challenge,\textsuperscript{93} and Kate never challenged the validity of the divorce during Charles’s lifetime, instead waiting until she applied to be the executrix of his estate.\textsuperscript{94} The Massachusetts court addressing who should be considered Charles’s lawful widow found that Charles had always been a Massachusetts domiciliary and that the

\begin{itemize}
\item \textsuperscript{78} \textit{Id.} at 16 ("Charles S. and Kate H. Andrews married in Boston in April, 1887, and they lived together at their matrimonial domicil in the State of Massachusetts.").
\item \textsuperscript{79} \textit{Id.} ("In April, 1890, the wife began a suit for separate maintenance, which was dismissed in December, 1890, because of a settlement between the parties, adjusting their property relations.").
\item \textsuperscript{80} \textit{Id.}
\item \textsuperscript{81} \textit{Id.} ("He . . . had no other business there than the prosecution of this divorce suit.").
\item \textsuperscript{82} \textit{Id.} ("He boarded at a hotel in Sioux Falls all the time . . .").
\item \textsuperscript{83} \textit{Id.} ("[H]e voted there at a state election in the fall of 1891, claiming the right to do so as a bona fide resident under the laws of that State.").
\item \textsuperscript{84} Cf. \textit{Wamsley v. Wamsley}, 635 A.2d 1322, 1324 (Md. 1994) (suggesting that where a person votes is one of the more important factors in establishing domicile).
\item \textsuperscript{85} \textit{Andrews}, 188 U.S. at 16 ("The wife received notice, and appeared by counsel . . .").
\item \textsuperscript{86} \textit{Id.} at 16–17.
\item \textsuperscript{87} \textit{Id.} at 17.
\item \textsuperscript{88} \textit{Id.}
\item \textsuperscript{89} \textit{Id.}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textit{Id.} ("Annie Andrews married Charles S. Andrews in good faith and in ignorance of any illegality in the South Dakota divorce . . .").
\item \textsuperscript{94} \textit{Id.}
\end{itemize}
South Dakota divorce could not be recognized by Massachusetts, which meant that Kate rather than Annie would administer the estate.⁹⁵

Massachusetts law precluded the recognition of a divorce obtained elsewhere by a Massachusetts domiciliary on a ground that would not have provided a basis for a divorce in Massachusetts.⁹⁶ When analyzing the constitutionality of the Massachusetts denial of the divorce’s validity, the Andrews Court quoted from Maynard: “Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of the people than any other institution, has always been subject to the control of the legislature.”⁹⁷ Continuing to cite Maynard to support its analysis, the Andrews Court explained that once a marriage had been contracted, “the law steps in and holds the parties to various obligations and liabilities.”⁹⁸ Because marriage “is the foundation of the family and of society, without which there would be neither civilization nor progress,” that relationship “is an institution, in the maintenance of which . . . the public is deeply interested.”⁹⁹

The Massachusetts law denying recognition was “directed . . . against the execution in Massachusetts of decrees of divorce obtained in other States by persons who are domiciled in Massachusetts.” ¹⁰⁰ Massachusetts domiciliaries who seek divorces elsewhere because those divorces could not be secured at home “go into such other States with the purpose of practicing a fraud upon the laws of the State of their domicil; that is, to procure a divorce without obtaining a bona fide domicil in such other State.”¹⁰¹ Requiring that states give full faith and credit to fraudulent divorces would be an affront to state sovereignty. An important aspect of sovereignty involves the state’s power over the marital status of its own citizens, and that power would be severely undermined if a state’s domiciliary could step over the border, change his or her marital status, and then return home, forcing the state to recognize the new marital status. The Andrews Court reasoned:

If a State may not forbid the enforcement within its borders of a decree of divorce procured by its own citizens who, whilst retaining their domicil in the prohibiting State, have gone into another State to procure a divorce

⁹⁵ Id. at 18 (“From the evidence above stated the ultimate facts were found to be that Andrews had always retained his domicil in Massachusetts . . . . [I]t was decided that the decree rendered in South Dakota was void in the State of Massachusetts, and hence that Kate H. Andrews was the widow of Charles S. Andrews and entitled to administer his estate.”).

⁹⁶ The Massachusetts law states:

A divorce decreed in another State or country according to the laws thereof by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this Commonwealth; but if an inhabitant of this Commonwealth goes into another State or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this Commonwealth, a divorce so obtained shall be of no force or effect in this Commonwealth.


⁹⁷ Id. at 30 (quoting Maynard v. Hill, 125 U.S. 190, 205 (1888)).

⁹⁸ Id. at 31 (quoting Maynard, 125 U.S. at 210).

⁹⁹ Id. (quoting Maynard, 125 U.S. at 210).

¹⁰⁰ Id.

¹⁰¹ Id.
in fraud of the laws of the domicil, [then] the existence of all efficacious power on the subject of divorce will be at an end. ¹⁰²

Where both parties are domiciled in a particular state, a different state will not acquire jurisdiction to grant a divorce merely because one of the parties visits there temporarily. Any decree issued under those circumstances is not entitled to full faith and credit¹⁰³ because the court issuing the decree would not have had the authority to do so.¹⁰⁴

The Andrews Court interpreted South Dakota law to require "domicil, and not mere residence, [as] the basis of divorce proceedings in that State."¹⁰⁵ Yet, the Court was not thereby suggesting that the holding would have been different had South Dakota law merely required residence, because "domicil in that State was essential to give jurisdiction to the courts of such State to render a decree of divorce which would have extra-territorial effect"¹⁰⁶ and because "the appearance of one or both of the parties to a divorce proceeding could not suffice to confer jurisdiction over the subject matter where it was wanting because of the absence of domicil within the State."¹⁰⁷ Because the South Dakota court did not have jurisdiction to grant the divorce, the Massachusetts court was not required by the Full Faith and Credit Clause "to give effect to the decree of divorce in question."¹⁰⁸

The line of cases from Maynard to Andrews sets out a jurisprudence that is not transparent in all respects, and the Court in Haddock v. Haddock¹⁰⁹ sought to clarify the jurisprudence. The Haddocks married in New York, and Harriet Haddock remained there after the wedding.¹¹⁰ John, who claimed that he had been fraudulently induced to marry, abandoned Harriet shortly after the ceremony.¹¹¹ He moved to Connecticut, where he was eventually awarded a divorce.¹¹² Years later, Harriet filed for divorce in New York,¹¹³ where the court did not allow a record of the Connecticut decree to be entered into evidence.¹¹⁴ That decision was appealed, and the question

¹⁰² Id. at 32.
¹⁰³ Id. at 37–38.
¹⁰⁴ Id. at 39 ("[J]urisdiction over the subject matter depended upon domicil, and without such domicil there was no authority to decree a divorce.").
¹⁰⁵ Id. at 41.
¹⁰⁶ Id.
¹⁰⁷ Id. at 41–42.
¹⁰⁸ Id. at 42.
¹¹⁰ Id. at 564 ("[T]he parties had been married in New York in 1868, where they both resided and where the wife continued to reside . . . .").
¹¹¹ Id. at 564–65 ("[I]t was averred that the husband, immediately following their marriage, abandoned the wife . . . . The answer admitted the marriage, but averred that its celebration was procured by the fraud of the wife, and that immediately after the marriage the parties had separated by mutual consent."); see also id. at 606 (Brown, J., dissenting) ("Marriage between these parties was solemnized June 4, 1868. They separated the same day, without a consummation, and have never lived together since.").
¹¹² Id. at 565 (majority opinion) ("[T]he husband had, in 1881, obtained in a court of the State of Connecticut a divorce . . . .").
¹¹³ Id. at 564 ("The wife, a resident of the State of New York, sued the husband in that State in 1899 . . . .")
¹¹⁴ Id. at 566 (discussing "the refusal of the court to admit in evidence the Connecticut decree").
before the United States Supreme Court was whether the Connecticut decree was
denied the faith and credit that it was due.\textsuperscript{115}

When John filed for divorce, he had not had Harriet personally served but instead
had given her notice "by publication and by mailing a copy of the petition to her at
her last known place of residence in the State of New York."\textsuperscript{116} The \textit{Haddock} Court
made clear that full faith and credit guarantees are robust—"where a decree rendered
in one State is embraced by the full faith and credit clause that constitutional
provision commands that the other States shall give to the decree the force and effect
to which it was entitled in the State where rendered."\textsuperscript{117} The Court, however, also
suggested that constructive service over a non-resident defendant does not trigger
full faith and credit guarantees—"[w]here a personal judgment has been rendered in
the courts of a State against a non-resident merely upon constructive service and,
therefore, without acquiring jurisdiction over the person of the defendant, such
judgment may not be enforced in another State in virtue of the full faith and credit
clause."\textsuperscript{118} Here, there was no claim that Connecticut had personal jurisdiction over
Harriet.\textsuperscript{119}

\textit{Atherton} illustrated that a divorce decree involving a nonresident who had
received constructive notice might nonetheless be subject to full faith and credit
guarantees.\textsuperscript{120} But \textit{Atherton} was distinguishable because the marital domicile was in
Kentucky,\textsuperscript{121} whereas in \textit{Haddock} the marital domicile was in New York.\textsuperscript{122} Further,
because the husband abandoned his wife with the intention of avoiding his marital
obligations, the state where he became domiciled did not become the marital
domicile.\textsuperscript{123} \textit{Atherton} was thus not controlling, and the divorce decree issued in
Connecticut was not subject to full faith and credit guarantees.\textsuperscript{124}

Yet, the \textit{Haddock} Court was not holding that Connecticut was precluded from
altering the status of its domiciliary (John):

\footnotesize{\textsuperscript{115} \textit{id.} at 565–66 ("The Federal question is, Did the court below violate the Constitution of the United
States by refusing to give to the decree of divorce rendered in the State of Connecticut the faith and credit
to which it was entitled?").

\textsuperscript{116} \textit{id.} at 566.

\textsuperscript{117} \textit{id.} at 567 (citing \textit{Harding} v. \textit{Harding}, 198 U.S. 317 (1905)).

\textsuperscript{118} \textit{id.}

\textsuperscript{119} \textit{id.} at 572 ("[I]t is apparent that the Connecticut court did not acquire jurisdiction over the wife . . . by virtue
of the domicil of the wife within the State or as the result of personal service upon her within its borders.").

\textsuperscript{120} See generally \textit{Atherton} v. \textit{Atherton}, 181 U.S. 155 (1901). I discussed the \textit{Atherton} case previously
in this Article. See supra text accompanying notes 32–55.

\textsuperscript{121} \textit{Atherton}, 181 U.S. at 171.

\textsuperscript{122} \textit{Haddock}, 201 U.S. at 572 ("New York was the domicil of the wife and the domicil of matrimony.").

\textsuperscript{123} The \textit{Haddock} Court stated:

\[\text{Where the domicil of matrimony was in a particular State, and the husband
abandons his wife and goes into another State in order to avoid his marital
obligations, such other State to which the husband has wrongfully fled does not, in
the nature of things, become a new domicil of matrimony . . . .}\]

\textit{Id.} at 570.

\textsuperscript{124} See \textit{id.} at 571–72, 606.
In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State.\(^{125}\)

To make matters more complicated, Connecticut’s recognition that John had ended his marriage to Harriet did not somehow obligate New York to recognize that Harriet’s marriage to John had ended.\(^{126}\) To give Connecticut that power would allegedly diminish New York’s power to determine the marital status of one of its domiciliaries (Harriet):

If the fact be that where persons are married in the State of New York either of the parties to the marriage may, in violation of the marital obligations, desert the other and go into the State of Connecticut, there acquiring a domicil, and procure a dissolution of the marriage which would be binding in the State of New York as to the party to the marriage there domiciled, it would follow that the power of the State of New York as to the dissolution of the marriage as to its domiciled citizen would be of no practical avail.\(^{127}\)

The \textit{Haddock} holding was in tension with the following \textit{Atherton} observation:

\begin{quote}
The purpose and effect of a decree of divorce from the bond of matrimony, by a court of competent jurisdiction, are to change the existing status or domestic relation of husband and wife, and to free them both from the bond. The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law.\(^{128}\)
\end{quote}

Admittedly, \textit{Haddock} did not overrule \textit{Atherton}—the \textit{Haddock} Court was not claiming, for example, that the same state (Connecticut) should view John as unmarried and Harriet as married. Instead, the \textit{Haddock} Court was suggesting that Connecticut should view John as unmarried and that New York was free to view Harriet as still married to John.\(^{129}\)

Suppose that after having secured his divorce in Connecticut, John moved to New Jersey and remarried. Suppose further that John died, and Harriet sought to be the administrator of the estate. \textit{Andrews} would not control because John had been domiciled in Connecticut when he had secured his divorce. Nonetheless, \textit{Haddock}

\begin{footnotes}
\item[125] \textit{Id.} at 572.
\item[126] Cunningham, supra note 74, at 222–23 (“[T]he Court ruled that New York was not required to extend full faith and credit to a divorce decree granted in an ex parte proceeding by a forum that was neither the parties’ marital domicile nor the absent defendant wife’s domicile. Although Connecticut, as Mr. Haddock’s domicile, had the authority to adjudicate his marital status and to give effect within its borders to such a decree, the Connecticut court had no basis for asserting jurisdiction over Mrs. Haddock, a New York domiciliary . . . .” (footnote omitted)).
\item[127] \textit{Haddock}, 201 U.S. at 574.
\item[128] \textit{Atherton} v. \textit{Atherton}, 181 U.S. 155, 162 (1901).
\item[129] \textit{Haddock}, 201 U.S. at 605–06.
\end{footnotes}
suggests that such a divorce decree would not be subject to full faith and credit guarantees which means that New Jersey might choose not to recognize the divorce, much to the consternation of John’s purported spouse, who had (allegedly) celebrated a marriage with John in New Jersey, and any children born into that (non)marriage. It is perhaps for this reason that Justice Holmes in his Haddock dissent worried that the decision was “likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage.”130

Basically, Haddock countenances the possibility that individuals with valid divorces in one state might nonetheless discover that according to the law of another state they do not have valid divorces and are still married, and are thus precluded from remarrying.131 Not content with issuing a holding potentially destabilizing marriage,132 the Haddock Court went even further, discussing “the inherent power which all governments must possess over the marriage relation, its formation and dissolution, as regards their own citizens.”133 The Haddock Court further explained:

Where a court of one State, conformably to the laws of such State, or the State through its legislative department, has acted concerning the dissolution of the marriage tie, as to a citizen of that State, such action is binding in that State as to such citizen, and the validity of the judgment may not therein be questioned on the ground that the action of the State in dealing with its own citizen concerning the marriage relation was repugnant to the due process clause of the Constitution.134

Thus, the Haddock Court suggested that the state’s power over the marital status of its domiciliaries is so great that even federal due process guarantees cannot be used to undermine a domicile’s marital status determination.135 However, the Court did not thereby foreclose a due process challenge in a different state where a party might argue that the decree did not trigger full faith and credit guarantees because due process guarantees had been violated.136

---

130 Id. at 628 (Holmes, J., dissenting).
131 See id. at 605-06 (majority opinion).
132 The court would later emphasize the importance of marriage by referring to how marriage involves “a right ‘older than the Bill of Rights.’” Obergefell v. Hodges, 135 S. Ct. 2584, 2599 (2015) (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)).
133 Haddock, 201 U.S. at 569.
134 Id. (citing Maynard v. Hill, 125 U.S. 190 (1888)).
135 See id.
136 The Court distinguished the territorial versus extraterritorial implications of its position by discussing Maynard:

The case, therefore, did not concern the extraterritorial efficacy of the legislative divorce. In other words, whilst the ruling recognized the ample powers which government possesses over marriage as to one within its jurisdiction, it did not purport to hold that such ample powers might be exercised and enforced by virtue of the Constitution of the United States in another jurisdiction as to citizens of other States to whom the jurisdiction of the Territory did not extend.

See Haddock, 201 U.S. at 575.
The post-\textit{Haddock} jurisprudence is very confusing and makes marital status determinations even more indeterminate in a certain set of cases where individuals have crossed state lines to obtain divorces. The Court may have appreciated the difficulties \textit{Haddock} created and, in any event, modified the jurisprudence to make marital status determinations more determinate.

\textbf{C. The Post-\textit{Haddock} Jurisprudence}

Over thirty years later, the Court revisited the \textit{Haddock} approach in \textit{Davis v. Davis}.\textsuperscript{137} Mark and Maude Davis were domiciled in the District of Columbia until he sought a divorce \textit{a mensa et thoro}.\textsuperscript{138} He was awarded custody of their son, and she was awarded custody of their daughter.\textsuperscript{139} He later filed for an absolute divorce in Virginia, claiming to be a domiciliary of that state while admitting that Maude was domiciled in the District of Columbia.\textsuperscript{140} She was personally served.\textsuperscript{141} Maude appeared "specially," alleging that Mark was not domiciled in Virginia and instead that "the residence that he was attempting to establish was for the sole purpose of creating jurisdiction in the court to hear and determine the suit for divorce, and was therefore a fraud upon the court and not residence in contemplation of law."\textsuperscript{142} The court, however, found that Mark was a Virginia domiciliary.\textsuperscript{143}

Years later, Mark sought to have his support obligation modified, offering three justifications: (1) the Virginia decree, (2) "his daughter had married and was no longer living with [Maude]," and (3) his income had decreased.\textsuperscript{144} The D.C. Circuit reasoned that the Virginia decree was not entitled to full faith and credit because, under \textit{Haddock}, Virginia had to "be the last matrimonial domicil of the parties, or, if not, that the wife be subjected to the jurisdiction of the court [below] either by personal service within the State, or by voluntary appearance and participation in the suit."\textsuperscript{145} That decision was appealed.\textsuperscript{146}

The \textit{Davis} Court distinguished \textit{Haddock}, outlining several differences:

\begin{quote}
There [in \textit{Haddock}] the husband, immediately after marriage in New York, fled to escape his marital obligations and never returned to discharge any of them. The wife remained in that State. He acquired
\end{quote}

\footnotesize
\begin{itemize}
\item \textsuperscript{137} 305 U.S. 32, 35, 41–42 (1938).
\item \textsuperscript{138} Id. at 35 ("Petitioner and respondent married in 1909 and, until about the time he brought the suit for limited divorce, lived together in the District of Columbia."); see also \textit{A Mensa Et Thoro}, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining the term as "(Of a divorce decree) effecting a separation of the parties rather than a dissolution of the marriage").
\item \textsuperscript{139} \textit{Davis}, 305 U.S. at 35–36 ("The decree of separation awarded to him custody of the son; to her, custody of the daughter; and directed him to pay $300 a month for support of wife and daughter.").
\item \textsuperscript{140} Id. at 36 ("Petitioner's complaint in the Virginia court alleged that he was a resident of that State for the requisite time, [and] showed that respondent was a resident of the District of Columbia . . . ").
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Id.
\item \textsuperscript{143} Id. at 37 ("[T]he court found that petitioner was a resident of Arlington County, Virginia, for the requisite time; that it had jurisdiction of the 'subject matter and of the parties'; overruled the exceptions, and confirmed the report.").
\item \textsuperscript{144} Id. at 38.
\item \textsuperscript{145} Id. at 39 (quoting \textit{Davis v. Davis}, 96 F.2d 512, 515 (D.C. Cir. 1938), rev'd, 305 U.S. 32 (1938)).
\item \textsuperscript{146} See \textit{Davis v. Davis}, 304 U.S. 552, 552–53 (1938) (granting certiorari).
\end{itemize}
Yet, the *Davis* characterization of *Haddock* was somewhat misleading. There had been an allegation that Harriet Haddock had been at fault and had done something to disrupt the marital relation, namely, that she had perpetrated such a serious fraud as to make the marriage impossible. As to the truth of the allegation that a grievous fraud had been perpetrated, this was a matter of state law. But if the allegation that Harriet had fraudulently induced John to marry her were true, then it would not be clear that Harriet Haddock was without fault and had done nothing to impair the marriage nor would it be clear that John Haddock had simply abandoned his wife without cause, especially given the testimony that they had agreed to live apart.

The *Davis* Court noted that Harriet Haddock had "not appeared in the Connecticut court for any purpose," whereas Maude Davis had appeared "specially." But an individual who appears specially to challenge jurisdiction is not seeking to address the merits, so it is not clear what point the Court was trying to convey when noting that Harriet had not appeared for any purpose. Perhaps the Court was suggesting that Maude would have been wiser not to have appeared at all in Virginia and instead to have challenged the Virginia court's jurisdiction in the District of Columbia when pressing her claim that Mark was foisting a fraud on the court. But such a rule represents an amazing public policy choice. Basically, this

---

147 *Davis*, 305 U.S. at 41–42.
148 *Haddock v. Haddock*, 201 U.S. 562, 564–65 (1906) ("The answer . . . averred that its [the marriage's] celebration was procured by the fraud of the wife . . . .").
149 *Haddock*, 201 U.S. at 566 ("The averments concerning the alleged fraud in contracting the marriage and the subsequent laches of the wife are solely matters of state cognizance . . . ."). As another example, New York law provides as follows:

If the plaintiff proves to the satisfaction of the court that through misrepresentation of some fact which was an essential element in the giving of his consent to the contract of marriage, and which was of such a nature as to deceive an ordinarily prudent person, he has been victimized, the court is empowered to annul the marriage.

150 See *Haddock*, 201 U.S. at 625 (Brown, J., dissenting) ("The testimony leaves it doubtful whether it was a case of abandonment or of separation by mutual consent.").
151 *Davis*, 305 U.S. at 41.
152 Id. at 36.
153 See *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 526–27 (1931) ("[T]he special appearance for the purpose of quashing the notice of service did not amount to a general appearance."); *Goldey v. Morning News*, 156 U.S. 518, 525–26 (1895) ("[T]he defendant appeared specially and for the sole and single purpose of presenting the petition for removal. This was strictly a special appearance for this purpose only, and, whether the attempt to remove should be successful or unsuccessful, could not be treated as submitting the defendant to the jurisdiction of the state court for any other purpose."); see also *Davis v. Davis*, 96 F.2d 512, 516 (D.C. Cir. 1938) ("[T]he special appearance of the wife in the Virginia suit was not sufficient to give full jurisdiction. It did not constitute a waiver of objection to jurisdiction.").
154 The suggestion that not appearing may have been in Maude's best interest can be seen in the Court's finding that:
would induce the party who wishes to contest the divorce to wait and challenge it later in his or her own jurisdiction. In the meantime, the individual granted the divorce might marry someone else and start a new family. But the later challenge to the divorce, if successful, would delegitimize that second family. This policy choice might well “cause considerable disaster to innocent persons and [] bastardize children hitherto supposed to be the offspring of lawful marriage.”

Presumably, the reason that it was important that John Haddock had (allegedly) abandoned his wife was that when a husband acquires a new domicile to avoid his marital obligations, his acquisition of a new domicile does not also entail that the marital domicile has changed. The Court’s mentioning Mark’s alleged blamelessness might lead one to infer that the marital domicile had changed by virtue of Mark Davis having innocently acquired a new domicile. But such an inference would be mistaken. As the D.C. Circuit pointed out, the marital domicile does not change when a husband acquires a new domicile after a court has granted a separation from bed and board—the wife’s domicile remains what it was at the time of separation until she, herself, acquires a new domicile. Just as Connecticut did not become the marital domicile by virtue of John’s having gone there to live, Virginia did not become the marital domicile by virtue of Mark’s having gone there to live.

The Davis Court distinguished Haddock by pointing to but not explaining the relevance of a number of factors including the (possible) fault of the husband and the lack of any type of appearance by the wife. Ultimately, the resolution of the case was not based on the factors that the Court hinted might be relevant but, instead, on something else—namely, the Davis Court rejected that Maude had in fact only made

[S]he alleged that neither she nor petitioner had been a resident of Virginia for a year before commencement of the suit; and asserted that he was not then a bona fide resident there, but that the residence he was attempting to establish was for the sole purpose of creating jurisdiction in the court to hear and determine the suit for divorce, and was therefore a fraud upon the court and not residence in contemplation of law.

See Davis, 305 U.S. at 36.

155 See Haddock, 201 U.S. at 628 (Holmes, J., dissenting).

156 Id. at 570 (majority opinion) (“Where the domicil of matrimony was in a particular State, and the husband abandons his wife and goes into another State in order to avoid his marital obligations, such other State to which the husband has wrongfully fled does not, in the nature of things, become a new domicil of matrimony . . . .”).

157 See Davis, 96 F.2d at 515 (noting that in Atherton “the domicil of the husband was the domicil of the wife, on the theory that he was the innocent party and that she was guilty of desertion”) (citing Atherton v. Atherton, 181 U.S. 155 (1901))).

158 Id. at 515–16 (“Since the District of Columbia court, at the instance of the husband, separated the parties by a divorce a mensa et thoro and provided for separate maintenance of the wife, there can be no presumption that the matrimonial domicil shifted to Virginia following the acquisition of a new domicil by the husband.” (citing Rinaldi v. Rinaldi, 118 A. 685, 686–87 (N.J. Ch. 1922))).

159 Id. at 515 (“Upon the termination of the marriage in any way, or upon judicial separation, the wife can acquire a new domicil; until she does so, she retains the domicil which she had at the time of the termination of the marriage relation.” (quoting RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 29 (AM. LAW INST. 1934))).

160 Haddock, 201 U.S. at 572.

161 Davis v. Davis, 305 U.S. 32, 39 (1938) (discussing the lower court’s holding that Virginia was not the marital domicile).

162 Id. at 41–42.
a special appearance. Because in the Court's view she had subjected herself to the jurisdiction of the Virginia court, the Court held that the Virginia decree was subject to full faith and credit. 

Davis and Haddock are quite compatible. Indeed, Haddock expressly stated:

[W]here a bona fide domicil has been acquired in a State by either of the parties to a marriage, and a suit is brought by the domiciled party in such State for a divorce, the courts of that State, if they acquire personal jurisdiction also of the other party, have authority to enter a decree of divorce, entitled to be enforced in every State by the full faith and credit clause.

The Davis Court's having distinguished Haddock, while nonetheless applying it, may have been intended to send a message sub silentio that the Court was trying to rein in or modify Haddock. Four years after Davis was issued, the Court did indeed modify prevailing law.166

In Williams v. North Carolina, the Court addressed whether a Nevada divorce decree was subject to full faith and credit guarantees. Otis Baxter Williams had been married to Carrie Wyke, and Lillie Hendrix had been married to Thomas Hendrix. But in 1940, O. B. Williams and Lillie Hendrix together went to Las Vegas to divorce their respective spouses. Thomas Hendrix was given constructive notice by having a copy of the summons and complaint mailed to him at his last post office address whereas Carrie Williams was actually served by a local sheriff.

---

163 Id. at 43 ("Plainly her plea and conduct in the Virginia court cannot be regarded as special appearance merely to challenge jurisdiction. Considered in its entirety, the record shows that she submitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties.").

164 Id. ("Petitioner is entitled as a matter of right to have the Virginia decree given effect in the courts of the District of Columbia.").

165 Haddock, 201 U.S. at 570 (citing Cheever v. Wilson, 76 U.S. 108 (1869)).


167 Id. at 293, 302–04.

168 Id. at 289 ("Petitioner Williams was married to Carrie Wyke in 1916 in North Carolina and lived with her there until May, 1940.").

169 Id. ("Petitioner Hendrix was married to Thomas Hendrix in 1920 in North Carolina and lived with him there until May, 1940.").

170 Id. ("[P]etitioners went to Las Vegas, Nevada and on June 26, 1940, each filed a divorce action in the Nevada court.").

171 Id. ("In the case of defendant Thomas Hendrix service by publication was had by publication of the summons in a Las Vegas newspaper and by mailing a copy of the summons and complaint to his last post office address.").

172 Id. at 289–90 ("In the case of defendant Carrie Williams a North Carolina sheriff delivered to her in North Carolina a copy of the summons and complaint."). The trial court discussed the service of Carrie Williams:

The following affidavit was filed: "I received the within summons on the 18th day of July, A.D., 1940, and that I personally served the same upon the within named defendant, Mrs. O. B. Williams, on the 22nd day of July, A.D., 1940, at Granite Falls, County of Caldwell, North Carolina, by then and there delivering to her, the said defendant, personally, a copy of said summons attached to a certified copy of the complaint in the within entitled action. Dated this 22nd day of July, A.D., 1940. J. F. Parlier, Sheriff Caldwell County, State of North Carolina."
Both O. B. Williams and Lillie Hendrix were granted divorces on the ground of extreme cruelty after having met the Nevada six-week residency requirement. They then returned to North Carolina, where they were eventually charged with bigamous cohabitation. The charge was offered in evidence in the Nevada proceedings, contending that the divorce decrees and the Nevada marriage were valid in North Carolina as well as in Nevada.

The North Carolina Supreme Court held that the state did not have to recognize the divorce decrees under Haddock and, in addition, suggested that the Nevada judgments were not subject to full faith and credit because there had been no jurisdiction to grant the divorces—neither of the Williamses and neither of the Hendrixes had been domiciled in Nevada when the divorce decrees were issued. The Williams I Court, however, refused to address whether the divorce decrees were not subject to full faith and credit "on the easy assumption that petitioners' domicile in Nevada was a sham and a fraud," perhaps because North Carolina "admit[ted] that there probably [wa]s enough evidence in the record to require that petitioners be considered 'to have been actually domiciled in Nevada.'" Instead, the Court addressed whether North Carolina could refuse to recognize the divorce even "if petitioners had resided in Nevada for a term of years and had long ago acquired a permanent abode there," which required revisiting Haddock.

Affidavit of Parlier, dated July 22, 1940, to service of summons before F. H. Hoover, Clerk Superior Court of above State and County.

State v. Williams, 17 S.E.2d 769, 776 (N.C. 1941); see also State v. Williams, 29 S.E.2d 744, 746 (N.C. 1944), aff'd sub nom. Williams v. North Carolina, 325 U.S. 226 (1945) (“Service of summons was obtained by publication, and no appearance was made by the defendant, Carrie Ora Williams, albeit notice was served on her by the sheriff of Caldwell County, North Carolina.”); contra Williams I, 317 U.S. at 313 (Jackson J., dissenting) (“No personal service was made on the home-staying spouse in either case; and service was had only by publication and substituted service.”).

Williams I, 317 U.S. at 290 (“A decree of divorce was granted petitioner Williams by the Nevada court on August 26, 1940, on the grounds of extreme cruelty, the court finding that 'the plaintiff has been and now is a bona fide and continuous resident of the County of Clark, State of Nevada, and had been such resident for more than six weeks immediately preceding the commencement of this action in the manner prescribed by law.' The Nevada court granted petitioner Hendrix a divorce on October 4, 1940, on the grounds of wilful neglect and extreme cruelty and made the same finding as to this petitioner's bona fide residence in Nevada as it made in the case of Williams.” (footnote omitted)).

Id. (“The Nevada court granted petitioner Hendrix a divorce on October 4, 1940, on the grounds of wilful neglect and extreme cruelty and made the same finding as to this petitioner’s bona fide residence in Nevada as it made in the case of Williams. Petitioners were married to each other in Nevada on October 4, 1940.”).

Id. at 289 (“Petitioners were tried and convicted of bigamous cohabitation under § 4342 of the North Carolina Code . . . .”).

Id. at 290.

Id. at 291. (The Supreme Court of North Carolina in affirming the judgment held that North Carolina was not required to recognize the Nevada decrees under the full faith and credit clause of the Constitution (Art. IV, § 1) by reason of Haddock v. Haddock, 201 U.S. 562.” (citation omitted)).

See id. at 291.

Id. at 292.

Id. at 291.

Id. at 292.

Id. (“[W]e cannot avoid meeting the Haddock v. Haddock issue in this case . . . .”).
The *Williams I* Court noted that many of the facts of the case related to notice were comparable to the *Haddock* facts related to notice. But the *Haddock* Court had held as follows:

New York, the matrimonial domicil where the wife still resided, need not give full faith and credit to the Connecticut decree, since it was obtained by the husband who wrongfully left his wife in the matrimonial domicil, service on her having been obtained by publication and she not having entered an appearance in the action.\(^{184}\)

The only difference between the recounted *Haddock* facts and the facts of *Williams I* was that Carrie Williams had actually received service.\(^{185}\) But the *Williams I* Court did not focus on that difference. Instead, the *Williams I* Court emphasized the *Haddock* Court reasoning that “the state granting the divorce had no jurisdiction over the absent spouse, since it was not the state of the matrimonial domicil, but the place where the husband had acquired a separate domicil after having wrongfully left his wife.”\(^{186}\)

After recounting the selected facts of *Haddock*, the *Williams I* Court expressly rejected “the theory of the *Haddock* case that, so far as the marital status of the parties is concerned, a decree of divorce granted under such circumstances by one state need not be given full faith and credit in another.”\(^{187}\) The *Haddock* understanding of the robustness of full faith and credit guarantees was faulty because “Art. IV, § 1 . . . require[s] that ‘not some but full’ faith and credit [must] be given judgments of a state court.”\(^{188}\)

The *Williams I* Court emphasized the importance of at least one party being domiciled in the state where the divorce is granted, describing it as “essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect.”\(^{189}\) But the individual’s being domiciled in the state is not only important for purposes of giving the decree extraterritorial effect—domicile is also important because it provides the basis upon which the state is authorized to exercise its power.\(^{190}\) The Court noted that “[e]ach state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders,”\(^{191}\) naming a few of the many implicated interests such as the “[p]rotection of offspring, property interests, and the enforcement of marital responsibilities.”\(^{192}\)
I Court then summed up its position by explaining that “each state by virtue of its command over its domiciliaries and its large interest in the institution of marriage can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.”

The Williams I Court repudiated the implications of Haddock, as applied to the case before it, as follows:

Under the circumstances of this case, a man would have two wives, a wife two husbands. . . . Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live. Children of the second marriage would be bastards in one state but legitimate in the other.

Basically, the Williams I Court embraced the Atherton conclusion that “[a] husband without a wife, or a wife without a husband, is unknown to the law,” a proposition upon which the Haddock Court had cast doubt. The Williams I Court further undercut Haddock by emphasizing the importance of respecting due process guarantees. For example, the Court explained that a state could alter the marital status of one of its domiciliaries if the constructive notice “meets the requirements of due process.” Justice Frankfurter was more explicit in his concurrence, saying: “If the actions of the Nevada court had been taken ‘without due process of law’, the divorces which it purported to decree would have been without legal sanction in every state including Nevada.”

The Haddock Court had not worried about due process guarantees. Instead, the Haddock Court had noted that permitting one state to change the marital status of an individual domiciled elsewhere would undermine the power of the other domicile with respect to the marital status of one of its domiciliaries. The Williams I Court admitted the implication but explained that such a result was less significant than the Haddock Court had thought. While it is true that in some sense a state with more lax divorce rules might undercut the public policy of a state with more stringent rules, that is merely one of the effects of enforcing full faith and credit guarantees.

The Court expressly noted that it had not reached “the question as to the power of North Carolina to refuse full faith and credit to Nevada divorce decrees because, contrary to the findings of the Nevada court, North Carolina finds that no bona fide
DIVORCE, DOMICILE, AND THE CONSTITUTION

The Court then reversed and remanded the decision to the Supreme Court of North Carolina.202

There was another trial in North Carolina, where the jury found that Williams and Hendrix had not been domiciled in Nevada when they had obtained their respective divorces.203 The jury rejected that Hendrix and Williams had established domicile, obtained their divorces, and then changed their minds, deciding to return to North Carolina.204 The conviction was affirmed on appeal by the Supreme Court of North Carolina, and then reviewed by the United States Supreme Court.205 The Williams II Court explained, “Under our system of law, judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil.”206 The mere assertion by one state court that a party was domiciled in that state, however, does not suffice to establish that fact. The Court explained that “simply because the Nevada court found that it had power to award a divorce decree cannot . . . foreclose reexamination by another State. Otherwise, as was pointed out long ago, a court’s record would establish its power and the power would be proved by the record.”207 Instead, North Carolina had the power to revisit whether in fact Hendrix and Williams were domiciled in Nevada at the time that the divorce decrees were issued.208 The Court explained that the Nevada finding of domicile was entitled to “respect”209 and cautioned that states are not free to ignore evidence that particular

201 Id.; see also id. at 321 (Jackson, J., dissenting) (“The only suggestion of a domicile within Nevada was a stay of about six weeks at the Alamo Auto Court, an address hardly suggestive of permanence.”). On the contrary:

North Carolina did not base its disregard of the Nevada decrees on the claim that they were a fraud and a sham, and no claim was made here on behalf of North Carolina that the decrees were not valid in Nevada. It is indisputable that the Nevada decrees here, like the Connecticut decree in the Haddock case, were valid and binding in the state where they were rendered.

Id. at 306–07 (Frankfurter, J., concurring).

202 Id. at 304 (majority opinion).

203 State v. Williams, 29 S.E.2d 744, 751 (N.C. 1944), aff’d, Williams v. North Carolina, 325 U.S. 226 (1945) (“[T]he jury has found that the defendants were domiciled in this State when they brought their actions for divorce in Nevada; that they had acquired no bona fide domicil in that State, and that the Nevada decrees were ineffectual to sever the marriage ties.”).

204 Id. at 750 (“[T]he jury was instructed that if the defendants went to Nevada with the requisite intent and actually acquired a domicil there, though they later changed their minds and returned to this State, the courts of that State acquired jurisdiction of the marital status of the defendants and the decrees in evidence would be entitled to full faith and credit in this State and every other state.”).

205 Williams v. North Carolina (Williams II), 325 U.S. 226, 227 (1945) (“This case is here to review judgments of the Supreme Court of North Carolina, affirming convictions for bigamous cohabitation . . . .”).

206 Id. at 229 (citing Bell v. Bell, 181 U.S. 175 (1901)).

207 Id. at 234.

208 Id. at 230 (“As to the truth or existence of a fact, like that of domicil, upon which depends the power to exert judicial authority, a State not a party to the exertion of such judicial authority in another State but seriously affected by it has a right, when asserting its own unquestioned authority, to ascertain the truth or existence of that crucial fact.”).

209 Id. at 233 (“The fact that the Nevada court found that they were domiciled there is entitled to respect, and more.”).
individuals were in fact domiciled in the state granting the divorce. That said, however, there was enough in the record to justify the conclusion of the North Carolina court that no domicile had been established in Nevada.

The Williams II Court understood that permitting a state to examine whether domicile had been established in a different state would put certain divorce decrees at risk, which might put individuals "in situations that create unhappy consequences for them." This, however, is a risk that individuals assume when they go to one jurisdiction to obtain a divorce and then move shortly or immediately thereafter.

The resolution of these matters as evidenced by Williams I and Williams II did not end all difficulties. As Justice Rutledge noted in his dissent, the North Carolina finding of an absence of domicile in Nevada would not entail that Nevada could not recognize the divorce decree that had been issued by a Nevada court, which meant that "the marriage is good in Nevada, but void in North Carolina." Regrettably, the result that Atherton and Williams I had sought had not been achieved—namely, that it could not be the case that the same couple was viewed as married in one state but not in another. This result, however, is not as damming as might first appear. In the hypothesized example, the issue of the legality of the divorce recognized in the forum but not in the domicile (or anywhere else) would presumably not be raised that often. The reason that the divorce and subsequent marriage were not recognized (in the domicile) in the first place was that the couple had gone to the forum state, divorced their respective spouses, married, and then left, thus manifesting that they had had no intent to be domiciled in the forum. But the couple's having left the forum immediately after the divorce decrees were issued suggests that the couple chose the forum state because of its forgiving residency requirements rather than because of some deep connection to the state, which means that the legality of the divorce (under forum law) would not come up often if only because the couple would spend little if any time in that state. The complicated legal issues under Williams I and Williams II, such as the fact that the divorce would be recognized in the forum state but nowhere else, would seem less likely to arise as a practical matter than would the

---

210 Id. ("The challenged judgment must, [ ], satisfy our scrutiny that the reciprocal duty of respect owed by the States to one another’s adjudications has been fairly discharged, and has not been evaded under the guise of finding an absence of domicil and therefore a want of power in the court rendering the judgment.").

211 Id. at 234 ("But when we are dealing as here with an historic notion common to all English-speaking courts, that of domicil, we should not find a want of deference to a sister State on the part of a court of another State which finds an absence of domicil where such a conclusion is warranted by the record.").

212 Id. at 237; see also id. at 234, 239.

213 Id. at 238 ("The petitioners [ ] assumed the risk that this Court would find that North Carolina justifiably concluded that they had not been domiciled in Nevada.").

214 Id. at 247 (Rutledge, J., dissenting). While it is true that Williams II suggests that a couple might be married to each other in Nevada but married to their former spouses in North Carolina, it is not true that Williams I had eliminated this problem. Contra Ann Laquer Estin, Family Law Federalism: Divorce and the Constitution, 16 WM. & MARY BILL RTS. J. 381, 402 (2007) ("Williams II reestablished one of the problems that Williams I had eliminated: under this reasoning, Williams and Hendrix were validly divorced in Nevada but still married to their prior spouses in North Carolina."). Williams I expressly declined to address the consequences that would result from a finding that the Nevada divorce was a sham. See Williams v. North Carolina (Williams I), 317 U.S. 287, 292 (1942). It also might be noted that the same problem arose in Andrews. Basically, the Andrews's divorce was valid in South Dakota but not valid in Massachusetts. See supra text accompanying notes 77-108.
problems raised under *Haddock*, where domiciles as a general matter were given great deference with respect to their determinations of the marital status of their domiciliaries.\footnote{Cf. Estin v. Estin, 334 U.S. 541, 553 (1948) (Jackson, J., dissenting) ("If there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom."). The difficulty raised in *Williams II* is distinguishable from the difficulty raised in *Haddock*. The *Haddock* Court suggested that New York might recognize that John, a Connecticut domiciliary, had received a valid divorce from Harriet, but nonetheless would not have to recognize that Harriet (a New York domiciliary) had received a valid divorce from John. The *Williams I* Court suggested that according to Nevada both O. B. and Carrie would have gotten a valid divorce, but that according to North Carolina neither would have gotten a valid divorce. While these approaches are distinguishable, it is nonetheless true that both approaches suffer from a similar defect—the marital status of two individuals might change just by virtue of their taking a plane ride from one state to another.}

\textit{D. Continued Clarification of the Jurisprudence}

*Williams I* and *Williams II* clarified the importance of one of the parties being domiciled in the forum state if the court was going to have jurisdiction to grant the divorce. A separate question involves the circumstances under which an individual can seek to establish that a court lacked jurisdiction to grant the divorce.

*Sherrer v. Sherrer* involved a married couple, domiciled in Massachusetts, who had long had marital difficulties.\footnote{Id. at 345–46 ("Petitioner obtained housing accommodations in Florida, placed her older child in school, and secured employment for herself.").} Margaret Sherrer went to Florida with the couple's two children, ostensibly to take a vacation.\footnote{Id. ("Petitioner, accompanied by the two children of the marriage, left Massachusetts on the latter date, ostensibly for the purpose of spending a vacation in the State of Florida.").} Shortly after arriving there, however, Margaret told her husband, Edward, that she did not plan on returning to Massachusetts.\footnote{Id. ("Shortly after her arrival in Florida, however, petitioner informed her husband that she did not intend to return to him.").} She found housing and a job and placed her older child in school.\footnote{Id. at 345–46 ("He retained Florida counsel who entered a general appearance and filed an answer denying the allegations of petitioner's complaint, including the allegation as to petitioner's Florida residence.").}

Three months later, she filed for divorce, claiming to be domiciled in Florida.\footnote{Id. at 346 ("The Florida court on November 29, 1944, entered a decree of divorce after specifically finding 'that petitioner is a bona fide resident of the State of Florida, and that this court has jurisdiction of the parties and the subject matter in said cause.'").} Edward hired local counsel, contesting both her claim of domicile and the grounds asserted for the divorce.\footnote{Id.} Later that year, the Florida court issued the divorce, expressly finding that Margaret had established domicile.\footnote{Id. at 345-46 ("He retained Florida counsel who entered a general appearance and filed an answer denying the allegations of petitioner's complaint, including the allegation as to petitioner's Florida residence.").} Within a week of the issuance of the divorce, Margaret married Henry Phelps, whom she had known in Massachusetts and who had followed her to Florida shortly after she had left.
They lived together as a married couple in Florida for a few months and then returned to Massachusetts.\textsuperscript{224} A few months later, Edward Sherrer filed suit in Massachusetts, challenging the validity of Margaret’s Florida divorce and claiming that they were still married because the divorce issued in Florida was void for lack of jurisdiction and thus her subsequent marriage to Phelps was also void.\textsuperscript{225} The Massachusetts court found that she had never been domiciled in Florida.\textsuperscript{226} The Supreme Judicial Court of Massachusetts affirmed, finding that “the requirements of full faith and credit did not preclude the Massachusetts courts from reexamining the finding of domicile made by the Florida court.”\textsuperscript{227}

When reversing the Supreme Judicial Court of Massachusetts decision,\textsuperscript{228} the Sherrer Court explained:

\begin{quote}
[T]he requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree.\textsuperscript{229}
\end{quote}

Yet, Andrews seemed to preclude such a holding.\textsuperscript{230} The Sherrer Court noted that Andrews could be distinguished\textsuperscript{231} because there the defendant had withdrawn her appearance rather than litigate whether her husband was in fact domiciled in South Dakota.\textsuperscript{232} Rather than rely on that difference, however, the Court noted that the Andrews analysis had been superseded by subsequent developments in the case law.\textsuperscript{233} Further, the fact that Massachusetts was making a decision about the marital status of current domiciliaries did not give the state the power to revisit the validity of the divorce.\textsuperscript{234} The Court explained that the fact “[t]hat vital interests are involved

\begin{itemize}
\item \textsuperscript{223} Id. at 347 (“On December 1, 1944, petitioner was married in Florida to one Henry A. Phelps, whom petitioner had known while both were residing in Massachusetts and who had come to Florida shortly after petitioner’s arrival in that State.”).
\item \textsuperscript{224} Id. (“Phelps and petitioner lived together as husband and wife in Florida, where they were both employed, until February 5, 1945, when they returned to Massachusetts.”).
\item \textsuperscript{225} Id. (“Respondent alleged that he is the lawful husband of petitioner, that the Florida decree of divorce is invalid, and that petitioner’s subsequent marriage is void.”).
\item \textsuperscript{226} Id. at 347–48 (“The Probate Court, however, resolved the issues of fact adversely to petitioner’s contentions, found that she was never domiciled in Florida, and granted respondent the relief he had requested.”).
\item \textsuperscript{227} Id. at 348.
\item \textsuperscript{228} Id. at 356.
\item \textsuperscript{229} Id. at 351–52.
\item \textsuperscript{230} Id. at 352 (“It is suggested, however, that Andrews v. Andrews militates against the result we have reached.” (citation omitted)).
\item \textsuperscript{231} Id. at 353 (“On its facts, the Andrews case presents variations from the present situation.”).
\item \textsuperscript{232} See id. at 353 n.20.
\item \textsuperscript{233} Id. at 353 (“But insofar as the rule of that case may be said to be inconsistent with judgment herein announced, it must be regarded as having been superseded by subsequent decisions of this Court.”).
\item \textsuperscript{234} See id. at 354 (“But the recognition of the importance of a State’s power to determine the incidents of basic social relationships into which its domiciliaries enter does not resolve the issues of this case.”).
\end{itemize}
in divorce litigation indicates to us that it is a matter of greater rather than lesser importance that there should be a place to end such litigation.235

Basically, Sherrer precludes individuals from having multiple bites at the (litigation) apple—once an individual has litigated in one jurisdiction whether his or her soon-to-be ex-spouse was domiciled there, that individual will not be allowed to relitigate the issue in a different jurisdiction merely because of dissatisfaction with the initial result.236 A separate question, however, is whether the state’s interests in its domiciliaries’ marriages is adequately protected under Sherrer. In his Sherrer dissent, Justice Frankfurter noted that states themselves have an interest in assuring that courts issuing divorce decrees in other states have the authority to do so.237 Justice Frankfurter seemed especially worried that private parties might circumvent the power of their domicile over their marriage via private agreement.238

The federal case law on divorce jurisdiction seems relatively straightforward in at least a few respects. A court does not have the authority to grant a divorce unless at least one of the parties is domiciled in that jurisdiction. Individuals who participate in the divorce proceeding and contest the court’s jurisdiction, however, will not be afforded an opportunity to challenge the divorce decree collaterally when their initial challenge was unsuccessful.

II. STATE COURTS AND THE DOMICILE REQUIREMENT

Several states have rejected that courts only have jurisdiction to grant a divorce if one of the parties is domiciled in that jurisdiction. Various justifications, some quite sympathetic, have been offered to justify not requiring that at least one of the parties be domiciled in the forum state. Until the Court rejects the approach that it has used for over a century, however, individuals may put themselves (and their possible future families) at risk if securing divorces in jurisdictions where they are not domiciled.

235 Id. at 356.
236 See Johnson v. Muelberger, 340 U.S. 581, 586–89 (1951) (holding that a daughter was prevented from mounting a collateral attack on jurisdiction when her father, as defendant, “participat[ed] . . . in [divorce proceedings . . . [and had] been accorded full opportunity to contest the jurisdictional issues”); Coe v. Coe, 334 U.S. 378, 384 (1948) (holding that an individual who participated in divorce proceedings could not later attack the judgment collaterally claiming lack of jurisdiction); see also Robert H. Smith, Full Faith and Credit and Section 1983: A Reappraisal, 63 N.C. L. Rev. 59, 90 n.181 (1984) (“Subsequent decisions have applied issue preclusion to contested determinations of domicile and have not permitted a second forum to relitigate the jurisdiction issue.”).
237 Sherrer, 334 U.S. at 358 (Frankfurter, J., dissenting) (“A State that is asked to enforce the action of another State may appropriately ascertain whether that other State had power to do what it purported to do.”).
238 Id. (“And if the enforcing State has an interest under our Constitution in regard to the subject-matter that is vital and intimate, it should not be within the power of private parties to foreclose that interest by their private arrangement.”).
Several states have laws specifying that military personnel who have resided in the state for the requisite period may file for divorce in that jurisdiction. These laws are at least potentially problematic insofar as they are suggesting that residence but not domicile is required.

In Wallace v. Wallace, the New Mexico Supreme Court held that a trial court had jurisdiction to issue a divorce, even assuming that neither of the parties was domiciled in New Mexico. New Mexico had a statute authorizing courts to issue divorces to individuals who had been stationed in New Mexico for a year. Because that condition was met and because it was “within the power of the legislature to establish reasonable bases of jurisdiction other than domicile,” the court saw no difficulty in affirming the decision below.

The Wallace court reasoned that the “domiciliary requirement is designed to prevent divorce-minded couples from shopping for favorable residence requirements,” and then noted that the requirement had not been particularly effective in achieving that purpose. If the goal were really to prevent forum-shopping, then “[t]he result [would] more nearly [be] reached under a statute, such

239 See, e.g., D.C. Code Ann. § 16-902(e) (West 2012) (“If a member of the armed forces of the United States resides in the District of Columbia for a continuous period of 6 months during his or her period of military service, he or she shall be deemed to reside in the District of Columbia for purposes of this section only.”); GA. CODE ANN. § 19-5-2 (West 2019); MINN. STAT. ANN. § 518.07(1) (West 2013) (“No dissolution shall be granted unless: [] one of the parties has resided in this state, or has been a member of the armed services stationed in this state, for not less than 180 days immediately preceding the commencement of the proceeding . . . .”); N.C. GEN. STAT. ANN. § 50-18 (West 2011); S.D. CODIFIED LAWS § 25-4-30 (2019) (“The plaintiff in an action for divorce or separate maintenance must, at the time the action is commenced, be a resident of this state, or be stationed in this state while a member of the armed services. Subsequently, the plaintiff need not maintain that residence or military presence to be entitled to the entry of a decree or judgment of divorce or separate maintenance.”).

240 See, e.g., S.D. CODIFIED LAWS § 25-4-30 (“Subsequently, the plaintiff need not maintain that residence or military presence to be entitled to the entry of a decree or judgment . . . .”). Some states try to circumvent the issue by suggesting that an individual who has been stationed in the state for the requisite period will be presumed to be a domiciliary of the state. See, e.g., TEX. FAM. CODE ANN. § 6.304 (West 2011) (stating that an individual in the armed forces meeting such requirements “is considered to be a Texas domiciliary and a resident of that county . . . for the purpose of filing suit for dissolution of a marriage”); VA. CODE ANN. § 20-97(1) (West 2017) (requiring that a member of the armed forces meeting a specific time requirement “be presumed to be domiciled in and to have been a bona fide resident of this Commonwealth during such period of time”).

241 Wallace v. Wallace, 320 P.2d 1020, 1022 (N.M. 1958) (“Assuming that appellant is correct in his contention that the parties were not domiciled in New Mexico at the time instant action was filed, does it follow that the court was without jurisdiction? We think not.”).

242 The 1953 statute, according to the Court, read as follows:

[Persons serving in any military branch of the United States government who have been continuously stationed in any military base or installation in the state of New Mexico for such period of one (1) year, shall for the purposes hereof, be deemed residents in good faith of the state and county where such military base or installation is located.

Id. at 1021–22.

243 Id. at 1022, 1025.

244 Id. at 1022–23.

245 Id. at 1023 (“The concept of domicile has been notably unsuccessful in achieving this goal.”).
as the one in question, which in effect grounds jurisdiction on the strength of the facts connecting the parties to the state of the forum." All else equal, an individual who has to remain in a state for a whole year would be less likely to go there for forum-shopping purposes than would someone who only had to spend six weeks in the jurisdiction. Precisely because it would not be difficult to pretend to be domiciled in a state where only six weeks’ residence was required, a divorce decree from such a jurisdiction might be more subject to collateral attack than would a decree from a jurisdiction requiring residence for a year.

While the Wallace court may have been correct that the domicile requirement is thought to deter forum-shopping and that a longer residency requirement might more effectively serve that goal, the court may have been incorrect that the only (or even primary) reason that domicile is required is to reduce forum-shopping. The Court has implied that the domicile has a special interest in marital status that a non-domicile lacks. In Sosna v. Iowa, the Court noted that a one-year residency requirement would make successful collateral attacks less likely, but nonetheless affirmed that "judicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicil."

An additional point might be emphasized that was not given adequate consideration by the Wallace court. While jurisdictions might impose a year-long residency requirement before divorce decrees can be issued, jurisdictions need not have such a lengthy residency requirement. Indeed, a jurisdiction might claim that current residency is not required, perhaps if the couple celebrated their marriage in that jurisdiction. If the Court were to hold that domicile is not required, the

---

246 Id.
247 Cf. id. (discussing why a one-year residency requirement is preferable to a six-week residency requirement).
248 See Sosna v. Iowa, 419 U.S. 393, 408 (1975) (noting that “a one-year residency requirement . . . provides a greater safeguard against successful collateral attack”).
249 For example, the Court once noted as follows:

The State has a considerable interest in preventing bigamous marriages and in protecting the offspring of marriages from being bastardized. The interest of the State extends to its domiciliaries. The State should have the power to guard its interest in them by changing or altering their marital status and by protecting them in that changed status throughout the farthest reaches of the nation.

Estin v. Estin, 334 U.S. 541, 546 (1948); see also May v. Anderson, 345 U.S. 528, 541 (1953) (“The wife’s marital ties may be dissolved without personal jurisdiction over her by a state where the husband has a genuine domicile because the concern of that state with the welfare and marital status of its domiciliary is felt to be sufficiently urgent.”); Williams v. North Carolina (Williams I), 317 U.S. 287, 300 (1942) (discussing “the power of a state to alter the marital status of its domiciliaries”).

250 See Sosna, 419 U.S. at 408.
251 Id. at 407 (quoting Williams v. North Carolina (Williams II), 325 U.S. 226, 229 (1945)).
252 Wheat v. Wheat, 318 S.W.2d 793, 795 (Ark. 1958) (“Arkansas is one of the five states in which the necessary period of residence is relatively short. In Idaho and Nevada the period is six weeks, in Wyoming sixty days, in Arkansas three months before judgment, and in Utah three months before the commencement of suit.”).
253 But see Jennings v. Jennings, 36 So. 2d 236, 237–38 (Ala. 1948) (“Has the court by virtue of the statute the power to render a decree of divorce when not only the respondent, but also the complainant resides in another state? We do not think so.”).
254 For example, a New York judge opined as follows:
Court would then have to decide whether there were constitutional constraints on how short of a residency period was required before a court in that jurisdiction could issue a divorce. Otherwise, a state might require either a very short or, perhaps, no residency requirement before issuing a divorce decree. The Wallace fears about the destabilizing effects caused by forum-shopping might then only be aggravated.

States can set the residency requirement that they think appropriate, but additional argumentation is required to justify having a particular residency requirement instead of rather than in addition to a requirement of domicile. One commentator hypothesized that states replace the domicile requirement to supplement the income of local attorneys, although other justifications might be offered for not requiring domicile. For example, one worry associated with requiring domicile in addition to residence is that the former requirement may simply induce individuals to perjure themselves with respect to their intent to remain indefinitely in the state so that they can meet the domicile requirement. A related worry involves maintaining the integrity of judgments—a court might make a reasonable judgment that a person is domiciled in the state so a divorce can be issued, but then find that the person immediately leaves the state after securing the divorce, thus putting the validity of the judgment at risk even though the court’s finding of domicile was quite reasonable at the time the decree was issued. While the court might have “reached its decision in the utmost good faith, the want of domicile becomes retroactively so demonstrable that the issue must be decided the other way when the decree is relied upon in another state.”

David-Zieseniss v. Zieseniss, 129 N.Y.S.2d 649, 655 (N.Y. Sup. Ct. 1954); id. at 657 (“I conclude, therefore, that marriage within the State is a fact sufficient of itself to enable a State to confer upon its courts jurisdiction of an action to dissolve that marriage . . . .”).

255 Roddey M. Ligon, Jr., Is Domicile a Jurisdictional Prerequisite to a Valid Divorce Decree?, U.S. A.F. JAG BULL., Jan. 1961, at 9 (“Several states, possibly motivated by a desire to give the local bar a larger share of the divorce dollar, have enacted statutes specifying that servicemen who have been stationed at a military installation located within such state for a specified period of time have satisfied the state’s residence requirements.”).

256 Wheat, 318 S.W.2d at 795 (“It is a matter of common knowledge that every year thousands of unhappily married persons, unable to obtain divorces at home, visit one or another of these five states in search of marital freedom. It is equally well known that the need for proof of domicile leads to perjury in a vast number of instances.”); see also Klindt v. Klindt, 888 S.W.2d 424, 427 (Mo. Ct. App. 1994) (“[A] person’s ‘residence’ or ‘domicile’ is established by an intention to live at a place permanently, or for an indefinite time, combined with ‘actual bodily presence’ in that place.” (quoting Sharp v. Sharp, 416 S.W.2d 691, 695 (Mo. Ct. App. 1967))).

257 The Wheat Court explained the difficulty courts face in determining domicile:

Domicile differs from residence only in the existence of a subjective intent to remain more or less permanently in the particular state. Whether that intent exists on the part of a person who comes to Arkansas can seldom be proved with any measure of certainty. Often it is only after the court has decided this perplexing question that the lack of intent becomes apparent, as when the successful plaintiff immediately leaves the state.

Wheat, 318 S.W.2d at 797.

258 Id.
Suppose that worries about perjury or the integrity of judgments are put aside. It may be that requiring an individual to file for divorce in her domicile will be too burdensome. While “every person has a domicile somewhere,” it is not clear how making it practically impossible for parties to divorce benefits the parties themselves or society as a whole, and the concern that individuals have effectively been denied access to divorce has induced some states not to require domicile in other contexts as well.

B. Same-Sex Divorce Litigation

Before the Court issued Obergefell v. Hodges, some states recognized same-sex marriages, while others did not. A state that did not recognize same-sex marriages might have been unwilling to grant a divorce to a same-sex couple. A couple domiciled in a state that refused to grant them a divorce would then have had relatively few options—one of the parties might have to establish domicile in a state that granted such divorces. Or, the same-sex couple might decide to divorce in the state where they had married if local law permitted them to do so.

Suppose that a same-sex couple had been unable to divorce in their domicile and instead had availed themselves of a local law permitting them to divorce in the
jurisdiction in which they had celebrated their marriage. Assuming that each personally appeared in the proceeding, neither would be able to challenge the divorce collaterally by claiming that neither of the parties had been domiciled in the state and thus the court had lacked jurisdiction to issue the decree.\(^{267}\)

Suppose, instead, that one member of a same-sex marriage had taken advantage of the opportunity provided by local law of obtaining a divorce in the state where the couple had married. An ex parte divorce is subject to a collateral challenge alleging lack of jurisdiction based on neither party having been domiciled in the state.\(^{268}\) The (possibly former) spouse could contest such a divorce in his or her own jurisdiction claiming that the court had lacked authority to issue the decree.

Once \textit{Obergefell} was decided in 2015, a state could no longer claim that it could refuse to issue same-sex divorces because that jurisdiction did not recognize same-sex marriages and thus there was no jurisdiction to consider whether to issue a same-sex divorce.\(^{269}\) Ex parte divorces issued by the state of celebration (but not domicile) prior to 2015 might still be subject to collateral attack, however.\(^{270}\) Certainly, an individual who benefited from the divorce might later be estopped from challenging it.\(^{271}\) But an individual who had not benefited might still be able to have the divorce invalidated, even if the “ex”-spouse had subsequently remarried.\(^{272}\)

The same point might be made about military divorces or any divorce secured on the basis of residence but not domicile. While states might have good policy reasons to justify permitting an individual to file for divorce so long as she has been a resident

\(^{267}\) \textit{Cf.} Wallace v. Wallace, 320 P.2d 1020, 1024 (N.M. 1958) (“[S]uffice it to say that since the appellant submitted to the jurisdiction of the court he would not be allowed to attack the decree collaterally in another state. Nor may this decree, wherein the defendant appeared and had an opportunity to question the jurisdiction of the court, be attacked by a third party in a sister state since it is not subject to collateral attack in this state.”) (citations omitted)). In the \textit{Wallace} case, both parties had appeared. \textit{Id.} at 1021, 1024.

\(^{268}\) Walker v. Walker, 200 A.2d 267, 268 (Vt. 1964) (“It is settled constitutional law that the doctrine of full faith and credit does not bar relitigation of the issue of domicile as the jurisdictional basis of an ex parte divorce.”) (citing \textit{Williams v. North Carolina (Williams I)}, 325 U.S. 226 (1945)); see also \textit{Sosna v. Iowa}, 419 U.S. 393, 407 (1975) (“[J]udicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile.”) (quoting \textit{Williams II}, 325 U.S. at 229)).

\(^{269}\) See \textit{Obergefell} v. Hodges, 135 S. Ct. 2584, 2607–08 (2015) (striking down same-sex marriage bans as a violation of federal constitutional guarantees). For an example of a pre-\textit{Obergefell} approach, see; \textit{Chambers v. Ormiston}, 935 A.2d 956, 967 (R.I. 2007) (“[T]he word ‘marriage’ in § 8-10-3(a), the statute which empowers the Family Court ‘to hear and determine all petitions for divorce from the bond of marriage,’ was not intended by the General Assembly to empower the Family Court to hear and determine petitions for divorce involving (in the words of the certified question) ‘two persons of the same sex who were purportedly married in another state.’”) (quoting \textit{Rhode Island State Labor Relations Bd. v. Valley Falls Fire Dist.}, 505 A.2d 1170, 1171 (R.I. 1986)).

\(^{270}\) \textit{Compare} Sargent v. Sargent, 307 A.2d 353, 357 (Pa. Super. Ct. 1973) (wife permitted to challenge ex parte divorce for lack of jurisdiction over five years after the divorce decree had been issued), \textit{with} Self v. Self, 893 S.W.2d 775, 779–80 (Ark. 1995) (“In the case at bar, Mildred was advised within two weeks after entry of the divorce decree that it was a voidable decree, and yet she let it remain in effect for twenty-four years. . . . Under these circumstances we have no hesitance in holding that the chancellor erred in failing to apply the doctrine of laches to Mildred’s petition.”).

\(^{271}\) \textit{E.g.}, Peterson v. Goldberg, 585 N.Y.S.2d 439, 443 (N.Y. App. Div. 1992) (“[O]ne who remarries in reliance upon an ex parte judgment of divorce is estopped from contesting the effectiveness of the judgment.”) (citations omitted).

\(^{272}\) \textit{E.g.}, Guerieri v. Guerieri, 183 A.2d 499, 504 (N.J. Super. Ct. Ch. Div. 1962) (“In the case at bar the divorce procured by John Guerieri, Jr., in Alabama is not valid in New Jersey. He has since remarried and has been living with his new spouse as husband and wife. A divorce will therefore be granted to the petitioner, Mary Guerieri, on the ground of the adultery of her husband, John Guerieri, Jr.”).
for the requisite period,\textsuperscript{273} and state courts have sometimes upheld the refusal to require domicile against constitutional challenge,\textsuperscript{274} an ex parte divorce challenged collaterally for lack of jurisdiction would not be immune from invalidation merely because the state courts had held that domicile was not required. As Justice Holmes has noted, "[s]tate courts do not always have the Constitution of the United States vividly present to their minds."\textsuperscript{275}

CONCLUSION

The United States Supreme Court has not recently addressed whether a court has jurisdiction to grant a divorce even if neither party is domiciled in that state, although the past jurisprudence suggests that the Court, if asked, would say "no."\textsuperscript{276} The Court has suggested that jurisdiction to grant a divorce is based on domicile,\textsuperscript{277} and that an ex parte divorce decree issued when neither party is domiciled in that state is not entitled to full faith and credit.\textsuperscript{278}

Individuals acting in accordance with state law may nonetheless be at risk if they divorce where they reside if they, in addition, are not domiciled there. That risk can be contained—as long as both parties appear, neither party will later be permitted to challenge the divorce decree collaterally alleging a lack of jurisdiction. Basically, this means that even if the court in fact lacked jurisdiction to grant the divorce, neither party will be permitted to make use of that lack of jurisdiction to have the divorce decree invalidated. But ex parte divorces are not similarly immunized from

\textsuperscript{273} For an example of a state’s residency period requirement, see the following:

\textit{(N)o dissolution shall be granted unless:}

\begin{itemize}
  \item[(1)] one of the parties has \textit{resided} in this state \ldots for not less than 180 days immediately preceding the commencement of the proceeding; or
  \item[(2)] one of the parties has been a \textit{domiciliary} of this state for not less than 180 days immediately preceding commencement of the proceeding.
\end{itemize}


\textsuperscript{274} See, e.g., Wheat v. Wheat, 318 S.W.2d 793, 797 (Ark. 1958) (upholding state law based on residency rather than domicile); Craig v. Craig, 56 P.2d 464 (Kan. 1936) (upholding divorce based on residence rather than domicile).

\textsuperscript{275} Haddock v. Haddock, 201 U.S. 562, 632 (1906) (Holmes, J., dissenting).

\textsuperscript{276} Ligon, Jr., \textit{supra} note 255, at 11 ("The United States Supreme Court has never had to decide the precise question whether some relationship between the state and the litigants other than domicile will suffice for purposes of divorce jurisdiction. That Court has, however, made statements indicating that if the question were presented the answer might very well be ‘no.”").

\textsuperscript{277} Sosna v. Iowa, 419 U.S. 393, 407 (1975) ("[J]udicial power to grant a divorce—jurisdiction, strictly speaking—is founded on domicile.” (quoting Williams v. North Carolina (\textit{Williams I}), 325 U.S. 226, 229 (1945))).

\textsuperscript{278} The \textit{Williams I} Court discussed the importance of domicile in conferring authority over divorce:

\begin{quote}
In recognition of the paramount interest of the state of domicile over the marital status of its citizens, this Court has held that actual good faith domicile of at least one party is essential to confer authority and jurisdiction on the courts of a state to render a decree of divorce that will be entitled to extraterritorial effect under the Full Faith and Credit Clause . . . .
\end{quote}

\textit{Williams v. North Carolina (\textit{Williams I}), 317 U.S. 287, 308–09 (1942) (Murphy, J., dissenting) (citing Bell v. Bell, 181 U.S. 175 (1901)); see also Jennings v. Jennings, 36 So. 2d 236, 237 (Ala. 1948) ("Jurisdiction, which is the judicial power to grant a divorce, is founded on domicile under our system of law.” (citing \textit{Williams II}, 325 U.S. at 237–39)).}
subsequent attack, and individuals acting in accord with local law may nonetheless find that their allegedly valid divorces are subsequently found to be invalid, thereby negating in the eyes of the law any families subsequently formed.

Perhaps a state legislature is permitted to make the judgment that the benefits of providing convenient access to divorce outweigh the costs that might be imposed were a divorce subsequently to be found not entitled to full faith and credit.279 But individuals who take advantage of such a law might pay a heavy price later and, at the very least, are entitled to know whether their following local law when seeking a divorce might nonetheless mean that their divorces and any subsequent remarriages would be subject to non-recognition. In his Estin dissent, Justice Jackson suggested that “[i]f there is one thing that the people are entitled to expect from their lawmakers, it is rules of law that will enable individuals to tell whether they are married and, if so, to whom.”280 The same point might be made about members of the other branches, and the Court should make clear at the earliest opportunity whether domicile is still required for a court to be able to issue a divorce and for such a decree to trigger full faith and credit guarantees.

279 See Wheat v. Wheat, 318 S.W.2d 793, 796 (Ark. 1958) (“Even if the act deprives the decree of prima facie extraterritorial validity when the Arkansas court fails to make a finding of domicile, it was for the legislature to say whether this disadvantage is outweighed by the beneficial consequences of the statute.”).