FEDERALISM, FAMILY LAW AND THE SUPREME COURT

*Michael L. Coulter**

Fundamental to politics in the United States is the federal system. It devolves and distributes power to states. As Justice Brandeis famously said, "states are laboratories of democracy."[1] There are, however, limitations to the distribution of power in our federal system. The founders embraced the variation that would come with having states make policy decisions, but they also recognized that states would have some limitations in the power placed upon them.[2] One such limit is Article IV's full faith and credit clause, which reads, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of

* Michael Coulter ('91), Ph.D., is Professor of Political Science at Grove City College, where he has taught courses in political theory and American politics since 1995. He is the co-editor of *Encyclopedia of Catholic Social Teaching, Social Science and Social Policy* (Scarecrow Press, 2007) and has contributed to several reference works, including the *Encyclopedia of the Supreme Court* (Gale, 2009) and *Criminal Justice* (Salem, 2007).

1 New State Ice Co. v. Liebmann, 285 U.S. 262 (1932).

2 Thomas R. Hensley, The Rehnquist Court: Justices, Rulings, and Legacy 275-76 (2006).

every other state."[3] This paper seeks to examine the significance of the full faith and credit clause as it relates Supreme Court cases governing marriage and divorce. The U.S. Supreme Court has moved from permitting states the capacity to not recognize some marriages and divorces in other states to requiring that marriages and divorces in any state be fully accepted by all other states.

There is a significant body of law in the United States, known as family law, which determines who can marry, the legal rights of spouses, the circumstances under which a civil divorce can take place, the provision of financial support for spouses and children, and the custody of children in the case of a divorce or separation.[4] Inheritance law is also greatly affected by and related to family law.[5] In the United States, family law traditionally has been determined by states, and thus there has been variation in it. Such differences do not exist in countries with a unitary legal system, such as England and France.[6] Even some countries with a federal system have determined that family law should be uniform.[7]

In the early years of the American republic, marriage was considered more than a contractual agreement between two parties; marriage was a status and this status had a particular effect on a married woman.[8] A married woman's legal status was gen-

3 U.S. Constitution, Article IV § 1.

4 Mary Ann Glendon, The Transforming of Family Law: State, Law, and the Family in the United States and Western Europe 144 (1989).

5 *Id*. at 295.

6 Daniel J. Elazar, *Contrasting Unitary and Federal Systems*, 18 Int'l Political Science Review 237, 246-48 (1997).

7 Glendon, *supra* note 4, at 190.

8 Lawrence M. Friedman, American Law in the 20th Century 434 (2002).

erally understood to be subsumed in the identity of her husband. This doctrine was known as *feme coverture,* which means that the woman was covered by the male and could not own property or conduct legal actions in her name.[9] Also, for most of the early years of the American republic, states made divorce very difficult. Although several northern states permitted limited divorce, in the south it was extraordinarily difficult to obtain one.[10] Neither Congress nor the Supreme Court changed state laws affecting marriage and divorce during the end of the eighteenth or in the entirety of the nineteenth century.

Preserving State Power in Marriage

The earliest case where the U.S. Supreme Court ruled in a significant way related to a state marriage law was *Barber v. Barber*, 62 U.S. 582 (1859).[11] This case involved the Barbers who were married in 1840; Mrs. Barber obtained a legal separation from her husband and an order for alimony for as long as they remained married.[12] Mr. Barber failed to pay the alimony, so Mrs. Barber sought to recover the money that she believed was owed to her.[13] Mr. Barber said that they were no longer married because he had obtained a divorce in Wisconsin in 1852 on the grounds that

9 Karen Pearlston, *Married Women Bankrupts in the Age of Coverture*, 34 Law & Soc. Inquiry 265, 265-95 (2009).
10 Friedman, *supra* note 8, at 435.
11 Barber v. Barber, 62 U.S. 582 (1858).
12 *Id*. at 585.
13 *Id*. at 586.

his wife had not resided with him.[14] The Supreme Court heard the case because it involved residents of two different states. It is worth noting that the opinion states that Mrs. Barber brought the case "by her next friend," because she could not bring the lawsuit herself.[15] The court's majority opinion said that the Wisconsin divorce "certainly has no effect to release the defendant . . . from his liability to the [alimony] decree" which had been entered into in New York.[16] In other words, Mr. Barber was divorced from Mrs. Barber in Wisconsin but not in New York because New York legal institutions were not required to recognize Wisconsin's judgments regarding a marriage in New York. The majority opinion strongly states that this is not simply a case about alimony, implying that alimony is a matter to be determined by states, but rather that the case is about upholding a contract.[17]

In regards to the understanding of the family that operated in American law at the time, it is particularly instructive to read this case's dissent. Written by Justice Peter Daniel and joined by two other members, the dissent does not state that New York should accept the divorce; on the contrary, the dissenting opinion asserts that the U.S. Supreme Court should never have even entertained the case because of the doctrine of *feme coverture*, which holds that "during the life of the husband and wife the wife cannot be remitted to the position of *feme solo*, and cannot be therefore a cit-

14 *Id*. at 587.
15 *Id*. at 584.
16 *Id*. at 588.
17 *Id*. at 604.

izen of a state or community different from that of her husband."[18]

Another case from this era was *Cheever v. Wilson*, 76 U.S. 108 (1870), which involved a couple who had moved from Washington, D.C. to Indiana and, once there, obtained a divorce.[19] Mr. Wilson initiated litigation in the District of Columbia in order to seek payment from Mr. Cheever because of an obligation made by Mrs. Cheever after the Cheevers divorced. Essential to the holding of the case was the legitimacy of the divorce in Indiana; the court ruled that the divorce had been legally obtained in Indiana because the couple met the Indiana requirements for a divorce. Both spouses participated in the divorce proceedings.[20] The Supreme Court indicated that the Indiana courts had proper jurisdiction to determine the case and that the Washington, DC court offered no evidence to undermine the claim of residency in Indiana.[21] After the *Cheever* case, other state courts used jurisdictional tests to determine whether they would accept a divorce from another state or divorce a couple that had moved from another state. For example, many state courts required that a person have an actual residence in the state in order to obtain a divorce.

There were two other cases from the late 1800s which did not rule on the substance of family law, but rather on procedure for making family law. In *Pennoyer v. Neff*, 95 U.S. 714 (1877), the Court ruled that a defendant could not legally determine the

18 *Id*. at 602 (Daniel, J., dissenting).
19 Cheever v. Wilson, 76 U.S. 108 (1969).
20 *Id*. at 119.
21 *Id*. at 124.

relationship of a resident of one state to a resident of another state.[22] Thus one state could theoretically determine a resident to be divorced from a resident of another state. In *Maynard v. Hill*, 125 U.S. 190 (1888), the Supreme Court ruled that it was permissible for the Oregon territorial legislature to pass an act indicating that a resident was divorced from a non-resident.[23] The court acknowledged that the marriage creates a new status for spouses, but that the status could be changed by law.[24]

A very significant case where the Supreme Court wanted to make divorce decrees at least partially exempt from the full faith and credit clause was *Haddock v. Haddock*, 201 U.S. 562 (1906).[25] This case involved a couple who had secretly married in 1868 but separated immediately after marriage. The husband then settled in Connecticut and obtained a divorce in 1881.[26] In 1891 the husband inherited considerable property and the wife initiated proceedings to obtain financial support in a New York court. She was awarded such a decree, which the husband challenged based on the Connecticut divorce decree.[27] In a 5-4 decision, Justice Edward White, writing for the majority, acknowledged that the full faith and credit clause is generally operative, and he even states that a judicial decision could be binding on someone who,

22 Pennoyer v. Neff, 95 U.S. 714, 732 (1878).
23 Maynard v. Hill, 125 U.S. 190, 216 (1888).
24 *Id.* at 213.
25 Haddock v. Haddock, 201 U.S. 562 (1906)
26 *Id.* at 565.
27 *Id.* at 566.

at the time, is a resident of another state.[28] In the end, however, the Supreme Court did not require that a divorce received in one state be accepted in another. The plaintiff could not obtain the divorce if the plaintiff were considered to be at fault in the divorce and if the other spouse, who was not at fault, were not present in the judicial proceedings where the divorce was granted. The majority opinion stated that "if one government, because of its authority over its own citizens has the right to dissolve the marriage tie as to the citizen of another jurisdiction, it must follow that no government possesses as to its own citizens, power over the marriage relation and its dissolution."[29] The Supreme Court believed it was significant that Mr. Haddock had abandoned his wife, and wanted to enable New York to maintain its strict marriage laws.

Haddock and other related cases did not prevent all out-of-state divorce decrees from being recognized in another state. If spouses married in one state, and then moved and later divorced and moved again, the divorce would be recognized in other states where both the marriage and the divorce did not occur. In general, the U.S. Supreme Court during the nineteenth and early twentieth centuries sought to preserve the autonomy of states in determining marriage law by giving strict attention to the residency of both spouses and the possible fault of one spouse in the dissolution of the marriage. At the same time, there was a realization that the Full Faith and Credit clause prevented states from having com-

28 *Id.*
29 *Id.* at 573.

plete autonomy.[30]

These cases occurred at a time when there was an attempt to pass uniformly strict divorce laws in the American states.[31] The National Conference of Commissioners on Uniform State Laws and the National Congress on Uniform Divorce Laws each proposed model legislation during this period.[32] During his presidency, Theodore Roosevelt was even part of the campaign for enacting uniformly strict divorce laws. It appears that there was recognition of the rising tension between having states with different divorce laws and increased mobility which enabled people to find a jurisdiction more suitable to one's wishes.

Full Faith and Credit Fully Extended to Divorces

In 1942 and 1945, the Supreme Court issued two rulings, both of which involved the same couple from North Carolina. The first case initiated a shift in Supreme Court decisions where the Full Faith and Credit clause was strictly applied to divorce decrees. The new approach by the Court made it possible to obtain so-called migratory divorces more easily, which had been severely limited under previous court rulings. In *Williams et al. v. State of North Carolina*, 317 U.S. 287 (1942), the Court considered the case of two North Carolina residents, O.B. Williams and Lillie Hendrix, who moved to Nevada in 1940 and lived there

30 Glendon, *supra* note 4, at 190.
31 *Id.*
32 *Id*. at 188.

six weeks, which was enough time to establish legal residence.[33] In the early 1930s Nevada had shortened the time required for residency to attract more people seeking a preferred legal judgment. Other states, adopting a position of legal realism, were also enacting more liberal divorce laws to reflect the actual practices of American life.[34]

On June 26, 1940, Williams and Hendrix both filed for divorce in a Nevada court on the grounds of extreme cruelty. The spouses of those individuals were not in Nevada and did not participate in the court proceedings. The Nevada courts, however, recognized them as residents and granted both of them divorces. The two then married in Nevada and returned to North Carolina in late 1940.[35] Later, they were convicted of "bigamous cohabitation" and sentenced to time in state prison.[36] The Supreme Court stated that North Carolina could have, but did not, make a judgment about whether the petitioners had established a proper residence in Nevada.[37] The Court did say that if their residency was accepted, then the divorce must be accepted as well.

This case effectively overturned *Haddock* as it accepted court decrees from other states on a no-fault basis.[38] The Court did not attempt to assign blame in the marriage. They recognized that this case rejected the holding in *Haddock*. The majority opinion states

33 Williams et al. v. State of North Carolina, 317 U.S. 287, 289 (1942).
34 Friedman, *supra* note 8, at 436.
35 *Williams*, 317 U.S. at 290.
36 *Id.* at 289.
37 *Id.* at 291.
38 *Id.* at 293, 297, 304.

that "it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more law state. But such an objection goes to the application of the full faith and credit clause in many situations."[39] The continuing acceptance of the *Haddock* case would have led to more situations where people were married in one state and divorced in another. The majority opinion further states that there is "no reason, and none has been advanced, for making the existence of state power depend on an inquiry as to where the fault in each domestic dispute lies."[40] The majority opinion in the case acknowledged that creating tests for exceptions to the full faith and credit clause would turn the Supreme Court "into a divorce and probate court for the United States."[41] Justice Frank Murphy indicated in his dissent that he hoped an "area of flexibility" could be carved out where the full faith and credit clause would not have to be applied so strictly.[42]

In the second Williams case, *Williams et al. v. North Carolina*, 325 U.S. 226 (1945), the North Carolina court rejected that Williams and Hendrix had properly obtained a domicile in Nevada and, therefore, they were still under the jurisdiction of the North Carolina courts.[43] This enabled North Carolina legal authorities to argue that they did not have to accept the divorce

39 *Id.* at 303.
40 *Id*. at 301.
41 *Id.* at 305 (Frankfurter, J., concurring).
42 *Id.* at 309.
43 Williams et al. v. North Carolina, 325 U.S. 226, 227 (1945).

decrees from Nevada and that they could convict Williams and Hendrix of bigamy.[44] The majority of the Supreme Court accepted the North Carolina determination of residence, but there were dissenters in the case, including Justices Black and Douglas, who argued that the North Carolina legal system did not offer proper evidence against domicile in Nevada; that is, North Carolina authorities simply asserted that Williams and Hendrix did not have a proper residence there.[45]

A similar case was *Eisenwein v. Commonwealth*, 325 U.S. 279 (1945), wherein the Supreme Court ruled that the Commonwealth of Pennsylvania could challenge the claim of residency of a person returning to Pennsylvania who claims to have obtained a divorce in Nevada.[46] The Pennsylvania Supreme Court ruled that the petitioner had no intention to establish a bona fide domicile in Nevada because he only lived there long enough to establish a legal residence at which time he obtained the divorce and then immediately moved to Cleveland, Ohio.[47] The Supreme Court's holding in *Eisenwein* is that states can challenge proceedings in other states' courts if they were deficient in those proceedings, but that states cannot reject the different standards for divorce in another state.[48] There were other cases at the time which permitted residency challenges, but by the late 1950s the Supreme Court

44 *Id*.
45 *Id.* at 270.
46 Eisenwein v. Commonwealth, 325 U.S. 279 (1945).
47 *Id*. at 280-81.
48 *Id.* at 281.

required that states accept the legal determinations of other states regarding residency status.

There was a further development regarding divorce law as the Court entertained two cases that followed the Williams cases, *Sherrer v. Sherrer*, 334 U.S. 343(1948),[49] and *Johnson v. Muelburger*, 340 U.S. 581 (1951).[50] In these cases, the court used *res judicata* principles, wanting to balance the interests between the parties and to have finality in decisions. In these cases, the US Supreme Court required states to recognize divorces where both spouses cooperated in a divorce in another state.

The Court recognized divorce decrees in several other cases from the late 1940s or 1950s where only one party initiated the divorce proceedings in another state. At the same time, the Court did not recognize the validity of decrees of one state affecting alimony or child support that had been established in another state. In *Cook v. Cook*, 342 U.S. 126 (1951) the court ruled in an 8 to 1 decision that Vermont needed to accept a divorce that was granted in Florida because of the Full Faith and Credit clause.[51] This was another example of a migratory divorce, in that one party sought a divorce in Florida because it provided a more suitable legal environment in which to obtain one. The Vermont legal authorities had to accept that the Florida court properly determined the petitioner's residence.[52]

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49 Sherrer v. Sherrer, 334 U.S. 343 (1948).
50 Johnson v. Muelburger, 340 U.S. 581 (1951).
51 Cook v. Cook, 342 U.S. 126 (1951).
52 *Id.* at 129.

In *Sutton v Leib*, 342 U.S. 402 (1952), the Supreme Court ruled once again that the proceedings from one state should be accepted in other states.[53] This complicated case involved a woman who was divorced in Illinois and was awarded alimony until she remarried. The woman remarried in Nevada, but a New York court invalidated the Nevada marriage because the man she married had been married previously in New York. The woman's former husband, who had been paying alimony faithfully, believed that he was entitled to stop paying because she re-married. He wanted the state of Illinois to accept her Nevada marriage but not the New York declaration of nullity regarding the Nevada marriage.[54] The court ruled that the "Full Faith and Credit Clause requires Illinois to recognize the validity of records and [the] judicial proceedings of sister states,"[55] although the court did indicate that Illinois state law could be amended to directly address the situation as to how an annulled marriage could affect the status of an alimony decree.[56]

The U.S. Supreme Court, beginning with the first *Williams* case, moved away from the role of protecting marriage and supporting states with strict marriage laws. The Supreme Court then expressed support for the legal standards of marriage and divorce in states and attempted to resolve matters in the best interest of both parties. The Court also rejected the notion that no one state

53 Sutton v. Leib, 342 U.S. 402 (1952).
54 *Id.* at 405-06.
55 *Id.* at 406.
56 *Id.* at 409.

could determine fault in the case of a divorce. Some have argued that the Court's failure to be concerned with fault led the wholesale changes in family law that occurred in the late 1960s and early 1970s when nearly all states adopted some form of no fault divorce, which undermined the need for migratory divorces.[57] The evidence for such a claim is not conclusive, and other factors contributed to states changing their laws, such as a changing environment of public opinion and a growth of legal realism. Nevertheless, the Supreme Court, through its application of the full faith and credit clause, certainly did make it harder for any one state to have state divorce laws much more strict than others.[58]

Considering these cases, one can see the inherent tension in a federal system; if some states have laws related to marriage and family that are considerably different than others, it creates the possibility that some people might move in order to obtain favorable legal outcomes. Moreover, it creates a situation where there might exist widely different marriage and divorce practices. Nevertheless, maintaining wide variation regarding marriage and divorce laws over a long period while having a full faith and credit clause seems unlikely. Instead, the full faith and credit clause seems to move states, if not toward the "least common denominator," at least toward a "lower common denominator."

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57 Gerald C. Wright, Jr. & Dorothy M. Stetson, *The Impact of No-Fault Divorce Law Reform on Divorce in American States*, 40 J. Marriage & Fam. L. 575, 575-80 (1978).

58 Glendon, *supra* note 4, at 190.