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Economic origins of the no-fault divorce revolution

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Abstract Richard Posner argues that late twentieth-century divorce-law reform rendered marital relationships in the United States increasingly contractual in nature. Chief among such reforms was the no-fault divorce revolution: the widespread switch in states' legal regimes from fault-based, mutual-consent divorce to no-fault based, unilateral divorce, which swept across America in the 1970s. While a growing literature considers the no-fault divorce revolution's effects on divorce rates, almost no work considers its causes. Taking Posner's observation as its starting point, this paper develops testable hypotheses relating to the potential origins of no-fault divorce reforms in the US.

Keywords No-fault divorce · Unilateral divorce · Divorce · Richard Posner

JEL Classification K36 · J12

1 Introduction

Posner (1992, 2007) argues that late twentieth-century divorce-law reform rendered marital relationships in the United States increasingly contractual in nature. Chief among such reforms was the "no-fault divorce revolution:" the widespread switch in states' legal regimes from fault-based, mutual-consent divorce to no-fault based, unilateral divorce, which swept across America in the 1970s. A large law-and-

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economics literature investigates the no-fault divorce revolution's effects on divorce rates. However, almost no work considers its causes. Taking Posner's observation as its starting point, this paper develops testable hypotheses relating to the potential origins of no-fault divorce reforms in the United States.[1]

The prospective drivers of such reform we consider reflect two categories of economic pressures on divorce law's substance: "efficiency influences," arising from socioeconomic changes in America in the second half of the twentieth century, discussed in part by Posner (1992, 2007), and "redistributional influences," arising from the rent-seeking activities of interest groups with a substantial stake in the status of American divorce law, which have received far less attention. Although discussions suggesting the importance of various manifestations of both types of influences can be found scattered throughout the legal literature on divorce-law reform, they are entirely absent from the economics literature, which has concerned itself exclusively with the outcomes of that reform rather than its origins.

With the goal of encouraging and facilitating empirical investigation, our paper brings together, elaborates, and considers side-by-side alternative efficiency and redistributional hypotheses for the latter. Both categories of potential *explanantia* for the no-fault divorce revolution have advantages and disadvantages in terms of the satisfaction they offer as plausible contributors to divorce-law reform. Until the required empirical work has been conducted to shed further light on the question of this reform's cause(s), we suggest that a marriage of influences from both categories may provide the most useful way to understand America's no-fault divorce revolution.

We begin in Sect. 2 by describing the United States' transition to what Posner calls "contractual" marriage, which culminated in, and was formalized through, the no-fault divorce revolution. Section 3 considers what is known about America's no-fault divorce revolution: how divorce-law reform has affected divorce rates. Section 4 develops possible answers to what remains unknown about this reform: what may have caused it. Section 5 concludes by considering how both efficiency and redistributional pressures may have jointly contributed to America's no-fault divorce revolution.

2 The transition to contractual marriage in America

2.1 Divorce law before the no-fault divorce revolution

Between the time of America's founding and the mid-nineteenth century, official divorce in the United States was rare (Friedman 1984: 651).[2] The reason for this is simple enough: states' laws made it exceptionally difficult for married couples to divorce formally. South Carolina's law did not permit divorce at all until the end of

[1] On the importance of endogenizing legal institutions in Posner's approach to law and economics, see Posner (1987), Harnay and Marciano (2009), and Leeson (2012).

[2] On the history of law relating to marriage and divorce in the western world, from ancient times to through the twentieth century, see Brundage (1987) and Phillips (1988).

the nineteenth century. And elsewhere throughout the country, a legal divorce required a private act of the state legislature (Friedman and Percival 1976: 62–63).

No state's law recognized consensual divorce. Instead, to secure a legislative act granting marital dissolution, a party needed to prove the existence of grounds for divorce—that his or her spouse was guilty of one or more particular acts warranting marital dissolution under the law, and that he or she was not, since legislatures would not grant a divorce to a guilty party regardless of his or her partner's guilt. In the late eighteenth and early nineteenth centuries, most states moved from divorce by legislative act to divorce by judicial decree. Delaware was the last to do so, moving to divorce by judicial decree only in 1897 (Friedman 1984: 652). Even after this shift, however, with few and short-lived exceptions, states' laws continued to permit divorce only on grounds that were typically narrow, such as adultery, desertion, fraud, impotence, and eventually cruelty (Marvell 1989: 543–544).

Divorce law in America remained in this fault-based state throughout most of the country until the 1970s. But beginning about a century earlier, divorce *de facto* began to diverge significantly from divorce *de jure*. According to Friedman (1984: 659), around 1870 a kind of proto-no fault divorce became prevalent in the United States in practice. These consensual divorces were often achieved through the collusion of divorce-desiring spouses, who concocted false evidence of legally accepted grounds for marital dissolution—such as one spouse's adultery—and the lawyers and judges involved in divorce cases, who often went along with the charade.

This tension between divorce law's formal substance and divorce in practice in nineteenth-century America was also observable elsewhere in states' legal systems. As Hartog (1991) points out, for example, consistent with their legal bans on consensual divorce, states' laws did not recognize private separation agreements between unhappily married couples desiring marital dissolution, which sought to abrogate or modify state-imposed obligations of marriage by contracting around them to create what often amounted to informal divorces.[3] At the same time, however, states' courts routinely recognized bigamous relationships forged in the wake of informal, and officially illegal, marital dissolutions between spouses who technically remained married under the law.

In the twentieth century, such circumvention of fault-based divorce law, which continued to prevail in most American states, became more elaborate. A few states had laxer divorce laws which, when combined with lax residency requirements, permitted divorce-seeking couples from states with stricter divorce laws to dissolve their marriages more easily. Famously, Nevada, for example, was home to "divorce ranches," where wealthy persons could stay for 6 weeks, meeting the state's residency requirement, which in turn permitted them to pursue divorce under Nevada's more liberal divorce regime (Jacob 1988: 34). It was also possible to travel abroad to obtain a divorce in similar fashion, although some state's courts refused to honor such divorces (Blumberg 1991: 121).

[3] For a discussion of the history of private separation agreements and their enforceability in early modern England, see Leeson et al. (2014).

Posner (1992) makes a distinction between what he calls "status based" and "contractual" relationships that is useful for understanding the foregoing divergence between American states' divorce statutes, which refused to permit consensual divorce, and divorce in practice, which often involved consensual divorce through spouses exploiting loopholes in the law. Posner (1992: 264) defines status-based relationships as those "imposing rights and duties that cannot be altered by contract." The relationship between siblings depicted in Sophocles' *Antigone* illustrates the status variety. Antigone has certain strict, inalienable duties toward her brother Polyneices. Even Polyneices' betrayal of his home city, perhaps the foulest crime imaginable to an ancient Greek, is insufficient to relieve Antigone of her duty to bury him, though by doing so she risks almost certain death.

In contrast to status-based relationships are purely contractual ones. A purely contractual relationship is one whose terms are spelled out in a written document, whose attendant rights and duties are alienable, and whose parties have recourse to the legal system to resolve disputes arising in the course of their relationship. The quintessential example of such a relationship is that traditionally found between business partners.

According to Friedman (1984), the difference between American divorce law and practice before the late twentieth century reflected two competing demands on the American legal system—one a "moral" demand, which sought to instantiate rules protecting and upholding existing marriages, and the other an economic demand, which required a means of enabling legal divorce so as to ensure clear rights of property and inheritance when spouses separated. In turn, these competing demands reflected and contributed to two contrasting conceptions of marriage relationships—one status based and the other contractual. States' divorce statutes, whose fault basis rejected consensual divorce, reflected (what was in the United States, at least) an older view of marriage relationships, which saw them as status based and thus incapable of dissolution through consent. In contrast, states' divorce practices, which often permitted divorce-desiring spouses to mutually terminate their relationships, reflected a newer and increasingly common view of marriages, which saw them as contractual and thus terminable by their parties' will.

2.2 Divorce law after the no-fault divorce revolution

In the late twentieth century, the *de facto-de jure* divorce divergence described above was swept away in what is commonly called America's "no-fault divorce revolution." This revolution began in the late 1960s and is often associated in particular with the divorce-law reforms California introduced in its Family Law Act of 1969, which subsequently became widespread in various forms across the United States in the 1970s.[4]

[4] According to Blumberg (1991), New York's 1966 divorce-law reform constituted a still earlier no-fault style liberalization, which permitted "divorce by contract." As she describes this reform (1991: 120): "Husband and wife may jointly and mutually terminate their marriage without any nominally or substantively significant state action. All they have to do is agree on the terms, file their agreement, and abide by its content. At the end of a statutory waiting period, either may convert the agreement into a

Given the practice of consensual divorce prior to the 1970s, it is important not to overstate the effect of the no-fault divorce "revolution"—which was a revolution of formal law—on the availability of consensual divorce in the United States before divorce-law liberalization (Blumberg 1991: 117–119). But it is equally important to avoid characterizing the effect of this important change in formal law as largely inconsequential. First, generating false evidence of one spouse's adultery, for example, or spending 6 weeks in a resort in Nevada—typical means of securing *de facto* consensual divorce before the no-fault divorce revolution—was costly to divorce-desiring spouses (Friedman and Percival 1976: 67–68; Blumberg 1991: 121). No-fault reforms undertaken during the no-fault divorce revolution eliminated, or at least substantially reduced, these costs by saving divorce-desiring spouses the time, money, and potential reputational price of exploiting divorce-law loopholes to secure legal marital dissolution. These reforms therefore made divorce easier for couples who wanted out of their marriages and, in doing so, rendered marital relationships more like traditional contracts by removing obstacles to parties' ability to terminate their relationships by consent. By 1985 every state in the US had passed some form of no-fault reform, allowing couples to end their marriages without the need to prove to courts that fault grounds for divorce existed (Gruber 2004).[5]

Second, the no-fault divorce revolution did not merely legalize and legitimate consensual divorce. In many states it also enabled *unilateral* divorce, going still further in making marriage more like a conventional contract. States accomplished such reform by adding no-fault grounds for divorce to their legal codes, which were typically modified to permit divorce in the case of "irretrievable breakdown" or "irreconcilable differences." In some of these states, the fact that a single spouse seeks divorce for such reasons is *ipso facto* legal grounds for divorce, enabling such a spouse to end his or her marriage without his or her marital partner's consent. In other states, unilateral divorce, while possible, is more costly, requiring spousal separation periods before unilateral divorce proceedings can be initiated (Peters 1986).

Approximately two-thirds of US states currently have in place unilateral-divorce laws, the remainder retaining some sort of mutual-consent requirement, or permitting unilateral divorce but only at greater cost through, for example, separation periods. As a result, in most of America, marriage is not merely legally terminable by spouses' mutual consent. Similar to a conventional contract, it is legally terminable at either spouse's will. In fact, in some cases a marriage may be less binding than a commercial contract if the breaching party does not have to pay damages.

Footnote 4 continued
divorce." However, as we note below, even under this liberalization, New York's divorce law remained quite restrictive.

[5] States accomplished such reform by adding no-fault grounds for divorce in their legal codes, which were typically modified to permit divorce in the case of "irretrievable breakdown" or "irreconcilable differences." The details of this modification varied across states, but most reformed laws required judges to conduct inquiries to determine whether the relationships between spouses seeking divorce were in fact unsalvageable.

Because of the no-fault divorce revolution that ushered in these legislative reforms, today, Posner (2007: 143) points out, marriage in the United States "hovers uneasily at the border of contract." Important elements of status-based marriage remain under reformed laws: the terms of marriages are non-negotiable; a person may not enter into a marriage contract with more than one person at a time; and courts generally refuse to adjudicate disputes between partners in ongoing marriages, leaving them to sort things out for themselves (Posner 2007: 147). Nevertheless, by rendering marriage lawfully terminable by consent and in most cases terminable at will, the no-fault divorce revolution rendered American marital relationships more formally and thoroughly contractual.[6]

3 The effect of American divorce-law reform

A growing law-and-economics literature studies the effect that the no-fault divorce revolution, which rendered American marital relationships more contractual in nature, has had on divorce rates in the US. This literature focuses in particular on no-fault reforms that allowed spouses to divorce unilaterally. Unlike reforms permitting no-fault divorce, those permitting unilateral divorce were not adopted in all states, generating variation conducive to empirical research on such reforms' effects.

Theoretically, empirical studies in this area are guided by Becker et al.'s (1977) application of the Coase theorem to marriage and divorce. These authors argued that a legal change from requiring both spouses' consent to dissolve their marriages to requiring the consent of only one spouse would not affect divorce rates if transaction costs are zero, as couples will bargain to end inefficient marriages and keep efficient marriages together regardless of how the law allocates property rights over marital status between spouses.[7] If the Coase theorem's conditions are satisfied, this reasoning predicts that unilateral-divorce reform should have no effect on married couples' propensities to divorce.

The first empirical investigation of Becker et al.'s hypothesis and examination of unilateral-divorce reform's effect on divorce rates in the US was conducted by Peters (1986). Using data from the 1979 Current Population Survey, Peters found support for Becker et al.'s prediction.[8] Unilateral-divorce laws had no effect on divorce rates in the United States.[9]

[6] The no-fault divorce revolution was not the only divorce-law revolution to render marriage more contractual in the late twentieth century. The "prenuptial-enforcement revolution," whereby in the 1980s states began implementing reforms that rendered premarital agreements, which typically stipulate the distribution of property in the event of divorce or death, but may also stipulate within-marriage behavior, made marital relationships explicitly contractual in many ways. On the prenuptial-enforcement revolution, see Leeson and Pierson (2015).

[7] Of course, as these authors point out, alternative allocations of rights will still have distributional consequences for spouses.

[8] Peters (1986) also found that divorce settlements were smaller for women in unilateral-divorce states, implying a welfare effect from divorce-law reform. And Parkman (1992) found that unilateral-divorce reform increased married women's labor participation rate.

[9] Allen (1992) subsequently argued that Peters' results were sensitive to the coding of divorce laws that she used and that other, equally plausible codings produced the result that unilateral divorce did in fact

A lingering concern with Peters' approach, however, was potential endogeneity caused by preexisting trends in states' divorce rates. States that had historically high divorce rates were more likely to pass unilateral-divorce laws. Further, states' divorce rates might tend to converge over time for reasons unrelated to divorce-law reform. Failure to account for these factors will underestimate the effect of divorce-law reform on divorce and may lead to a falsely negative result.

To address this concern, Friedberg (1998) reexamined unilateral-divorce reform's effect on divorce rates using state-specific time trends to correct for pre-existing divorce-rate trends in each state. Employing this method and 20 years of divorce-certificate data from each state, Friedberg found that unilateral-divorce reform was associated with a rise in divorce rates, albeit a small one. In a subsequent paper that focused on how unilateral-divorce reform affected children in the US, Gruber (2004) found what appeared to be a corroborating result. Gruber used census data to measure the stock of divorced persons in each state and found that the percentage of currently divorced persons was higher in states that had enacted unilateral-divorce legislation.

Ultimately, however, the conclusion that unilateral-divorce laws permanently increased American divorce rates was shown to be false. In an influential and convincing study, Wolfers (2006) demonstrated that both Friedberg's and Gruber's results were spurious. Wolfers' innovation was to consider unilateral-divorce reform's effects on divorce rates dynamically by estimating how this legal change affected divorce rates 1–2 years after its introduction, 3–4 years after, and so on up through 15+ years after implementation. Doing so, he found that unilateral divorce-law reform caused a one-time spike in divorce rates followed by a subsequent decline that returned divorce rates to their pre-reform levels. Unilateral-divorce laws, it seems, led to a temporary bump in divorce rates, but had no lasting effect.

Wolfers (2006) also showed that Gruber's (2004) results evidenced only that the stock of people who were *currently* divorced had risen as a result of unilateral-divorce reform. This statistic, however, ignores persons who divorced and later remarried. Wolfers found that when the total stock of divorced persons was considered, which includes both persons who were divorced at the time of the census and persons who divorced but were remarried at the time of the census, the switch to unilateral divorce again had no effect. Although research that seeks to establish unilateral-divorce reform's effect on divorce rates in the US is ongoing, a common interpretation of this literature's findings is that such reform led couples to divorce earlier and reduced the probability that they would remarry, but did not affect the divorce propensity of American marriages (Stevenson 2007).[10]

Footnote 9 continued
increase divorce rates. Using a different empirical strategy, Nakonezny et al. (1995) also produced results that suggested the adoption of no-fault divorce reform increased divorce rates in the US. Gruber (2004) subsequently made a careful examination of state statutes in connection with his work on the effects of American divorce-law reform, and his coding is now used in most empirical work in this literature.

[10] Other empirical work that considers America's no-fault divorce revolution studies this revolution's effect on, for example, marriage rates, marriage-specific investments, and the welfare of women and children (see, for instance, Rasul 2003; Gruber 2004; Stevenson and Wolfers 2006; Stevenson 2007).

4 Economic origins of American divorce-law reform

While considerable attention in the law-and-economics literature has been devoted to measuring at least one aspect of the no-fault divorce revolution's effect on American divorce rates—the effect of unilateral divorce—little attention has been given to the potential causes of American divorce-law reform. What factors may be responsible for the shift to increasingly contractual marriage relationships in the United States?

In his analysis of the evolution of marriage and divorce, Posner (1992: 213–219) notes that legal changes relating to marriage and divorce may reflect two alternative kinds of influences. The first of these, favored in Posner's analysis, is what we call "efficiency influences," which provide pressure for legal reform by altering the substance of efficient law.

Consider, for example, Friedman's (1984) account of the evolution of divorce policy in early America. As described above, initially that policy made legal divorce exceptionally difficult to achieve. Over the course of the nineteenth century, however, judicial officials began to countenance spousal collusions, permitting an increasing number of divorce-seeking couples to secure legal divorces. To explain this shift, Friedman points to an important efficiency influence: the growing economy of Industrial Revolution-era America. The growing nineteenth-century US economy raised the social benefit of clear rights of property and inheritance when spouses separated. Efficiency enhancing divorce policy thus required an easier means by which separating spouses could secure legal divorces. The result of this efficiency pressure was the legal system's increased willingness to tolerate the collusive actions of divorce-seeking spouses, granting them legal divorces.

There are two avenues via efficiency influence theories through which policy may be reformed in a welfare-enhancing direction in the face of such changes. The first of these is what Posner (1992: 214) calls "Darwinian" forces, whereby societies whose laws adapt without conscious direction toward efficiency are selected for over societies whose laws do not. The other way the law may be reformed in an efficiency enhancing direction is through the legal-reform efforts of social-welfare maximizing policymakers.

The second kind of influence Posner identifies as potentially driving divorce-law reform is what we call "redistributional influences," which provide pressure for legal reform through the rent-seeking activities of private interests. A voluminous public choice literature documents the importance of private-interest seeking by special interest groups and policymakers in the determination of law (see, for instance, Rowley and Schneider 2004). Redistributional influences in the divorce-law context simply reflect of such activity in the domain of legislation affecting marriage and divorce.

Underlying theories of potential redistributional pressures on divorce law is a different view of the policymaking process than that which underlies theories of potential efficiency pressures. Whereas the latter conceives of policymakers as motivated primarily by a desire to promote the public interest, the former sees the policymaking process as one characterized centrally by private-interest seeking.

Moreover, while pressures on policy that are efficiency based tend to generate welfare-enhancing law, pressures that are redistributional in nature generate no guarantee that the law will be welfare enhancing.

These differences do not imply that redistributional and efficiency forces cannot push in the same direction—that of welfare-enhancing law—merely that redistributional influences do not "automatically" militate in this direction as efficiency influences do. Nor do they imply that efficiency and redistributional influences are mutually exclusive. Indeed, as we discuss below, America's no-fault divorce revolution may have occurred precisely because both efficiency and redistributional influences applied pressure for the same kind of reform.[11]

4.1 Potential efficiency influences

Two dramatic changes affecting the nature of the American family occurred over the course of latter twentieth century. Each of these changes created efficiency pressure for divorce-law liberalization. The first such change was the growing economic independence of women from men. This change was made possible by a substantial increase in the returns to female employment in the labor market driven by technological shifts that rendered traditionally male skills, such as physical strength, less important in the workplace. Over the same period, the technology of household production also changed significantly. For example, indoor plumbing became widespread, as did electrical appliances. The spread of these technologies raised the productivity of household production, enabling more women to substitute market labor for household labor. Additionally, access to birth control became widespread during these decades, which, by reducing the risk of unwanted pregnancy, contributed further to the number of women in the labor market (Stevenson and Wolfers 2007). As more females began earning income in the marketplace and earning more than ever before, women became increasingly independent economically.

If we suppose, as Posner (1992: 250) does, that one of the central aims of divorce law historically, which made divorce more difficult, was to protect women's interests, the growing economic independence of American females in the second half of the twentieth century has an important implication for efficient divorce law. Namely, it suggests that efficient divorce law will involve easier divorce.

The cost of law that makes divorce more difficult, such as fault-based/mutual-consent divorce law, is that some spouses who would like to exit their marriages are unable, or at least must wait longer, to do so. However, when women are more economically independent, the benefit associated with creating this cost through fault-based/mutual-consent divorce law falls for the simple reason that women are less vulnerable economically and so require less protection against being left by their husbands. This creates an efficiency pressure—either through Posner's "Darwinian" forces, or through social-welfare pursuing policymakers—to

[11] This is also the view taken by Posner (1992: 216–217) who, while favoring efficiency influences in his account, nevertheless acknowledges that a combination of these pressures and those associated with redistributional influences may be important for understanding aspects of divorce law.

substitute no-fault/unilateral-divorce law for fault-based/mutual-consent law, the outcome of which in 1970s America may have been the no-fault divorce revolution.

Complementing this potential efficiency influence on divorce-law reform is a closely related pressure, generated also by women's increasingly active role in the marketplace in the second half of the twentieth century. When women are less likely to specialize in household production, the benefits of the division of labor that traditionally accrue from marriage fall, reducing the value of marriage. When marriage is less valuable, spouses invest less in its maintenance, making marital failure more likely. This in turn increases the demand for divorce, setting in motion the process described above. Because divorce is more costly to obtain for spouses under fault-based/mutual-consent divorce law, the cost of maintaining such law rises, creating efficiency pressure for no-fault/unilateral-divorce reform.[12]

The second important change affecting the nature of the American family in the latter twentieth century was the increasing separation of marriage and children. Out-of-wedlock births in the United States have risen dramatically since 1950, from almost none to about 40 % of all births today (Ventura 2009). This decoupling of marriage and children has been supported by the government's increasingly expansive role in providing for the children of economically vulnerable parents, who are often single, through programs such as Aid to Families with Dependent Children, and its successor, Temporary Assistance for Needy Families. The quality of American public administration has also improved over the past 50 years. This improvement has increased the ease with which debts, such as child support payments, can be collected, making it easier still to raise children outside of marriage.

According to Posner (1992: 250), an important part of the reason for legal intrusiveness in divorce historically was policymakers' desire to minimize the external costs of divorce borne by children. Divorce imposes a burden on children that divorcing parents, unless they are completely selfless, do not internalize fully. For example, children may be less likely to enjoy adequate economic and at-home support if they live in households with only one parent. Further, enforcing child support payments from former spouses who do not live with their children can be challenging. Making divorce more difficult to secure through fault-based/mutual-consent divorce law helps reduce divorce's external costs for children.

When an increasing number of children are born to unmarried parents, and those who are not are less vulnerable economically to their parents' divorce, the benefit of law that makes divorce more difficult to secure falls. In this way the appearance of both these phenomena in late twentieth-century America may have created an efficiency pressure for a switch from fault-based/mutual-consent divorce law to no-fault/unilateral divorce.

There are several attractive features of these efficiency influence theories of the origin of divorce-law reform in the United States. In addition to being potentially testable, these theories readily explain the timing of such reform. Each of the socioeconomic shifts considered above occurred in the latter part of the twentieth

[12] This particular efficiency influence explanation of the no-fault divorce revolution's origin is favored by Posner (1992: 252, 2007: 149).

century, overlapping with the period in which states began adopting the legal changes that rendered American marital relationships more contractual in nature.

Yet in our view, by themselves at least, such efficiency influence theories have an important drawback: in the US context they appear to require publicly interested policymakers, or at least do not account for the possibility that policymakers may also be privately interested. This is problematic if one believes, as we do, that private-interest seeking is an important motive in both traditional markets and political ones. The alternative avenue to publicly interested policymakers reforming divorce law in a welfare-enhancing direction per efficiency theories, recall, is Posner's "Darwinian" selection mechanism. Since it is hard to imagine a US state dissolving over time for failure to adopt efficiency enhancing divorce laws, in the American context, this Darwinian mechanism presumably refers to something like Tiebout (1956) competition enabled by the United States' federalist structure.

Our concern here is that, while in principle it is possible that a state's failure to enact efficient divorce-law reform could result in significant emigration to another state that enacted such reform, pressuring policymakers in the former state to do the same, it seems unlikely that divorce-law differences across states would in fact generate the requisite pressure.[13] Although the status of divorce law is undoubtedly important to individuals, whether it is important enough to drive locational decisions relative to the other policy differences that exist across states is doubtful.

If inter-jurisdictional competition is ruled out as a probable mechanism whereby efficiency pressures generate welfare-enhancing divorce-law reform and private-interest seeking is excluded from consideration, we are left with policymaking by publicly interested political decision makers as the mechanism of such reform. And, while social-welfare considerations surely play some role in guiding policymakers' decision making in the domain of divorce law as in others, the role played by private-interest seeking in that domain is likely at least as important. Given the significance of private-interest seeking in virtually all other legislative areas, it would be surprising if rent-seeking was not also prominent in the area of divorce law.

4.2 Potential redistributional influences

The second category of potential influences motivating the no-fault divorce revolution we consider consists of redistributional pressures. Public choice theory describes a wide variety of legal outcomes as the result of political exchanges between self-interested, reelection-seeking policymakers and self-interested, rent-seeking interest groups—the latter offering political support to the former in return for policy that redistributes wealth from individuals who are not in their groups to their members. The basic formula this literature identifies for successful redistributional influence is straightforward: an interest-group must be reasonably small, composed of members who are readily identifiable by other members of the group,

[13] In fact, Brinig and Buckley (1996) provide evidence that inter-state competition for migrants leads some states to become "deadbeat havens"—i.e., to adopt policies that are less vigilant in collecting child-support payments from divorced spouses.

and be able to generate benefits by lobbying for legal outcomes that are concentrated on the group's members, the cost of which are less concentrated, or "diffused," across non-members.

The members of a group that satisfies these conditions have strong incentives to organize for legal lobbying that redistributes wealth to them, are in an excellent position to effectively organize for such lobbying, and have a good chance of successfully influencing the law to serve their interests without significant opposition from individuals whose interests are harmed by their influence. If groups of individuals that satisfy these conditions whose interests would be served by no-fault/unilateral-divorce reform can be identified, so can potential redistributional drivers of the no-fault divorce revolution.

Identifying such groups is more difficult than it may initially appear, however. Consider perhaps the most obvious group of persons who stand to benefit significantly through divorce-law liberalization: persons who want to exit their marriages. A switch from fault-based/mutual-consent law to no-fault/unilateral-divorce law would endow these persons with property rights in their marital status and, as a result, they would no longer need to bribe their spouses in order to leave their marriages. Thus divorce-law reform would transfer wealth to the members of this group from their spouses.

The group of persons who wish to exit their current marriages is unlikely to constitute an effective special-interest group, however, for the simple reason that it does not satisfy the conditions for such a group described above. Persons who want to exit their marriages are numerous and not readily identifiable by one another, making it difficult for them to organize for lobbying purposes. Moreover, to the extent that the benefits of divorce-law reform are concentrated on the members of this group, the costs they create are concentrated equally on the members of the group composed of their spouses, eliminating the lobbying advantage required for special-interest group success.

Despite this, if we break the group of persons who wish to exit their marriages into subgroups whose populations are substantially smaller and consist of more readily identifiable members, such that organization becomes more feasible, it is possible that the foregoing difficulties of effective special-interest group influence on divorce law for such persons can be overcome. Once such subgroup pointed to in the law-and-economics literature on divorce is that consisting of middle-aged men. Cohen (1987) argues that while women provide most of their services early in marriage, men provide most of their services later in marriage. Marriage, which traditionally was difficult to exit, therefore enabled husbands to credibly commit to promises to provide for their wives later in marriage. Under a fault-based/mutual-consent regime, middle-aged women, who have already delivered their services, would demand large payments to agree to end their marriages. In contrast, under a no-fault/unilateral-divorce regime, husbands do not require their wives' consent to end their marriages. Because of this, middle-aged men stand to benefit from a switch to no-fault/unilateral divorce.

Although "middle-aged men" who desire divorce is a smaller group than all persons who desire to end their marriages and perhaps consists of more readily identifiable members, it would seem to be too large and too ambiguous in

membership for effective collective action. Moreover, even if a special-interest group of middle-aged men could organize, it remains the case that the extent to which the benefit of divorce-law reform would be concentrated on its members would be matched by an equally concentrated cost of such reform their spouses who, by necessity, constitute a group of the same size and equally identifiable (or not identifiable) members, symmetrically facilitating (or not facilitating) organization and lobbying in the opposite direction with respect to divorce law.

There is perhaps at least one potential subset of middle-aged men, however, that may be able to more effectively organize for divorce-law: men who have been divorced in the past. This group consists of a much smaller number of individuals whose identities are more easily identified. In California, for instance, an association of divorced men, called United States Divorce Reform, Inc., who felt they had been treated unfairly in their divorces, organized amidst California's no-fault reform process to have divorce removed from the purview of courts (Kay 1987: 56).

The difficulties of successful special-interest group activity that middle-aged men confront might also be surmounted—or rather rendered moot—if some members of this group can affect divorce-law policymaking directly. Consider, for instance, middle-aged men who desire to exit their marriages and occupy seats of political power. These individuals, who have their hands on the levers of divorce policy, do not confront the organizational costs confronted by middle-aged men in general. Their lobbying efforts are far more direct, can be conducted at far lower cost, and in many cases are likely to be far more persuasive. Given this, such individuals' private benefit of divorce-law reform may exceed their cost of working for such reform, facilitating private-interest driven divorce-law change that caters to the interests of middle-aged men without the need for middle-aged men to organize politically.

Parkman (1992), for example, argues that politicians who benefit personally from more liberal divorce laws may have contributed to no-fault/unilateral-divorce reform in the US. In particular, Parkman (1992: 134) points to Jerry Hayes, a California Assemblyman who was instrumental in the passage of the 1969 Family Law Act, which is often seen as the catalyst for the no-fault divorce revolution. After seeing to the passage of no-fault/unilateral-divorce reform in his state, Hayes successfully sued to have his alimony payments reduced under the new law. Similarly, according to Rasul (2003), older governors were more likely to preside over the passage of no-fault/unilateral-divorce laws in the United States—a result he suggests may be due to the fact that older governors (who are overwhelmingly male) were more likely to have undergone divorce themselves and thus were more sympathetic to divorce-law reform.

An alternative subgroup of persons who wish to exit their marriages offers still stronger potential for successful special-interest group activity that could have contributed to the no-fault divorce revolution in the US: abused spouses and spouses who are vulnerable to abuse. Per the logic described above, compared to fault-based/mutual-consent law, no-fault/unilateral-divorce law redistributes wealth from spouse abusers to abused spouses, who want to exit their marriages. The same logic suggests that, compared to fault-based/mutual-consent law, no-fault/unilateral-divorce law benefits spouses vulnerable to abuse who remain married, such as

women with violence-prone husbands, by raising the cost of abuse (since abuse is likely to lead an abused spouse to desire divorce, and under unilateral-divorce law, to prevent his spouse from leaving him, the abuser must offer his spouse a larger payment), which deters prospective abusers from acting on their impulses. Indeed, Stevenson and Wolfers (2006) found that American divorce-law reform reduced the incidence of wife abuse and suicide. Abused spouses (or spouses vulnerable to abuse) therefore constitute a potentially significant subgroup of persons who desire to exit their marriages with an interest in encouraging such reform.

This subgroup is much smaller than "middle-aged men" and consists of potential members who are more easily identified, for instance through battered-women's homes, rendering organization for lobbying, such as under the auspices of women's advocacy groups, much easier. Equally important, while it is true that the benefit of divorce-law reform—to the extent that it is concentrated among the members of the abused-spouses group—is matched by a cost that is concentrated equally among the members of the abusive-spouses group, who by necessity are equal in number to the members in the former group, the lobbying advantage required for abused spouses to succeed in influencing divorce law is preserved for two reasons. Compared to the members of the abused-spouses group, the members of the abusive-spouses group are much harder to identify if for no other reason than abusive individuals are typically unwilling to identify themselves as such. Second, and closely related, while perhaps in principle members of the abusive-spouses group could—were they able to overcome the problem of organization just pointed to—form a lobbying organization "for the advocacy of abusive spouses," this is difficult to imagine in the extreme. In contrast, members of the abused-spouses group can quite easily, and in fact do, have lobbying organizations "for the advocacy of victims of spousal abuse." Although domestic violence may not have become an important national issue in the US until the mid-1970s, at least for the handful of states that had not already introduced unilateral-divorce reform by 1974, abused-spouse interest groups may have had an incentive to encourage such reform.

Perhaps surprisingly, women's advocacy groups in the United States have not consistently been supporters of no-fault reform. As Fineman (1991) describes, in Wisconsin, for example, feminists were initially supportive of a 1975 bill that would have introduced no-fault divorce in their state. Upon learning that no-fault reform by itself might injure the interests of divorcing women by removing from them much of the bargaining power they had vis-à-vis their husbands in the case of marital dissolution under fault-based law, however, these same interests acted to block the impending no-fault law. Feminists subsequently encouraged the adoption of an alternative no-fault reform that would provide financial protection for divorcing women and were instrumental in organizing this new no-fault law's adoption. Similarly, in New York, in 2006 no-fault reform was opposed by the New York chapter of the National Organization of Women, but was supported by NOW's Pennsylvania chapter and the Women's Bar Association (Humm 2006). In still other states, such as California, feminist interest groups appear not to have been active in promoting or discouraging no-fault reform (Kay 1987; Jacob 1988). Thus, depending upon the presence or absence potential marital property law changes that may attend divorce reform, which may have very different effects on divorced

women's material welfare, women's advocacy groups may have an interest in lobbying for or against divorce-law liberalization, or no significant interest in divorce-law reform at all.

A different group of individuals with a substantial stake in the status of law affecting divorce in the United States is American lawyers who specialize in family law. Matrimonial lawyers benefit from increased demand from their services, which is generated primarily by increased litigation involving family law. Such lawyers, represented by organizations such as the American Academy of Matrimonial Lawyers, are well-positioned to influence divorce law: the number of them is small enough to facilitate collective action; the members of the relevant group are easily identifiable; the benefit of increased litigation accruing to matrimonial lawyers is highly concentrated in light of the fact entry into the legal profession is tightly restricted (Crandall et al. 2011); and the cost of creating this benefit is diffused among a large populace—the consumers of matrimonial lawyers' services.

It should therefore come as no surprise that committees consisting of lawyers—typically family law specialists—were intimately involved in America's divorce-law reform revolution. Such lawyers drafted the new legislation, testified on its behalf to state legislatures, and argued for no-fault reform in the media (Jacob 1988: 62–79). Similarly, organizations made up of lawyers—namely the National Conference of Commissioners on Uniform State Laws and the state Bar Associations—were instrumental in standardizing and promulgating no-fault legislation.

Despite this, it is uncertain whether lawyers had a simple economic incentive to favor no-fault laws because it is theoretically unclear and empirically unknown whether no-fault/unilateral-divorce reform is associated with increased or decreased litigation. Parkman (1992: 45) argues that American divorce-law reform increased litigation between divorcing spouses, which would mean that such reform stood to benefit matrimonial lawyers. According to him, under fault-based/mutual-consent divorce law, spouses needed to negotiate the terms of marital dissolutions, such as financial and custodial arrangements, before going to court. As a result, the typical function of the judicial process was to simply rubber-stamp terms to which couples had already agreed.

In contrast, under no-fault/unilateral-divorce law, because one spouse can initiate divorce proceedings without the other's consent, spouses are less likely to have worked out such agreements beforehand. As a result, issues such as child custody, division of assets, and awards of alimony must be decided externally, potentially resulting in increased matrimonial litigation. If Parkman is correct, and no-fault/unilateral-divorce reform is indeed associated with more divorce-related litigation, lawyers specializing in family law would have had strong incentives to lobby for such reform. The fact that the most significant attorney interest group in the US—the American Bar Association—seems to have been a strong proponent of divorce-law reform is suggestive that this may have indeed been the case.

It is equally plausible, however, that no-fault/unilateral-divorce reform could have reduced the amount of litigation involved in the typical divorce, reducing the demand for matrimonial lawyers and thus giving them incentives to oppose divorce-law reform. Under fault-based regimes, courts had to establish the degree to which

parties to divorce were responsible for the breakdown of marriage before they could decide the terms of divorce. To do this, courts had to make extensive inquiries into the causes of marriages' failures, which could lead to lengthy litigation. No-fault divorce law largely eliminated the need for this process and thus may have streamlined divorce litigation along this dimension greatly. In this case, rather than lobbying for a switch to no-fault/unilateral divorce, the interests of American matrimonial lawyers would have been served by lobbying to preserve the *status quo* of fault-based/mutual-consent divorce, delaying rather than contributing to the no-fault divorce revolution. And at least some American lawyers did in fact oppose divorce-law reform in their states, fearing that if the process of divorce became too streamlined, matrimonial lawyers might lose an important part of their business (Jacob 1988: 34, 86). These lawyers, however, seem to have been a minority.[14]

Another way in which no-fault divorce may have reduced the demand for matrimonial lawyers was by "energiz[ing] the divorce mediation movement" (Brinig 1995: 2). In the absence of the proof requirements that fault-based divorce law entailed, at least one of the primary purposes for lawyers in divorce proceedings historically was eroded by no-fault reform. Instead of relying on matrimonial lawyers, divorcing spouses could simply write their own divorce agreements or, where third-party intervention would be useful, rely on mediators, who need not be lawyers (Brinig 1995: 2–3). Although many lawyers ultimately served as mediators between divorcing spouses, the prospect of losing market share to mediators or other non-lawyers in divorce proceedings points to another reason why matrimonial lawyers may have had an interest in resisting no-fault reform. In California, for instance, the State Bar objected to a 1966 proposed ballot initiative that in reforming the state's fault-based divorce regime "would have removed divorces and related family law issues from the courts, and placed these matters before an administrative Department of Family Relations" (Kay 1987: 33).

The final potential redistributional influence on American divorce law we consider is that of the Roman Catholic Church and its affiliated organizations, such as the Catholic Welfare League. Like matrimonial lawyers, the Church's leadership consists of a reasonably small number of individuals who are easy to identify and well-positioned to lobby for the purposes of influencing the law. In the case of Church leaders, however, it is not material motivations that directly drive an interest in the substance of divorce policy, but rather "ideological" ones.

[14] Posner (2007: 152) makes a remark that suggests that, even if divorce-law reform streamlined aspects of the divorce process, it remains possible that such reform could increase the demand for matrimonial lawyers. According to him, divorce-law reform made it more important for courts to adopt a careful economic approach to the calculation of alimony. When divorce was based on fault, a husband who wanted divorce required his wife's consent, enabling her to bargain for substantial alimony. In contrast, under no-fault/unilateral-divorce law, a husband who wanted divorce did not require his wife's consent, undermining her ability to accomplish this. It follows that if judges are interested in wives' welfare, and careful determination of alimony involves more activity by and thus greater demand for matrimonial lawyers, matrimonial lawyers would have had an incentive to lobby for divorce-law reform. This argument, however, seems to be in tension with the efficiency influence logic Posner suggests elsewhere, discussed above, according to which no-fault/unilateral-divorce reform is associated with courts exhibiting less interest in the welfare of women under no-fault/unilateral divorce.

The Church remains staunchly opposed to divorce, and its ban on marital separation remains an important and distinctive element of Roman Catholic doctrine. Whereas Protestant churches have taken a more liberal attitude towards divorce—indeed, in England, a committee appointed by the Archbishop of Canterbury recommended a form of no-fault divorce as early as 1966—the Church has consistently maintained that marriage is an indissoluble sacrament (Jacob 1988: 45, 46). Divorce-law liberalization stands in opposition to this doctrinal interest. Historically, granting secular authorities the power to nullify this sacrament was unthinkable to Church leaders. Moreover, divorce-law liberalization was considered undesirable by many of the Church's members in non-leadership positions: practicing Catholics. The dual threat that divorce-law liberalization posed to the Church, on the one hand to its doctrinal interests, and on the other, to satisfying important segments of its membership, provided Church leaders with strong incentives to oppose no-fault/unilateral-divorce reform.

And, in many cases, this is precisely what they did. For decades the Church's opposition to no-fault laws was strident, and its influence in several states was far-reaching. A lawyer involved in drafting proposals for divorce-law reform in New York in the 1950s recalled being told he "would be in trouble if [he] ever tried to run for elective office or faced a Catholic judge" and was encouraged by a friend to seek out the counsel of the Archbishop of New York before proceeding—presumably to learn if any divorce reform would be deemed acceptable by the Church—which the lawyer did (Jacob 1988: 36). The Church also opposed no-fault reform in Wisconsin (Fineman 1991). In California, some Church representatives supported divorce-law reform (Kay 1987: 56). However, this support seems to have been for the creation of a special Family Court, whose purpose was to emphasize counseling unhappy couples seeking divorce as a means of attempting to reconcile them within marriage, which early proposals for no-fault reform in California included, not for policy that would liberalize divorce.

Evidence suggestive of the Church's influence on the American no-fault divorce revolution—or rather, in delaying it—is found in the fact that states with large Catholic populations were among the last states to pass divorce-law reforms. Massachusetts and Rhode Island reformed their divorce laws in 1975. Pennsylvania did so only 1980. And Illinois held out until 1983 (Jacob 1988: 87). Although the Church did not have the same obvious economic interest in the substance of American divorce law that the legal profession had, it nevertheless appears to have had an important private-interest driven influence on such law.

Redistributional theories of the unilateral-divorce revolution have both an important advantage and disadvantage relative to the theories of potential efficiency influences on American divorce-law reform considered above. Their chief advantage is their grounding in rent-seeking behavior which, as discussed previously, seems to us as likely to be important in the determination of legislation bearing on divorce as it is in the determination of legislation in other domains. The chief disadvantage of these theories is that they do not readily explain a central feature of American divorce-law reform that efficiency theories explain: the timing of this reform. The no-fault-divorce revolution occurred in the 1970s. An important question for redistributional theories, then, is: Why was divorce-law reform not in

the interest of, say, matrimonial lawyers, prior to the 1970s? Or, if it was, why did such interest groups fail to achieve reform until that time?

As developed above, the potential rent-seeking pressures on American divorce law we consider do not involve a dynamic component. This is not to say, however, that dynamic elements that could account for the timing of American divorce-law reform via redistributional pressures might not be found. Indeed, as we discuss below, we believe they can be. However, at least the most obvious dynamic elements require introducing aspects of efficiency influence theories, suggesting that private-interest seeking influences alone—just as efficiency influence theories alone—may not be able to persuasively account for the no-fault divorce revolution.

5 Concluding thoughts

Posner (1992, 2007) argues that as a result of the no-fault divorce revolution, marital relationships in the US have become increasingly contractual in nature. Taking his observation as our starting point, our interest is in encouraging research that, as Posner (1987) has emphasized the importance of in other legal contexts, endogenizes this divorce-law change.

Toward that end our analysis has elaborated some theoretical bases for what we hope will lead to future empirical analyses of the causes of American divorce-law reform. The testable hypotheses relating to such causes our paper develops reflect two categories of potential determinants of divorce-law reform: those relating to what we have called "efficiency influences" on American divorce law arising from socioeconomic changes that altered the substance of efficient divorce law, and those relating to what we have called "redistributional influences" on divorce law arising from rent-seeking activity by special-interest groups with a substantial stake in the substance of divorce law.

Although the theories that underlie the hypotheses we consider in each category of potential influence are grounded in different conceptions of the nature of the policymaking process, as indicated above, we not only believe that these categories of influence are not mutually exclusive, but indeed, that only by marrying them may the most compelling explanation of America's no-fault divorce revolution be possible. The marriage we have in mind aims to exploit the relative advantages of both efficiency influence and redistributional influence explanations of this legal change, namely the ability to explain the timing of American divorce-law reform on the one hand, and the ability to explain this reform in a manner that incorporates private-interest seeking behavior on the other.

One way of describing the marriage we have in mind is as an interaction between alternative sources of pressures whereby efficiency influences shape the menu of policy options that policymakers may choose from by adding efficiency enhancing reforms to the *status quo*, but redistributional influences determine which particular policy on that menu policymakers ultimately choose. To get a better sense of exactly what we mean by this, consider the histories of divorce-law reform in in New York and California.

In the 1960s New York and California shared similar socioeconomic characteristics: they had similar median household incomes, were populated by large groups of ethnic minorities, and exhibited moderate political climates. Surprisingly, both states' governors—Ronald Reagan and Nelson Rockefeller—had also themselves been divorced, a rarity among politicians at the time. Given their similar socioeconomic features, and thus, presumably, efficiency pressures, it would seem that in the late 1960s, when both states reformed their divorce laws, that they would have adopted similar divorce-law reforms. Yet New York and California's reforms were in fact very different. Indeed, these states reflected opposite ends of the divorce-law spectrum in the United States in the 1960s. This marked difference, it seems, was the product of markedly different redistributional pressures in the two states.

Historically, New York has had the most restrictive divorce laws in the nation. Until 1966, a 1787 statute that permitted divorce only if adultery could be proved governed marital dissolution in the state. Observers decried the perjury rampant in New York's divorce courts resulting from the state's highly restrictive divorce grounds and advocated change. But an important interest group in the state opposed reform: the Catholic Church.

The Church's influence in New York was extremely powerful. From 1939 to 1967, Cardinal Francis Spellman occupied the position of Archbishop of New York. Spellman was a central figure in New York politics, earning the nickname "the Powerhouse" because of his impressive political influence. As a Church leader, Spellman strongly opposed divorce-law liberalization in the state. His opposition was complemented by the lobbying activities of the Catholic Welfare League, which also fought liberalization (Jacob 1988: 36). For years the Church succeeded in preventing any kind of divorce-law reform in New York at all. Because of its efforts, formal divorce law remained in the ultra-restrictive state it had been in since the eighteenth century.

At the insistent urging of a number of high-profile legal professionals, in 1966 New York policymakers finally moved to adopt reform. They added some further grounds for divorce, such as cruelty, abandonment, confinement in prison, and a mutually-agreed-upon separation lasting at least 2 years. But these grounds remained highly restrictive. While New York's reform liberalized divorce relative to its status under the 1787 legislation, it was far from a no-fault reform and the state's divorce law remained among the most illiberal in the county (Jacob 1988: 41).

In stark contrast to New York is the history of divorce-law reform in California. Although California had a significant Catholic population, the Church never obtained political influence there comparable to that which it enjoyed in New York. Moreover, what influence the Church did have in California it spent fighting for funding for parochial schools rather than combating divorce-law reform.

As a result, in the late 1960s when California's governor appointed a committee of matrimonial lawyers charged with recommending provisions for divorce-law reform in the state, despite the radical nature of the committee's recommendations, which rendered divorce in California not only faultless but also, in practice, unilateral, the Church's response was muted. Because of the Church's decision to

pass on lobbying to fight divorce-law reform in California, in 1969 the Family Law Act was passed, ushering in the most liberal divorce law in the country (Jacob 1988: 43–61).

While both New York and California had similar socioeconomic features in the 1960s and thus presumably faced similar efficiency pressures for divorce-law reform in that decade, ultimately it was redistributional pressure from the Catholic Church that decided the nature of reform in each state.[15] In New York, where the Church was powerful politically and lobbied actively to thwart divorce-law liberalization, reform—albeit liberalizing to a degree—was modest and the law continued to restrict divorce significantly. In California, where the Church was not as powerful politically and did not lobby actively to thwart divorce-law liberalization, reform was radical and the law removed virtually all restrictions on divorce. In both states efficiency pressures made divorce-law liberalization a viable policy option for policymakers in the 1960s—and perhaps earlier still. But in New York redistributional pressure prevented policymakers from adopting liberal divorce law, at least in its more encompassing form, whereas in California, where such pressure was much weaker, policymakers were able to do so.

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[15] In her review of Jacob (1988), Blumberg (1991) argues that Jacob overstates the radical nature of the 1960s reforms and overlooks New York's permissive stance regarding migratory divorce. However, this does not invalidate the central point of narrative that New York law was and remained restrictive due, at least in part, to the influence of the Catholic Church. New York did have a permissive stance towards migratory divorces, but traveling abroad and receiving a divorce from a foreign court was extremely costly, as was the 2-year waiting period required for a separation agreement in that state after the 1966 reform. Divorce rates in California remained about twice as high as those in New York during the 1970s, which is an indication that divorce laws in the latter were substantially more stringent than in the former (Leeson and Pierson 2015).

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