The Business of Divorce

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Abstract: Most legal jurisdictions in the post-revolutionary United States only permitted divorce upon proof of adultery or an extended period of desertion. By the end of the 19th century, nearly every state had significantly liberalized their grounds for divorce, despite significant political disagreement over the issue. I argue that many of these liberalizations were motivated not by the public interest, but by the private interest of small groups of lawyers and local businesses motivated by the prospect of attracting divorce seekers to their communities. I substantiate this claim with historical evidence that liberal divorce laws were profitable to locally based lawyers and businessmen and pursued by local rather than state-based interest groups. The primacy of local interests is further validated by the fact that divorce law is frequently de-liberalized once a particular state attracts the attention of competing anti-divorce interest groups on the state or national level.

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I. Introduction

It would be difficult to overstate the controversy surrounding divorce laws in the 19th century. Pleas on both sides of the issue were impassioned and immovable. When the Reverend Charles A. Dickey testified in front of the United States Congress on the issue, he characterized divorce as "worse than any pestilence that can be brought in ships, or any calamities that can come from the clouds. For, let the foundations of our homes be meddled with, and we will have no foundations for our country."[2] In contrast, Elizabeth Cady Stanton described being trapped in an unhappy marriage as "…nothing more or less than legalized prostitution. Let us encourage, yea, urge those stricken and who are suffering in such degrading bondage, held there by crude notions of God's laws and the tyranny of a false public sentiment, to sunder all such holy ties…[3]

Stanton's words were addressed to the women of New York, who lived in one of the most restrictive divorce regimes in the country. New York's first divorce statute was passed in 1787 and declared adultery the only suitable grounds for a full divorce. Despite numerous attempts over the next 150 years to liberalize this strict divorce law, no piece of legislation ever successfully passed both the Assembly and Senate. Consequently, adultery remained the only acceptable grounds for divorce in New York until 1966 (Basch 1990, Hartog 1991). However, the legislatures of many other states did choose to liberalize, either by expanding the acceptable grounds for divorce or reducing the amount of time an individual would have to be a resident before they could sue for divorce under that state's law. These liberalizations enabled dissatisfied spouses to procure divorces that would have been illegal in the state they were married in by

[2] Proceedings of the National Congress on Uniform Divorce Laws 41 (Feb. 19, 1906). Quoted in Friedman 1984.
[3] Letter to Temperance Convention at Albany, Jan. 28, 1852, Stanton Papers. Quoted in Blake 1962.

simply moving to another jurisdiction and waiting the required amount of time—often as little as 3 months, or in the case of Nevada from the 1930s on, only 45 days.

There are two potential economic explanations for these liberalizations in divorce law. The first possibility is that the public interest had changed in such a way that altering the default marriage contract to be more easily dissoluble was a Pareto improvement. However, the possibility that legislatures systematically recognized the efficiency of more liberal divorce law and chose to provide these valuable public goods falls short given the theoretically indeterminate value of changing divorce law. To the extent that liberalizations in divorce law represent a transfer of marital rights from the satisfied to the dissatisfied spouse, the Coase theorem suggests that changes in divorce law will not alter the stock of efficient marriages. If a husband and wife are able to reach a marital bargain such that both benefit from remaining within the marriage, they will do so. Consequently, there is no assignment of rights over the decision to exit marriage that will alter the couple's final decision to either separate or remain together and therefore no assignment of rights that would be preferable to another in terms of social efficiency (Becker 1981; Becker, Landes, and Michael 1977). Further, even the wealth effects of these transfers are difficult to predict. Easy access to divorce does remove some of the risk from marriage, increasing the expected net present value of a union. However, since the offer of a lifetime of financial and familial support and the other benefits of marriage no longer comes with a guarantee of unconditional enforcement by the state, the admission of new legally permissible grounds for divorce also diminishes the expected net present value of the marriage contract. The net effect of a change in divorce law is consequently indeterminate from both a social and an individual perspective, making a simple public goods explanation unlikely.

The second potential explanation, and the one I argue for in this paper, is that liberalizations in divorce law were the result of legislative capture by private interests. Specifically, the history of migratory divorce havens illustrates that many of the liberalizations in divorce law that took place in the 19th century United States were driven by private interests of groups of lawyers that were small but well equipped to lobby. The primary modus operandi of divorce lawyers in these states was to attract clients from more restrictive states either through direct advertisement or by referral from a partner in a law firm back east. These clients, usually though not exclusively wealthy, would then move to the city for a period of three to six months depending on the local law. After this period of time, they were eligible for divorce on the grounds established by local statute. The local divorce lawyer received the fee, the local hotel owner received the rent money, the local businesses received 3-6 months of business from a wealthy patron, and the unhappy couple received the right to rearrange their marital obligations. However, despite the seemingly all-around benefits, vocal anti-divorce advocates across the country took great offense to this particular money-making endeavor. In the words of a Chicago newspaper, "When will justice overtake the legal vampires who thus rob fools of their money, and disgrace an honorable profession?"[4]

Most economic analysis of divorce has focused on attempting to understand changes in the divorce rate. The empirical veracity of the Becker-Coase proposition that changes in divorce law will not affect the divorce rate has been explored by the research program on the late 20th century transition to unilateral divorce laws in the United States. This literature has found mixed results, with the most up to date studies suggesting that changes in divorce law indeed have no significant long-term impact on the divorce rate (Allen 1992; Brinig and Buckley 1998; Ellman

[4] *Inter Ocean*, (Chicago, IL) Thursday, June 14, 1877.

and Lohr 1998; Friedberg 1998; Peters 1986, 1992; Wolfers 2006; and Zelder 1993). Other papers argue that the constant or falling divorce rate in the no-fault era is not a result of the family conforming to the Becker-Coase prediction as claimed, but an effect of the decreased security in marriage lowering expected gains and ensuring that only better matched couples with a high expected utility will find it worthwhile to enter marriage (Rasul 2006, Mechoulan 2006). A related body of research looks at wealth effects, or the relative well-being of married people under different divorce law regimes. For example, Brinig and Crafton (1994) propose that no-fault divorce would create a dis-incentive for domestic abuse by reducing the cost of exit for a maltreated spouse, and Stevenson and Wolfers (2006) empirically investigate this claim.[5]

The literature outlined above analyzes the economics of divorce by taking changes in divorce law as exogenous and analyzing the effects of changes in laws on the behavior of married people or people considering marriage. In this paper, I reverse the standard relationship between individuals and divorce law by analyzing the actions of individuals within the legal regime and the effects of those actions on changes in law. In doing so, I raise the question of the legislative motivations behind the two hundred year trend of liberalization in divorce law. Given that public interest explanations are particularly unlikely to be relevant in the arena of divorce law for the reasons discussed above, the incorporation of private interests in the economic analysis of divorce reveals important causal relationships that would not be uncovered by alternative methods of analysis.

In the next section of this paper, I present the economic theory of the effect of interest groups on legislative activity in the context of divorce law, with a particular emphasis on how

[5] Stevenson and Wolfers (2006) find reductions in female suicide, uxoricide, and domestic violence against both husbands and wives rate following the adoption of no-fault divorce.

the interests of lawyers translate into legislative influence. In section three, I outline the role of divorce mills in the evolution of United States divorce law. Then, in section four, I analyze the role of private interests in divorce liberalization by evaluating the validity of three related predictions: 1.) If liberalization was driven by private interests, liberal divorce laws should have been associated with demonstrable profits to local lawyers and businessmen. 2.) Since the profits of the divorce business were concentrated at the level of cities and other small localities, residents and representatives of these jurisdictions are expected to be stronger advocates for liberal divorce law than individuals operating at the state and national levels. 3.) Since liberal divorce law is beneficial at the local level only, state level legislatures are expected to be susceptible to the imposition of costs by anti-divorce pressure groups once the state's status as a divorce mill becomes nationally known. Section five concludes.

II. Role of interests in legislative change

Some positive fraction of legislative activity comes about as the result of interest groups perceiving an opportunity for profit through some change in the law and legislators in turn responding to their rent seeking activities (Buchanan and Tullock 1962: 269-280). Landes and Posner (1975: 888-891) describe this as an exchange in which the legislature sells legal change to the highest bidding interest group.

Some of these exchanges will be easier to negotiate than others, due to a score of issues that can be broadly described as credible commitment problems. Given that legislators face no sanction for violating the terms of an exchange with an interest group, a legislature can never guarantee that its agreement will not be overturned in the next period. It is most difficult for a legislature to credibly commit to a legal reform that is likely to be misinterpreted or overturned

by the judiciary, or that requires subsequent reinvestment in the form of funding or additional legislation. The influence of interest group politics also depends upon whether the judiciary decides to act as a pure contract enforcer or to engage in interpretive acts that neutralize legislative influence (see Buchanan 1975, Landes and Posner 1975, and Macey 1986).

This framework implies that reform in divorce law is an arena of legislation that is particularly susceptible to the influence of interest group politics. The right of states to choose their own set of laws governing marriage and divorce had long been established, and as such divorce laws were unlikely to be contested on grounds of constitutionality, at least at the national level.[6] On the level of routine administration of the law, a legislative enactment changing the criteria for procuring a divorce was straightforward. Though sometimes the interpretation of grounds for divorce could be fuzzy—what does and does not qualify as mental cruelty?—the changes in residency requirements which were the most sought after by pro-divorce interest groups were generally not subject to interpretation and therefore judicial nullification. Further, since gains to lawyers and local businesses were immediate and did not require any direct financial investment, there was no immediate or future action that could nullify the benefits to the interest group of this particular form of legal exchange. The problem of credible commitment is minimal, at least in comparison to other forms of legislation.

Further, O'Hara and Ribstein (2009) argue that law firms and other associations of lawyers make for particularly powerful interest groups. Lawyers are highly motivated to involve themselves with legal reform because they can gain or lose clients when the law changes. Further, their familiarity with the law, membership in organized legal associations, and the fact

[6] There had been occasional disputes in state level courts over the validity of migratory divorces, but the decisions were so varied and the precedent consequently so confused that both the majority and the dissenting opinions in the 1906 U.S. Supreme Court case believed that past state court decisions validated their perspective (Feigenson 1990: 119-121).

that they have already incurred the licensing costs associated with being allowed to exercise legal expertise all lower the costs associated with lobbying (Ribstein 2004).

Lawyers working within the same area of law have frequently formed associations in order to more effectively promote legislation in service of their shared interests. As early as 1932, Chief Justice Harlan F. Stone observed:

> The rise of big business has produced an inevitable specialization of the Bar. The successful lawyer of our day more often than not is the proprietor or general manager of a new type of factory, whose legal product is increasingly the result of mass production methods. More and more the amount of his income is the measure of professional success. More and more he must look for his rewards to the material satisfactions derived from profits as from a successfully conducted business, rather than to the intangible and indubitably more durable satisfactions which are to be found in a professional service more consciously directed toward the advancement of the public interest (quoted in Gordon 1988: 3-4).

Stone's insights have proven prescient, as lawyers are now generally accepted as an important driving force behind legal reform. Tort lawyers have been particularly influential in altering product liability law (Rubin and Bailey 1994), the First Amendment Lawyer's Association has been one of the driving forces pushing obscenity cases to the Supreme Court (McGuire and Caldeira 1993), and activity by entrepreneurial lawyers has been identified as a crucial component in the passage of various 20th century human rights legislations in the United States, Britain, and Canada (Epp 1998). These are just a few of many examples.

In sum, 19th century divorce legislation was particularly vulnerable to influence by a knowledgeable and well connected interest group that stood to benefit from easy divorce law. Consequently, it is not surprising that divorce law in the United States experienced an evolution that resulted in most states significantly liberalizing their divorce laws over the course of the 19th century.

III. The history of United States divorce law

The legal environment within which early United States legislatures and judges were developing practices governing divorce had its foundations in British common law. Family law in 18th century Britain was defined by the legal doctrine of coverture, which set the initial allocation of the family's property and legal rights as all but completely in the husband's control. Coverture also erected legal barriers to the exchange of rights between husband and wife by denying the wife's independent agency (Blackstone 1765: 430-33). This legal non-existence left married women in both Britain and the United States with no right to own property and no right to enter into contracts without her husband's approval and assistance.

Further, if married life proved less desirable than anticipated, legal exit options were severely limited. Full divorce including restoration of the right to marry was completely forbidden until 1715, when it became possible to request an individually tailored act of Parliament. These private legislative acts were the only means of obtaining full divorce from 1715 until the marriage law reforms in 1857, and during the entire 150 years of their relevance only 327 such acts were passed (Gibson 1994: 11-14).

It was this severe legal environment in which the American colonies were developing their first divorce statutes. Prior to the relaxation of divorce law that will be discussed in this paper, exiting a legal marriage – i.e. a union contracted between a man and a woman who were consenting, single, non-impotent, unrelated, and sane adults – was nearly impossible. The colonies in the New England region generally allowed divorce only in the case of desertion and adultery, but many other colonies did not begin to allow divorce at all until the late 18th and early 19th centuries. South Carolina forbid all divorce until 1869. Further, even in those jurisdictions where divorce was permitted, it was rare. Connecticut, recognized as the most permissive in

matters of divorce as early as the 1650s, only granted 40 divorces between 1655 and 1699 (Strow and Strow 2006: 241-242).

Throughout the 19th and into the 20th century, there was a slow but pervasive liberalization in these stringent divorce laws (Basch 1999, Cowley 1879, Friedman 1973, Hartog 2002). New York and South Carolina are the only jurisdictions that do not have dramatically more liberal grounds for divorce at the end of the 19th century than at the beginning. At the other end of the spectrum, Rhode Island liberalized as early as 1798 when they added "gross misbehavior and wickedness, in either of the parties repugnant to, and in violation of, the marriage covenant" as acceptable grounds for divorce, becoming the first state to allow divorce for other than adultery and desertion (Jones 1987).

Throughout the 1800s, most states add some combination of violent cruelty, mental cruelty, habitual drunkenness, imprisonment or felony conviction, and failure to support to the traditional biblical grounds of adultery and desertion. Some states pass additional less common grounds such as joining a religious sect believing cohabitation unlawful[7] or engaging in prostitution or other licentious behavior before marriage.[8] Other states add catch-all omnibus clauses, similar to no-fault divorce except in that the court must agree to your desire to separate. For example, the Territory of Washington passed a statute in 1855 allowing divorce for "any cause deemed by the court sufficient or where the court shall be satisfied that the parties can no longer live together."[9] By the end of the 19th century, the preponderance of states in the union had made it significantly easier for married women to remove themselves from the umbrella of coverture should it prove less desirable than anticipated.

[7] Kentucky Laws 1850, p.217-8, ch. 47, Art. 3, S 1.
[8] West Virginia Code 1870, p.441.
[9] Terr. Stats 1855, p.405-7.

Table 1 presents the year a state or territory first permits divorce on the liberal grounds of either mental cruelty, failure to support financially, or a quality of life ground of some sort. These provisions are considered liberalizations because they are the first to grant the judiciary discretionary latitude that extends beyond the traditional grounds of adultery, extended desertion, or violent cruelty. These quality of life grounds are generally expressed as "behavior that renders life intolerable," "gross misbehavior and wickedness," or "habitual exercise of bad temper." Some states enact full omnibus clauses that grant the courts permission to allow divorce wherever they see fit, and these are considered liberal during the periods in which they are in effect.[10] This accounting does not address the issue of divorce *a mensa et thoro*, a separation that carried legal weight but which did not permit remarriage (Bishop 1856). Also removed from consideration at this time for the sake of restraining the scope of the query is the practice of private legislative actions for divorce, which were infrequently permitted until Delaware become the last state to prohibit legislative divorce in 1897 (Friedman 1973).

[Insert Table 1]

This overview of liberalizations in divorce law reveals two interesting patterns. First, states and territories in the Midwest and the West are more likely to have liberal divorce law than states along the eastern seaboard. The proportion of states in each region to have enacted liberal divorce law is presented in figure 1.

[Insert Figure 1]

Second, every omnibus clause—the most liberal of all possible divorce laws—was eventually repealed. The removal of the omnibus clause by all state legislatures represents a systematic

[10] Connecticut (Public Acts 1849), Illinois (Revised Laws 1833, p.232-3), Indiana (Revised Laws 1824, ch. 32, S 1, p.156), Iowa (Laws 1845, ch. 24, p.23), Maine (Public Acts 1847, ch. 13, p.8), Minnesota (Laws 1855, p.62), Utah (Acts 1855, p.163), and Washington (Statutes of the Territory, 1855, p.405-7) all enact omnibus clauses for some period of time.

pattern of partial repeal of liberal divorce laws. Other liberal grounds of divorce that were less publicly controversial would remain in effect. This suggests that whatever forces motivated the initial relaxation of divorce law were at least in part overwhelmed by countervailing pressures.

This pattern of liberalization in the Midwest and the West followed by partial repeal of the most extreme liberalizations is best explained in the context of the divorce mills. Migratory divorce—the practice of divorce seekers traveling to a jurisdiction with more liberal laws in order to procure a divorce—is a tradition that began in the 1700's and persisted until the no-fault divorce revolution beginning in the 1960's (Blake 1962; Friedman 1984; Jones 1987). Connecticut was the first state considered a haven for divorce-seekers. This practice extended back to the New Haven Colony code of 1656, which established :

> "That if any husband shall without consent, or just cause shewn, willfully desert his wife, or the wife her husband, actually and peremptorily refusing all Matrimoniall society, and shall obstinately persist therein, after due means have been used to convince and reclaim, the husband or wife so deserted, may justly seek and expect help and relief, according to 1 Cor. 7. 15" (Hoadly 1858: 586).

Connecticut's practice of permitting deserted wives to procure divorce solely because they were deserted garnered the colony and then the state a reputation for being liberal in matters of divorce that persisted through the 18th and into the 19th century (Cowley 1879). Compared to later decades this policy may not seem particularly lax, and indeed it would not be considered liberal by the criteria outlined above, but most other jurisdictions of the time would permit divorce only in the case of adultery.

In the 1840s and 1850s, it was the frontier of Ohio, Indiana, and Illinois that offered haven to those in search of a less strict divorce law. This practice was often disparaged in the newspapers: "The laws of Ohio allow a divorce for "gross neglect of duty," which being liberally construed allows the parties to separate almost at pleasure. It is nearly the same in Illinois and

Wisconsin."[11] There were 837 divorces granted in Ohio in 1865.[12] Chicago was advertised as far away as England as a good place to spend a year while waiting for a divorce from an Illinois court.[13] However, it was the laws of Indiana that were the most notorious. Indiana's omnibus clause, enacted in 1824 and remaining in effect until 1871, allowed the courts to permit divorce "also for any other cause and in any other case where the court in their discretion shall consider it reasonable and proper that a divorce should be granted."[14] In the words of one newspaper, "Indiana is determined to be ahead of any other state—even Connecticut—in the freedom of divorce."[15]

In 1871, the Territory of Dakota enacted an expansive divorce statute. Around the same time, lawyers from Chicago, Cincinnati, and New York established divorce mills in Utah Territory, where the more flexible courts and short residency requirements enabled them to offer quicker and easier divorces (Daynes 2011). As these changes were taking place in the west, anti-divorce advocates in Indiana and Illinois were slowing down the divorce mills in those states by successfully pushing through more restrictive legislation.[16] Consequently Utah and the Dakotas became the premier divorce havens. Out of 300 divorce suits brought in Salt Lake City alone between September 1876 and September 1877, over 80% were initiated by non-residents.[17]

Within the Dakota Territory, groups of lawyers in different cities were in competition with each other for superiority in the divorce business. The May 24, 1891 Bismarck Daily Tribune reports that "The St. Paul Globe is agrieved (sic) because Fargo used to be regarded as

[11] "Divorce Laws of Ohio." *Fayetteville Observer*, (Fayetteville, NC) Monday, October 01, 1855.
[12] "Statistics of Divorce in Ohio." *The Daily News and Herald*, (Savannah, GA) Wednesday, June 06, 1866
[13] *Daily Evening Bulletin*, (San Francisco, CA) Friday, December 10, 1869.
[14] Rev Laws of Indiana 1824, ch. 32, S 1, p.156.
[15] "Divorce in Indiana." *Vermont Chronicle*, (Bellows Falls, VT) Saturday, June 05, 1869.
[16] *The North American*, (Philadelphia, PA) Saturday, November 10, 1877.
[17] *Inter Ocean*, (Chicago, IL) Saturday, December 08, 1877.

the divorce metropolis of Dakota territory, but of late, under the state regime, Sioux Falls is gathering in the business."[18] In addition to Fargo and Sioux Falls, Bismarck, Mandan, Jamestown, Grand Forks, and Yankton were all destination cities in the Dakotas for those in search of divorce. In addition to the 3 month residency requirement, courts in the Dakotas had the advantage of permitting divorce for desertion and willful neglect.[19] From 1869-1886, there were 1,087 divorces granted in the Dakotas, 70% of which involved couples who migrated to the territory for the explicit purpose of obtaining a divorce (Jones 1987).

By the turn of the century the far western states of Oklahoma, Oregon, and Wyoming served as migratory havens. In 1893, South Dakota increased their residency requirement from 3 months to 6 months, and Oklahoma's 3 month residency requirement began to steal the attention: "Oklahoma is rapidly supplanting the Dakotas in the divorce business. There are at least two good reasons for this. One is that the climate of Oklahoma is much more pleasant than that of Dakota, and the other is that the Oklahoma law requires only half as long a residence as that of Dakota."[20]

> Practically, the old Dakota divorce law now prevails in Oklahoma, with the additional advantage that no notice is to be served upon the person from whom a divorce is sought unless by accident he or she should happen to see a printed notice of the application in some obscure Oklahoma paper. Several large hotels are to be erected in the principal towns of Oklahoma, and the divorce lawyers of South Dakota are preparing to move.[21]

In 1895, there were 1000 people seeking residence in Oklahoma in order to be able to apply for divorce, with small divorce colonies of 25-200 divorce seekers popping up in different cities

[18] *Bismarck Daily Tribune*, (Bismarck, ND) Sunday, May 24, 1891.
[19] *Bismarck Daily Tribune*, (Bismarck, ND) Saturday, January 14, 1893.
[20] "Oklahoma's Divorce Colony: The Experiences of a Man Who Was Recently a Resident of It." *The Indiana State Journal*, (Indianapolis, IN) Wednesday, February 19, 1896.
[21] "Divorce Made Easy in Oklahoma." *The Milwaukee Journal*, (Milwaukee, WI) Sunday, April 07, 1895.

across the state.[22] Between the formation of the Territory of Oklahoma in 1890 and the media attention in 1895, the small territory had managed to grant 500 divorces.[23] An attorney from Guthrie, Oklahoma wrote:

> Guthrie is a pretty town. Persons of social standing desiring to temporarily reside here can always find congenial company and be entertained in royal style. Divorces can be easily obtained in Guthrie. The legal charges will be reasonable, and the persons concerned will be put to as little inconvenience as possible.[24]

The wax and wane of different divorce havens continued well into the 20th century. Nevada secured its well known status as a divorce mill in 1927 when it passed a law allowing divorce with only a 3 month waiting period. On February 26, 1931, Arkansas attempted to capture Nevada's advantaged position by shortening their residency requirement to 90 days. Only a week later Idaho followed suit, enacting a 90 day residency requirement on March 3, 1931. Nevada reacted almost immediately, shortening their residency requirement to 6 weeks. A United Press dispatch of May 2, 1931 reported that "a 10-minute hearing system was installed in Reno's divorce courts today in anticipation of the busiest week-end in the history of the nation's most famous divorce mill" and that "A new divorce suit every two minutes was the record set at the office of the county clerk here today" (quoted in Swearingen 1931: 254). Major cities in Nevada, particularly Reno, continued to capture these gains until the no fault divorce movement of the 1970's eliminated the need for migratory divorce (Bergeson 1935, Swearingen 1931).

There is some disagreement over the extent of migratory divorce. Anti-divorce activist Samuel W. Dike considered migratory divorces irrelevant because only 19.9% of divorces procured between 1867 and 1886 were granted outside the state where the couple was married

[22] "Lightning Unhitches: Oklahoma Distances Dakota as a Divorce Center." *The Milwaukee Journal*, (Milwaukee, WI) Sunday, June 16, 1895.
[23] "Divorce Decrees in Oklahoma." *The Galveston Daily News*, (Houston, TX) Sunday, August 11, 1895.
[24] *The Atchison Daily Globe*, (Atchison, KS) Tuesday, April 10, 1894.

(Potter et al. 1889: 513-517). However, a study cited in Jones (1987) finds that in the twenty year period from 1867-1886, 45-60% of divorces taking place in Arizona, Colorado, Idaho, Montana, Nebraska, Nevada, New Mexico, South Dakota, North Dakota, Utah, Washington, and Wyoming were granted to out of state residents. So whether or not migration was the dominant method of divorce, it was certainly of substantial import in the states housing divorce businesses. Further, other records suggest that as many as 60 percent of divorces were not counted in the 1900 census, and potentially even more in earlier censuses (Strow and Strow 2006). Given the proclivity of divorce mills towards secrecy and protection of their clients, it seems reasonable to suspect that at least a proportional number of these uncounted divorces were migratory.

IV. The business of divorce liberalization

The primary hypothesis of this paper is that the business of divorce described above generated substantial profits for small groups of lawyers and local community businessmen who formed highly motivated interest groups. I analyze the role of these interest groups in the context of three predictions that should be expected to follow if my hypothesis is correct. First, liberal divorce law must by associated with demonstrable profits to local lawyers and businessmen. Subsection A demonstrates that there were substantial profits to be had, and therefore sufficient motivation for these individuals to engage in interest group activity. Second, since the profits of the divorce business were concentrated at the level of cities and other small localities, residents and representatives of these jurisdictions are expected to be stronger advocates for liberal divorce law than individuals operating at the state and national levels. Indeed, politicians and associations founded at the state or national level are more likely to advocate the de-liberalization of divorce law. This is substantiated in subsection B. Third, since divorce

liberalization was primarily supported by local rather than state actors, state level legislatures are expected to be susceptible to capture by competing pressure groups once they emerge. In subsection C, I present evidence that both state and national legislatures are swayed by anti-divorce interest groups, particularly once the public unpopularity of the divorce mills reaches a level sufficient to counter the benefits offered to legislatures by lawyers and local businessmen.

A. Benefits to private interests

In October 1898, Senator Bentley of Wichita proposed a bill changing Kansas's residence requirement from one year to three months:

> The securing of divorces has gotten to be a matter of business, not sentiment, and those who deserve to be separated will go where a divorce can be secured quickest. Oklahoma used to be a Mecca for all unhappily mated people, and South Dakota now is one. Kansas is a much nicer state in which to reside than either of these places and I believe if we can secure a three months divorce law for Kansas it will boom business immensely. I have talked with many members of the legislature, and everybody favors it. The bill will be introduced at the next session, and we expect to make Kansas the headquarters for all divorce wanters by next summer.[25]

A comment on this speech adds, "As there is a two-thirds majority of attorneys in both houses, Senator Bentley feels confident his bill will pass unanimously."[26]

The support of attorneys in the community and in the legislature was a consistent force behind the passage of liberal divorce law. In developing states, the smaller population meant that there was a greater chance that the lawyers prosecuting local divorces were the same lawyers serving in the legislature. The overlap in those making the law and those benefiting from the law explains why one newspaper editorialized "It is probable that an attempt will be made [in the next meeting of the legislature] to amend the divorce laws, but any such attempt will find many

[25] *Bismarck Daily Tribune*, (Bismarck, ND) Saturday, October 22, 1898.
[26] *Bismarck Daily Tribune*, (Bismarck, ND) Saturday, October 22, 1898.

lawyers in opposition."[27] Similarly, in discussing a proposed increase in North Dakota's residency requirement from 3 months to 1 year, a commentator speculates that "There will be a big fight on the bill by lawyers and hotel keepers, who have reaped a harvest from the present law."[28]

In order to take advantage of these profit opportunities, groups of lawyers across the country—and sometimes even beyond the borders—coordinated to find ways to profit from liberal divorce laws:

> "The practice of coming to Indiana and getting divorced is by no means unfrequent among Eastern people, and a very large number come from New York city. The thing is very easily managed if the party has money and will avoid an honest lawyer, which is easily done. Many lawyers in New York have special partners throughout Indiana, who undertake the cases sent to them and then divide what profits accrue with the sender."[29]

Lawyers advertised these opportunities to potential clients through newspaper advertisements. One New York lawyer advertised: "Divorces procured without publicity in all the States; desertion, ill treatment, etc., sufficient cause." The respondent to this advertisement was able to procure a divorce from an Indiana court after staying in Fort Wayne for only a few days.[30] An 1877 account describes "a Chicago shyster, who advertised to get Utah divorces in thirty days or six weeks, without regard to residence, and without publicity."[31]

Some Western lawyers were known to have conspired with attorneys from "almost every State"[32] to procure divorces without residence or publicity. Some lawyers in the divorce mill states did not like having to share the cut with partners back east. George A. Webster, an

[27] "South Dakota's Divorce Law." *The Milwaukee Sentinel*, (Milwaukee, WI) Thursday, November 17, 1892.
[28] "North Dakota Divorce Law." *The Galveston Daily News*, (Houston, TX) Saturday, January 16, 1897
[29] "Gossip from Indianapolis—A Breach of Promise Case—Divorce Suits in Indiana." *Daily Evening Bulletin*, (San Francisco, CA) Friday, April 19, 1867
[30] "Twice Married: Testing the Value of an Indiana Divorce in New Jersey." *St. Louis Globe-Democrat*, (St. Louis, MO) Tuesday, August 24, 1875.
[31] *Inter Ocean*, (Chicago, IL) Thursday, June 14, 1877.
[32] *The North American*, (Philadelphia, PA) Saturday, November 10, 1877.

infamous divorce lawyer from Salt Lake City sent the following to the Central Law Journal in March 1877:

> You have doubtless noticed the number of soliciting advertisements for divorce practice, by parties in Chicago and other places. These solicitors all procure their divorces in this Territory, and I have represented and acted for many of them myself. But learning that most of the cases came from the profession through these brokers, I concluded to inform the profession as to the facts, and solicit direct, thus securing less division of fees and greater satisfaction ("Current Topics" 1877: 266).

This action, potentially risky on Webster's part, illustrates how much local lawyers stood to gain from maximizing the profits associated with divorce suits. Thus it is perhaps not surprising that a commentator from Indiana argued "It is the lawyers, not the laws, that draw them to our State. It is generally known in interested circles that we have the most agreeable and accommodating lawyers for this branch of the professional business to be found in any State in the Union."[33]

Next to the lawyers, the groups with the most to gain were the owners of the hotels, boarding houses, and other real estate where divorce seekers would stay during their 3-6 months in the area. One former resident of a divorce colony writes,

> When I was in Perry [Oklahoma] the divorce colony there numbered between forty and fifty. Of these a majority were New Yorkers, and at least half were women. The divorce colony is large enough to have some social life of its own, and the three months which its members are forced to pass in the Territory pass very pleasantly… they keep several boarding houses well filled, and the bona fide residents like to have them there.[34]

Mildred A. Hildreth, an infamous divorce lawyer from Fargo, North Dakota, talks very colorfully about how many of the people in the town are working together in order to satisfy the divorce seeking population:

> The hotel people are my personal friends, and Charley Fisk, the judge of that district, is the nicest fellow in the world. He is a particular friend of mine… Everything in (sic) done in chambers unless there is a contest… Jamestown is another great town. The proprietor

[33] Divorce Cases in Indiana—A Good Place for Lawyers." Ibid.
[34] "Oklahoma's Divorce Colony: The Experiences of a Man Who Was Recently a Resident of It." *The Indiana State Journal*, (Indianapolis, IN) Wednesday, February 19, 1896

> of the best hotel there is a personal friend of mine and is anxious to have a colony started there, and the newspaper people there are all my friends. The newspapers here and everywhere in the state for that matter can be bought up for a song. The divorce business in Fargo alone means at least $150,000 a year.[35]

Many of the visitors to the divorce colonies were wealthy and accustomed to living in a relative degree of luxury. Madame Margaret De Steurs, wife of Belgian minister in Paris and member of the Astor family, purchased a $12,000 residence when she moved to Sioux Falls for the purpose of securing a divorce.[36] Other service business also benefited from the increase in population, even in those cases when it was only temporary. The New York Herald estimated that the divorce colonies in North Dakota were pulling $500,000 in to the state annually.[37] By the time Nevada took over the business in 1931, one source puts the annual revenue from divorce at $3 million, or $45.2 million in 2012 dollars[38] (Swearingen 1931).

Though there were obvious and large benefits to the lawyers who would be compensated for prosecuting the influx of divorce suits and the service professional who would be meeting their other needs, there were in some cases benefits to the broader community. In their original incarnation, many of the divorce mills were established explicitly to attract needed people and services to ill-populated frontier towns.

> The law has been on the statute books for fifteen years, and when acted on by the territorial legislature in its early days for the purpose of inducing immigration to the then sparsely-settled prairies of South Dakota, and the act of granting divorces on such a short time contemplated that the application would remain a resident of the territory and contribute to the building up of the then thinly-settled commonwealth.[39]

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[35] Dakota's Divorce Mill: Where Matrimonial Bonds are Broken Quickly and Easily. *The Milwaukee Journal*, (Milwaukee, WI) Saturday, January 30, 1897.

[36] "After a Divorce." *The Atchison Daily Globe*, (Atchison, KS) Friday, August 14, 1891. "A Baroness in Trouble." *The Atchison Champion*, (Atchison, KS) Sunday, September 13, 1891 suggests that she afterwards tried to get out of the sale.

[37] Reprinted in *Weekly Rocky Mountain News*, Thursday, April 27, 1899.

[38] Based on percentage increase in CPI, from Officer and Williamson (2013).

[39] "'T Won't Work, Ladies: A Sudden Hitch in Certain Dakota Divorce Proceedings." *The Emporia Daily Gazette*, (Emporia, KS) Saturday, August 01, 1891.

Further, the legislature was not the only group to consider the prospect that those arriving in South Dakota for the purpose of securing divorce might be induced to stay. One account suggests that the single men of the West were supportive of divorce colonies because

> "… marriageable women are scarce in South Dakota and adjoining regions; that ranch life on the boundless prairies is lonely to an almost intolerable degree, and that the "anybody, good Lord" of the traditional old maid's prayer is heartily echoed by these well-to-do but desolate ranchers. It is thus that these men have come to look to the divorce courts of the flourishing towns of South Dakota as supply depots of wives, and to haunt them with matrimonial intent."[40]

A visitor to the colony validates the opinion that divorce colonies were good places to meet future partners: "As a rule the women are pretty, stylishly dressed, and well educated. The majority are young, and, being young, love life, excitement, pleasure… A new feature, and a strange one, too, is the number of men in Sioux Falls seeking a dissolution of the marriage tie."[41] So there were also non-pecuniary benefits to the establishment and maintenance of a divorce colony.

B. Support of local versus state level actors

Despite the fact that divorce law was made at the state level, the benefits of easy divorce legislation and short residency requirements accrued primarily to local actors (as described above). Consequently, most legislation on the issue was driven by locally based attorneys and legislators rather than politicians with a broader jurisdiction. Rarely did a push for easier divorce law come from state governors or organizations with a large base, such as state or nation-wide bar associations. Rather, these larger scale organizations often worked to shut down divorce

[40] *Morning Oregonian*, (Portland, OR) Friday, September 15, 1893.
[41] "Dakota's Divorce Colony: The Colonists Form a Distinct Population Among Themselves," *The Daily Picayune*, (New Orleans, LA) Friday, September 20, 1895

mills. This is consistent with turn of the century legal scholar Rollo Bergeson's description of competition between states for divorce mill status as a "a notorious "divorce racket" whose foster-fathers are short-sighted legislatures, avaricious chambers of commerce, resort promoters, and commercially-minded lawyers" (Bergeson 1935: 348).

The divorce business in Salt Lake City was so locally successful—and nationally unpopular—that a Grand Jury was appointed to review the records of the probate courts. The review was for the period September 1876 to September 1877. Out of 300 divorce suits brought during that year, there were detailed records available for 150 cases and lawyers listed for 67 cases. 99% of the cases were handled by three lawyers: George A. Webster, George C. Bates, and M. M. Bane.[42] Essentially all of the city's booming divorce business was handled by only three men, and the benefits were concentrated almost exclusively in their hands. There were few benefits to the state at large and certainly not the nation, making support at those levels exceedingly rare.

In fact, many efforts to reverse the legislation that permitted divorce mills to flourish were spearheaded by governors. When Connecticut Governor John Treadwell addressed the state legislature about the issue in 1810, he argued that permitting divorces was problematic because "it admits the principle that a legal and fair marriage may be dissolved for other causes than that of adultery, which, it is conceived, is the only legitimate cause, so the Legislature, especially of late years, have granted divorces for any cause, not specified in the statute, which they deemed subversive of the ends of marriage." Although Treadwell may not have been persuasive enough to change the trajectory of the law, his efforts illustrate the difference in levels of support between himself and the legislature. While the governor was theoretically accountable to the

[42] "The Divorce Abomination in Utah." *Inter Ocean*, (Chicago, IL) Friday, September 28, 1877.

whole state, the members of the legislature who were interested in preserving the laws were accountable to the smaller jurisdictions that were enjoying the benefits of the more liberal divorce statutes.

Indiana also enacted a revolutionarily liberal divorce statute that would eventually come to be reviled by its governor.[43] Indiana's omnibus clause, enacted in 1824, allowed that release from the bonds of matrimony could be granted "for any other cause and in any other case where the court in their discretion shall consider it reasonable and proper that a divorce should be granted."[44] In 1870, Governor Conrad Baker is quoted as very colorfully claiming "I shall not hesitate at the meeting of the legislature, if my life is spared, to commend this much needed reform to the attention of the general assembly."[45] It would seem that his life was spared, because the next year he is quoted in a speech to the state's legislature suggesting that less migratory divorce and more restrictive laws would be preferable:

> The laws of this state regulating the granting of divorces, and especially the lax manner in which they have been administered in some of our courts, have given Indiana a notoriety that is by no means enviable… With such amendments as these we might well hope that the Indiana divorces would soon cease to be advertised in any of the Atlantic cities as marketable commodities, and that refugees and fugitives from the justice of other states would no longer come to Indiana in quest of divorces, to be used on their return to their homes as licenses to violate the laws of our sister states.[46]

Later that same year the omnibus clause that permitted the courts to grant divorce in any situation they saw fit was removed from the Indiana state code, eliminating Indiana's status as a divorce mill.

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[43] The difference in support between actors with smaller versus actors with larger jurisdictions may also explain why an earlier attempt to overturn the omnibus clause in 1869 succeeded in the Senate but failed in the House. See *Vermont Chronicle*, (Bellows Falls, VT) Saturday, June 05, 1869.
[44] Rev Laws 1824, ch. 32, S 1, p.156.
[45] *Boston Daily Advertiser*, (Boston, MA) Tuesday, January 04, 1870.
[46] Quoted in *The Milwaukee Sentinel*, (Milwaukee, WI) Thursday, January 12, 1871.

The lack of support among organizations with a broader scale applied within the field of law as well. The National Conference of Commissioners on Uniform State Laws, established by the American Bar Association (ABA) in 1889, came out in favor of homogenous divorce law by drafting seven different model statutes between 1889 and 1906 and encouraging their universal adoption (O'Neill 1965: 205). The last of these model statutes allowed for full divorce only on grounds of adultery, bigamy, criminal conviction of a spouse, extreme cruelty, two years of willful desertion, or two years of habitual drunkenness. In addition to this conservative set of grounds, bringing suit for any cause other than adultery or bigamy required a two year bona fide residence in the state (*Proceedings* 1907: 124-128). By advocating a stricter divorce regime than that established in the divorce mill states, the ABA demonstrated its preference for restricting competition in divorce law. In addition to being consistent with the proposition that organizations serving larger jurisdictions received fewer benefits from the divorce business and would therefore be more likely to be apathetic or even antipathetic, this advocacy on the part of the ABA suggests that the organization—already in the practice of restricting the quantity of legal services through the practice of licensure (Ribstein 2004: 314-315)—may have enjoyed some form of monopoly rents from requiring that divorces be prosecuted in the home states of the applicants under a restrictive and more difficult to prosecute set of grounds.

C. The ascendancy of anti-divorce interests

Despite the local benefits to maintaining a thriving divorce business, easy divorce law remained highly controversial on a national scale. Over time, anti-divorce interests—largely driven by religious leaders from Catholic, Episcopal, and other Protestant denominations—

became increasingly strong and well organized. The divorce mill states were a regular target of these anti-divorce advocates. James Gibbons, a Cardinal in the Roman Catholic Church, writes:

> States are encouraging inventive genius in the art of finding new causes for divorce. Frequently the most trivial and even ridiculous pretexts are recognized as sufficient for the rupture of the marriage bond; and in some States divorce can be obtained "without publicity," and even without the knowledge of the defendant—in such cases generally an innocent wife… Every daily newspaper tells us of divorces applied for or granted, and the public sense of decency is constantly being shocked by the disgusting recital of divorce-court scandals (Potter et al. 1889: 520).

In addition to speaking out against the evils of divorce, these religious organizations were actively involved in campaigning against the divorce mills. These initiatives met with varying degrees of success, with failures generally due to "public apathy, sometimes coupled with undercover resistance from commercial and legal interests which profited from the divorce trade" (O'Neill 1965: 204). The Ohio Divorce Reform League, led by Bishop Gregory Thomas Bedell, Reverend William Henry Hoyt, and Reverend Samuel W. Dike, formed in Columbus, Ohio on December 6, 1883 at a conference of Protestant churches.[47] At the organization's second annual meeting, they resolved to ask the Ohio legislature to remove gross neglect as a ground for divorce and provide competent counsel for defendants, and participate in the Interstate Commission.[48]

William Hobart Hare, an Episcopal bishop in South Dakota, led one of the more notable and successful campaigns against the divorce business. Hare is described as having

> astonished his congregation and caused considerable commotion in the divorce colony by attacking the divorce law of the state, the people who come here and the various interests intimately connected with the business. "Any institution or practice carried on in a community which is sapping the moral life of that community," said he, "should be exposed and suppressed."[49]

[47] "Divorce Reform in Ohio." *The Milwaukee Sentinel*, (Milwaukee, WI) Friday, December 07, 1883.
[48] "Ohio Divorce Reform League." *St. Louis Globe-Democrat*, (St. Louis, MO) Wednesday, January 21, 1885.
[49] "Dakota Bishop on Divorce." *The Galveston Daily News*, (Houston, TX) Wednesday, January 04, 1893.

Hare recognized that he was up against business interests when he made his case to the legislature. A summary describes his petition as claiming that "… the measure now on the statute books is not only a disgrace to the State, but an actual damage to the business interests. He says he is prepared to prove the latter statement to the satisfaction of the committee."[50] Whether or not Hare succeeded in persuading anyone that stricter divorce laws would be good for business, the legislature did vote to increase South Dakota's residency requirement from three months to six months (O'Neill 1965).

As a result of anti-divorce advocacy, every omnibus clause established during the 19th century was eventually repealed. Most of these were repealed at the height of anti-divorce sentiment in the 1870s and 1880s, when politicians at the state and national level would have faced particularly high costs for their association with divorce mill states.

In addition to their role as direct advocates for legislative change, religious organizations were also influential in generating anti-divorce sentiment at the national level that no doubt contributed to the increasing reluctance of state level politicians to support easy divorce laws. President Theodore Roosevelt was heavily influenced by Bishop William Croswell Doane of Albany, New York, who favored prohibiting divorce altogether and frequently recommended that the Episcopal Church reconsider its decision to allow the innocent party in divorces brought on grounds of adultery be allowed to remarry (O'Neill 1965). Doane and the members of the Inter-Church Council on Marriage and Divorce are often credited with having motivated President Theodore Roosevelt to order the first official collection of statistics on marriage and divorce (Pringle 1931: 472; Strow and Strow 2006: 243).

[50] "To Repeal Dakota's Divorce Law." *The Daily Inter Ocean*, (Chicago, IL) Sunday, January 15, 1893.

Towards the end of the 19th century, some migratory divorces that affected allocations of property after divorce were challenged in the United States Supreme Court with mixed verdicts—some upheld the rights of states to act as divorce havens while others issued a challenge to the practice (Feigenson 1990). In an address to Congress in 1906, Roosevelt even encouraged Congress to consider a national amendment to the Constitution granting the Federal government the right to regulate divorce on the grounds that "when home ties are loosened, when men and women cease to regard a worthy family life…as the life best worth living; then evil days for the commonwealth are at hand" (quoted in Pringle 1931: 473).

V. Conclusion

This evolution in divorce law is particularly intriguing in light of the fact that the desirability of such change was hotly contested, with both sides of the issue argued vociferously by large and diverse groups of supporters.[51] However, despite the uncertainty surrounding the desirability of changing divorce laws, they almost universally became more liberal. Entrepreneurial lawyers and businessmen drove forward a set of reforms that a generation of feminists could not have achieved on their own, as illustrated by the fact that New York, the epicenter of progressive feminism, was one of the last states to reform its divorce statutes. If the nearly two century trend of liberalization in divorce law could be explained by a slow ideological shift towards the progressive, then the obstinence of New York's legislators would be an anomaly indeed. In saying this I do not intend to downplay the role of feminism—it is quite

[51] In this sense, the contemporary debate over the permissible grounds for marriage, i.e. should marriage between two parties of the same gender be allowed, strongly mirrors this older debate over the permissible grounds for divorce.

possible that without the efforts of feminist advocates, the divorce sharks of the mill states would have been simply to repugnant to succeed.

The fact that small groups of lawyers and businessmen had such great influence over such controversial legislation also has implications for democracy in general. First, it should give pause to those who yet hold out for the sanctity of democracy and its ability to manifest the public will. If lawyers can exert such pressure towards the cause of getting people out of unhappy marriages, surely they can exert it along less desirable margins as well. However, there is also cause for optimism about democracy in the right context. The divorce mills can reasonably be interpreted as insulated forums for institutional experimentation with relatively little risk. In areas of law in which local jurisdictions can remain relatively independent of each other, it can be possible to prove an experimental legal concept in the same way a consumer products firm might test a new offering in a small market. In this sense, the divorce mills may have paved the road for public acceptance of a more liberal family law in general.

Table 1: Year of divorce liberalization, by state

State	First formal legal code*	Year of Statehood	Liberal divorce law	Omnibus	Region
Alabama	1804	1819	1915	.	Middle
Arkansas	1804	1836	1846	.	Middle
California	1849	1850	1851	.	West
Colorado	1861	1876	1881	.	West
Connecticut	1790	1788	1849 (a)	1849 (a)	Northeast
Delaware	1790	1787	1859 (b)	.	Northeast
Florida	1822	1845	1835	.	Middle
Georgia	1790	1788	1860	.	Southeast
Idaho	1863	1890	1863	.	West
Illinois	1790	1818	1833 (c)	1833 (c)	Middle
Indiana	1790	1816	1824	1824 (d)	Middle
Iowa	1838	1846	1839	1845 (e)	Middle
Kansas	1854	1861	1857	.	Middle
Kentucky	1790	1792	1850		Southeast
Louisiana	1804	1812	1827	.	Middle
Maine	1790	1820	1847	1847 (f)	Northeast
Maryland	1790	1788	.	.	Northeast
Massachusetts	1790	1788	1870	.	Northeast
Michigan	1805	1837	1846	.	Middle
Minnesota	1849	1858	1849	1855 (g)	Middle
Mississippi	1798	1817	.	.	Middle
Missouri	1804	1821	1835	.	Middle
Montana	1864	1889	1895	.	West
Nebraska	1854	1867	1864	.	West
Nevada	1861	1864	1861	.	West
New Hampshire	1790	1788	1843	.	Northeast
New Jersey	1790	1787	.	.	Northeast
New York	1790	1788	.	.	Northeast
North Carolina	1790	1789	.	.	Southeast
North Dakota	1861	1889	1871	.	West
Ohio	1790	1803	1840	.	Middle
Oregon	1848	1859	1853	.	West
Pennsylvania	1790	1787	1815	.	Northeast
Rhode Island	1790	1790	1798	.	Northeast
South Carolina	1790	1788	.	.	Southeast
South Dakota	1861	1889	1871	.	West
Tennessee	1790	1796	1836	.	Southeast
Texas	1845	1845	1845	.	Middle
Utah	1850	1896	1852	1852 (h)	West
Vermont	1790	1791	1839	.	Northeast

State	First formal legal code*	Year of Statehood	Liberal divorce law	Omnibus	Region
Virginia	1790	1788	.	.	Southeast
Washington	1853	1889	1854	1854 (i)	West
West Virginia	1790	1863	.	.	Southeast
Wisconsin	1836	1848	1849	.	Middle
Wyoming	1868	1890	1882	.	West

Notes: Five states are omitted due to post-1900 statehood: Alaska, Arizona, Hawaii, New Mexico, and Oklahoma. The sample is curtailed at 1790, formal law may actually be older in those states marked 1790.
(a) repealed in 1872; (b) temporarily repealed from 1907 – 1927; (c) repealed in 1874; (d) repealed in 1873; (e) repealed in 1855; (f) repealed in 1883; (g) repealed in 1864; (h) repealed in 1887; (i) repealed in 1921

Figure 1: Proportion of states and territories with liberal divorce laws, by region