THE SUPREME COURT AND THE RIGHT TO DIVORCE IN THE UNITED STATES

Ann Laquer Estin,* University of Iowa, U.S.A.

In the United States, the debate over divorce has gone on for two centuries. Since before the American Revolution, marriage and the family have been changing in response to the economic, social, and cultural conditions of the new republic.1 These changes have been controversial and uneven, and they have been accompanied by a steady public debate over the problem of divorce.2 Despite strenuous efforts to reverse the trend, divorce rates increased steadily throughout the nineteenth and twentieth centuries.3 By the time of the “divorce revolution” of the 1970s, when states across the country moved to simplify their divorce laws, it had become clear that restrictive divorce laws would not contain divorce rates or cure the problem of marital breakdown.4 With new divorce laws, the states made it possible for an

---

* Professor of Law, University of Iowa. Prepared for the International Society of Family Law 12th World Congress, Salt Lake City, Utah, July 2005. Preliminary draft – please do not quote or circulate without contacting the author (ann-estin@uiowa.edu).


3 Riley, supra note 2 at 134-35 and 226-28; Blake, supra note 2 at 78-80 and 123-27.

unhappy partner to be released from a marriage, with or without the consent of his or her spouse, and without a long period of separation.\(^5\)

The transformation of divorce laws in the 1970s was not unique to the United States.\(^6\) As noted by Mary Ann Glendon, this time period saw an “unparalleled upheaval in the family law systems of Western industrial societies,” and, “in countries that are culturally quite diverse, . . . a remarkable coincidence of similar legal developments.”\(^7\) But divorce rates in America have always been higher than the rates in comparable European countries, and the breadth of the freedom to divorce in the United States remains unusual in a wider international context.\(^8\) As Glendon points out, Americans have come to see access to divorce as a matter of individual right.\(^9\)

It is important to clarify that the American “right to divorce” is not a positive right, formally recognized by the Supreme Court or other government institutions. The United States Constitution and Bill of Rights do not articulate a right to divorce. The Supreme Court has never issued an opinion describing the freedom to divorce as an aspect of broader individual rights in

\(^{5}\) Although the original purpose of many of these reforms was to replace an adversarial process with a more therapeutic approach, the goal of preventing marital dissolution was not successful. See J. Herbie DiFonzo, Beneath the Fault Line: The Popular and Legal Culture of Divorce in Twentieth-Century America (1997).


\(^{7}\) Glendon, supra note 6, at 1.

\(^{8}\) See Goode, supra note 6, at 144, 152-54, 180-81.

\(^{9}\) Glendon labels this the “American Difference.” Mary Ann Glendon, Abortion and Divorce in Western Law 112-13 (1987).
liberty or privacy. The reform movement of the 1960s and 1970s that led to the modern divorce system did not employ explicit “rights” language, and divorce legislation in the states was not framed in these terms. Rather, the right to divorce in America emerges from divergent state divorce laws and a series of conflict of laws principles developed in response to these differences. In effect, the broad American right to divorce emerged as a corollary to and a consequence of American federalism.

My purpose with this essay is to explore the role of the Supreme Court in the twentieth century transformation of divorce law in the United States. In a series of cases decided between 1942 and 1957, the Court abandoned its previous interpretation of the Constitution’s Full Faith and Credit Clause, which had served to support the efforts of some states to restrain access to divorce. In its place, the Court adopted a new approach that extended much greater freedom to individual husbands and wives to seek legal dissolution of their marriages. By limiting the reach of state governments over the marital lives of their residents, the Court gave implicit support to the individual’s right to terminate an unhappy marriage, and redefined the normative boundaries of state power in an area that had been the subject of a longstanding national debate.

The Supreme Court’s part in the divorce revolution is often unacknowledged today, because in this drama the Court did not act in its more familiar roles as either champion of


11 See generally Jacob, supra note 4.

12 According to Art. IV, Section 1 of the U.S. Constitution: “Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State.”

individual liberties or defender of traditional values. The Supreme Court never announced a constitutional right to divorce in the sweeping terms it later employed for marital privacy rights, 14 the rights of nonmarital children, 15 or abortion rights. 16 Instead, the Court’s work centered on what now appear to be obscure problems of conflict of laws and recognition of judgments, triggered by the widely divergent state approaches to divorce during the period before the no-fault reforms. 17

Federalism and divorce policy were often linked in the long national debate over divorce that took place in the late nineteenth and early twentieth centuries. This period was marked by a series of unsuccessful reform efforts attempting to narrow the differences between state laws through uniform laws or some type of national divorce legislation that would reduce the incidence of divorce. 18 At the peak of this debate, the Supreme Court limited the application of the Full Faith and Credit Clause in divorce cases in order to protect the especially restrictive divorce policies of a small group of states. 19 Forty years later, the Court stepped back in to the controversy and helped set the national divorce debate on a different course in which the old

17 Divorce historians note these Supreme Court cases as an important chapter in the larger story; see, e.g., Blake, supra note 2 at 173-88; Riley, supra note 2 at 141-42. See also Hendrik Hartog, Man & Wife in America: A History 278-82 (2000). Hartog describes Williams as “[t]he last act in the long nineteenth century constitutional drama of domiciles and divorces.” Id.
18 In addition to the historians cited above, see also James J. White, Ex Proprio Vigore, 89 Mich. L. Rev. 2096 (1991).
19 See Haddock v. Haddock, 201 U.S. 562 (1906), discussed infra at notes 35 to 43.
federalism questions were no longer at the center. Significantly, however, the Court’s decisions did not force any substantive changes in state laws. Rather, the new approach allowed different states to retain their distinct approaches to divorce, and extended to individual Americans greater freedom to choose among these competing regimes. In the divorce area, the Court’s transformative step was to reconceptualize marital status as severable, belonging individually to each member of a couple. Although the Court continued to speak the language of full faith and credit, its attention shifted from the conflicting divorce regulations of different states to the conflicting individual interests of divorcing spouses.20

Migratory Divorce and the Campaign for National Divorce Laws

The history of the right to divorce in America begins with the fact that marriage and divorce laws have been the province of state courts and legislatures rather than the national government. From the earliest period of American history, there have been significant differences among the states on these issues.21 Several of the colonies enacted laws allowing for divorce on grounds such as adultery, bigamy or desertion, while others prohibited divorce, following the pattern of English ecclesiastical law.22 After independence, divorce laws became more widespread. States on the western frontier had particularly liberal statutes, and unhappily married men and women began to travel to Ohio, Illinois, or Indiana to establish residence and file for divorce. Over the next 100 years, the divorce business moved, as some states tightened

20 See also Katherine L. Caldwell, Not Ozzie and Harriet: Postwar Divorce and the American Liberal Welfare State, 23 L. & Soc. Inquiry 1, 48 (1998), arguing that these cases reflect “the shift from a formulation of the courts as a site for social control to the limitation of judicial concern to the protection of individual rights.”

21 Riley, supra note 2, at 9-33.

22 Riley, supra note 2 at 9-33; Blake, supra note 2 at 34-47.
their rules to prevent divorce tourism and other states loosened theirs to attract it. In the 1890s, the divorce business centered in South Dakota, and by the 1920s it was entrenched in Nevada. In 1931, Nevada reduced its waiting period to establish residence to six weeks, and legalized gambling to entertain visitors waiting for their divorces.

Americans took advantage of the differences between states, resisting the constraints of local marital regulation with strategies that included leaving home to start again in a new place. Desertion was common, and a runaway spouse might marry again in another part of the country even without the benefit of divorce. For unhappy spouses, the diversity of divorce regulations among the states was both practically and symbolically important. The states with more lenient rules made it possible for those in strict divorce states to obtain their freedom through a “migratory” divorce. The wide range of different divorce regimes encouraged the idea that divorce was a respectable alternative to marital unhappiness.

During the nineteenth century, leading politicians and social reformers deplored the growing rates of divorce around the country. A statistical report published in 1889 showed a notable increase in divorce over the previous twenty years, and new statistics published in 1908 showed that the trend had gotten worse. Reformers were particularly critical of the states with easy divorce laws, although evidence suggested that only a small portion of divorces involved

---

23 Riley, supra note 2 at 85-107, 135-39; Blake, supra note 2 at 116-29, 152-72.

24 Blake, supra note 2 at 157-59.

25 See Riley, supra note 2 at 18-20, 47, 69-70; see also Hartog, supra note 17 at 19-23.

26 Riley, supra note 2, at 78-80, 86-93, 110-11, 124-25.
multiple states. These reformers succeeded in passing stricter divorce laws in some states, but their attempts at nationwide reform were unavailing.

Beginning in 1884, and continuing for more than sixty years, constitutional amendments were proposed in almost every session of Congress to give the national government authority to regulate marriage and divorce.\(^\text{27}\) Despite support from prominent religious leaders and politicians including Theodore Roosevelt and William Howard Taft, none of these proposals succeeded.\(^\text{28}\) During the same period, divorce reformers encouraged an effort to enact uniform state legislation on divorce.\(^\text{29}\) Although a model divorce statute was eventually approved, it was enacted into law in only three states.\(^\text{30}\)

At the beginning of the twentieth century, the Supreme Court weighed in on the problem of migratory divorce. During the nineteenth century, courts in states with restrictive divorce

\(^\text{27}\) One formulation of this amendment was: “Congress shall have the power to establish and enforce by appropriate legislation uniform laws as to marriage and divorce: Provided, That every State may by law exclude, as to its citizens duly domiciled therein, any or all causes for absolute divorce in such laws mentioned.” S.J. Res. 31, 67th Cong. 1st Sess. (1921); see *Marriage and Divorce—Amendment of the Constitution of the United States, Hearing Before a Subcommittee of the Senate Committee on the Judiciary*, 67 Cong. 1st Sess. 5 (Nov. 1, 1921) (*quoted in* Blake, supra note 2, at 148).

\(^\text{28}\) See generally Blake, supra note 2, at 145-151.

\(^\text{29}\) See Blake, supra note 2, at 136-145; Riley, supra note 2, at 108-121; White, supra note 18.

\(^\text{30}\) The National Conference of Commissioners on Uniform State Laws, founded in 1890, promulgated a uniform divorce law in 1900 addressing procedural and jurisdictional questions that was later divided into two separate acts. White, supra note 18, at 2114-2116. A National Congress on Uniform Divorce Laws began meeting in 1906 and developed an Act Regarding Marriage and Divorce that was adopted as a Uniform Act in 1907 and eventually enacted in Delaware, New Jersey, and Wisconsin. The 1907 Act specified a maximum of six narrowly-defined grounds for divorce and provided that a plaintiff would be required to be a bona fide resident of a state for two years before commencing an divorce action there. Id. at 2119-2122. See also Ernst Freund, *Uniform Marriage and Divorce Legislation*, 21 Case and Comment 7 (1914-15).
laws, such as New York, often refused to recognize divorce decrees from other, more liberal states. Initially, state courts decided these cases on the basis of comity, influenced by norms of international law. 31 In 1869, the Supreme Court ruled in Cheever v. Wilson 32 that a divorce decree based on the domicile of one spouse and in personam jurisdiction over the other was entitled to interstate recognition under the Full Faith and Credit Clause. 33 After Cheever, however, courts continued to use a variety of jurisdictional tests to determine whether an out-of-state divorce decree was entitled to recognition. 34

A series of these divorce recognition cases came before the Supreme Court between 1901 and 1906, and the Court upheld the regulatory power of the more conservative states. 35 The most


32 Cheever v. Wilson, 76 U.S. 108 (1869). Cheever also held that a married woman may acquire a domicile separate from her husband’s “whenever it is necessary and proper that she should do so” and held that proceedings for divorce may be instituted where she has her domicile. On the question of the wife’s separate domicile, see also Barber v. Barber, 62 U.S. 582 (1858).

33 U.S. Constitution, Art. IV, sec. 1.

34 Feigenson, supra note 31, at 126-28, O’Hear, supra note 31 at 1525-1534. Just as substantive divorce laws differed among the states, the rules for recognition of out-of-state divorce decrees varied significantly, with New York and the Carolinas taking the most restrictive approach.

35 The court’s initial decisions were in Atherton v. Atherton, 181 U.S. 155 (1901); Bell v. Bell, 181 U.S. 175 (1901); Streitwolf v. Streitwolf, 181 U.S. 179 (1901); and Andrews v. Andrews, 188 U.S. 14 (1902). In Atherton, the Court held that New York was required to recognize a Kentucky divorce obtained by a husband, where Kentucky was the state of matrimonial domicile, despite the fact that the wife had left Kentucky to return to her family in New York. Two dissenters took the view that if the husband’s misconduct had driven the wife from their home, she was entitled to acquire a separate domicile, and the divorce court would not have had sufficient jurisdiction over her to enter a decree entitled to full faith and credit. In Bell and Streitwolf, the Court found that courts in Pennsylvania and North Dakota had no jurisdiction to enter an ex parte divorce decree entitled to full faith and credit where neither of the parties had a
important and controversial was Haddock v. Haddock,\textsuperscript{36} which allowed the New York courts to refuse recognition to an \textit{ex parte} Connecticut divorce decree, obtained by a husband domiciled in Connecticut.\textsuperscript{37} After \textit{Haddock}, states were not required to give full faith and credit to out-of-state divorce judgments unless the petitioner was domiciled in the forum state and, in addition, the court had jurisdiction over the respondent based on either a “matrimonial domicile” within the state, the respondent’s actual domicile in the state, or the respondent’s personal appearance in the suit.\textsuperscript{38} Rules for determination of matrimonial domicile were convoluted, and turned ultimately on a determination of which party was at fault – a question on which the two states concerned sometimes disagreed.\textsuperscript{39} Even more troublesome, the Court in \textit{Haddock} accommodated the competing interests of Connecticut and New York by concluding that

\begin{itemize}
\item bona fide domicile in the state. Andrews held that Massachusetts was not required to give effect to a North Dakota divorce, based on personal jurisdiction over both husband and wife, where the Massachusetts court had concluded that neither party was domiciled in North Dakota.
\item Haddock v. Haddock, 201 U.S. 562 (1906). For a contemporary criticism of the decision by a leading scholar of conflict of laws, see Joseph H. Beale, Jr., Constitutional Protection for Decrees of Divorce, 19 Harv. L. Rev. 586 (1906). See also Blake, supra note 2 at 178-80; Riley, supra note 2 at 140-41, and Hartog, supra note 17 at 275-77.
\item In \textit{Haddock}, the husband and wife were married in New York in 1868, but never lived together. Husband left New York immediately after the marriage, settled in Connecticut in 1877, and obtained his divorce there in 1881 on grounds of the wife’s desertion. The wife took no action until 1894, when she filed in New York for a legal separation and alimony, twenty six years after the marriage and thirteen years after the Connecticut divorce, apparently because Mr. Haddock “had inherited a considerable property from his father” in 1891. The New York court refused to give effect to the Connecticut divorce based on the wife’s arguments that Connecticut had not obtained personal jurisdiction over her, and that the ground alleged for the divorce in Connecticut was false.
\item See Beale, supra note 36, at 587.
\item As Beale noted in his discussion of \textit{Haddock}, this question was one on which the state courts in Connecticut and New York had disagreed. See id. at 587-589. See also Herbert F. Goodrich, Matrimonial Domicile, 27 Yale L.J. 49 (1917).
\end{itemize}
although the Connecticut decree was not entitled to full faith and credit in New York, it was still fully binding in Connecticut.\footnote{This reflected the traditional rules that a divorce action is a proceeding \textit{in rem}, and that all states have inherent power over the marital status of their own citizens. Moreover, the Court also suggested that that other states could chose to extend it comity.} In other words, the husband was legally divorced in Connecticut, and still married in New York.

\textit{Haddock} was clearly responding to the migratory divorce problem. The Court wrote that a different rule would permit spouses intent on a divorce to “go into the State whose laws were the most lax, and there avail themselves for the purpose of the severance of the marriage tie and the destruction of the rights of the other party to the marriage contract, to the overthrow of the laws and public policy of the other States.”\footnote{Id. at 574.} But four of the nine justices on the Court dissented from the ruling, and academic legal writing was critical of the majority decision.\footnote{Justice Oliver Wendell Holmes, Jr., began his dissent:}

\begin{quote}
“I do not suppose that civilization will come to an end whichever way this case is decided. But as the reasoning \ldots of the majority does not convince me, and as I think that the decision not only reverses a previous well-considered decision of this court but is likely to cause considerable disaster to innocent persons and to bastardize children hitherto supposed to be the offspring of lawful marriage, I think it proper to express my views.”
\end{quote}

Id. at 628 (Holmes, J., dissenting). For academic commentary, see e.g. Goodrich, supra note 39; Beale, supra note 36; but see Joseph H. Beale, Jr., Haddock Revisited, 39 Harv. L. Rev. 417 (1926).
As divorce rates continued their steady increase, the rules and exceptions spawned by *Haddock* grew more numerous and the legal doctrine more complex and harder to defend.\(^{43}\)

Within a few years after the decision, social scientists had begun to dispute the connection between lenient divorce legislation and high divorce rates, and to argue that divorce was a response to broader social and economic factors.\(^{44}\) In popular culture, -- magazine articles, novels, and self-help books -- divorce was increasingly seen a useful remedy for unhappy marriages rather than a disease to be eradicated.\(^{45}\) By the 1930s the legal realists were pointing out the widening gap between the law on the books and the actual practices of divorce.\(^{46}\)

**The Supreme Court Shifts Direction**

Despite the growing critique, restrictive divorce laws remained in place through the first half of the twentieth century. This was most notable in South Carolina, which entirely prohibited divorce until 1949, and New York, which permitted divorce only on grounds of adultery until 1966. Increasingly, however, individual Americans found means to avoid such restrictions, either by a trip to a “divorce colony,” through collusive divorce proceedings based on fabricated evidence of cruelty or adultery, or through creative arguments for annulment.\(^{47}\)

A few states

\(^{43}\) See Hartog, supra note 17 at 272 (“A whole discipline of academic legal study – conflicts of law – emerged out of the struggle to rationalize and explain, a discipline that transformed divorce cases into problems in logic shorn of the human relations that had produced them.”)

\(^{44}\) See Riley, supra note 2, at 121-129; White, supra note 29, at 2123-2125.

\(^{45}\) See DiFonzo, supra note 5, at 13-36.


\(^{47}\) See Blake, supra note 2 at 189-202; DiFonzo, supra note 5, at 88-111.
began to permit divorce without proof of a marital offense, based on a period of “living separate and apart.”

When the issue of migratory divorce came back before the Supreme Court in 1942, the Court overruled *Haddock*. With its decision in *Williams v. North Carolina*, written by Justice William O. Douglas, the Court concluded that a divorce decree entered in the state of domicile of either the husband or wife was entitled to full faith and credit in every other state, even if the absent spouse had no ties to the jurisdiction and had not appeared in or consented to the proceeding.

*Williams* presented a classic case of a migratory divorce. In May 1940, Mr. O.B. Williams and Mrs. Lilly Hendrix left their spouses in North Carolina and went to Las Vegas, Nevada. After six weeks’ residence at the Alamo Auto Court they filed petitions for divorce on grounds of extreme cruelty on June 26. The Williams divorce was granted on August 26, and the Hendrix divorce on October 4. Williams and Hendrix were married to each other the same day, and returned to North Carolina. Upon their return, however, the North Carolina authorities refused to recognize the validity of their Nevada divorces, and prosecuted Williams and Hendrix for bigamous cohabitation. After their convictions were upheld by the North Carolina Supreme Court, Williams and Hendrix appealed to the United States Supreme Court.

---


The Court’s opinion in *Williams* begins with a description of the interests of the forum state:

Each state as a sovereign has a rightful and legitimate concern with the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of commanding problems in the field of domestic relations with which the state must deal. Thus it is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even if the other spouse is absent.\(^{51}\)

In addition, the Court was concerned about the effects of divorce recognition rules on the individuals involved. Justice Douglas pointed out that under the rule in *Haddock*, “a man would have two wives, a wife two husbands . . . . Each would be a bigamist for living in one state with the only one with whom the other state would permit him lawfully to live.”\(^{52}\)

In moving toward an approach that would bring the treatment of divorce decrees more in line with the effect of other judgments under the Full Faith and Credit Clause, Douglas squarely rejected the older view that a court’s jurisdiction should be affected by whether one spouse had acted wrongfully in deserting the other.\(^{53}\) Although he acknowledged that if *ex parte* divorce decrees were entitled to respect, “one state’s policy of strict control over the institution of

\(^{51}\) Id. at 298-99.

\(^{52}\) Id. at 300.

\(^{53}\) Id. at 301.
marriage could be thwarted by the decree of a more lax state,” he noted that the same objection could be made to many applications of the Full Faith and Credit Clause and dismissed it by observing: “Such is part of the price of our federal system.”

Justice Felix Frankfurter wrote a concurring opinion in *Williams*, noting that proposals to establish a uniform national law of marriage and divorce had not been successful, and arguing that the Court should not attempt “to reach the same end by indirection.” Frankfurter argued that *Haddock* had “made an arbitrary break with the past and created distinctions incompatible with the role of this Court in enforcing the Full Faith and Credit Clause.” He wrote that “a court is likely to lose its way if it strays outside the modest bounds of this special competence and turns the duty of adjudicating only the legal phases of a broad social problem into an opportunity for formulating judgments of social policy quite beyond its competence as well as its authority.”

There were two dissenting opinions in *Williams*. Justice Frank Murphy argued that in view of the important state policies concerning marriage and divorce, the Court should continue to recognize an “area of flexibility in the application of the [Full Faith and Credit] clause.” Justice Robert Jackson wrote a long opinion objecting to the majority position on the basis of the due process rights of the spouse left behind in North Carolina, as well as the evidence suggesting

54 Id. For the same reason, the opinion insisted that the full faith and credit question “does not involve a decision on our part as to which state policy on divorce is the more desirable one.” Id. at 303.

55 Id. at 304-07 (Frankfurter, J., concurring).

56 Id. at 308-311 (Murphy, J., dissenting). Justice Murphy’s biographers suggest that he was influenced here by his Catholic religious views; see Sidney Fine, *Frank Murphy: The Washington Years* 362-65 (1984); and J. Woodford Howard, Jr., *Mr. Justice Murphy: a Political Biography* 323-245(1968). See also Melvin I. Urofsky, *Division and Discord: The Supreme Court under Stone and Vinson*, 1941-1953, 131-36 (1997).
that Mr. Williams and Mrs. Hendrix had not established a valid domicile in Nevada during their short stay.\textsuperscript{57}

After the Supreme Court’s decision, Williams and Hendrix were prosecuted again in North Carolina, on the theory that their Nevada divorces were invalid because they had not in fact established a genuine domicile there. The case came back before the Supreme Court in 1945, and this time the convictions were upheld.\textsuperscript{58} In an opinion by Justice Frankfurter, the Court held that a state asked to extend full faith and credit to an out-of-state divorce could reconsider the petitioner’s claim to have established a domicile in the divorce state. Justice Murphy concurred, arguing that “no justifiable purpose is served by imparting constitutional sanctity to the efforts of petitioners to establish a false and fictitious domicil in Nevada. Such a result would only tend to promote wholesale disregard of North Carolina’s divorce laws by its citizens”.\textsuperscript{59}

Justice Wiley Rutledge wrote a dissenting opinion in the second \textit{Williams} case, voicing his concern that the ruling would “upset judgments, marriages, divorces, undermine the relations founded upon them, and make this Court the unwilling and uncertain arbiter between the concededly valid laws and decrees of sister states.”\textsuperscript{60} He argued that the “amorphous” common

\textsuperscript{57} Id. at 311-24 (Jackson, J., dissenting). Justice Jackson later explored the broader problem of federalism and full faith and credit in a lecture, Robert H. Jackson, Full Faith and Credit: The Lawyer’s Clause of the Constitution, 45 Col. L. Rev. 1 (1945).


\textsuperscript{59} Id. at 242 (Murphy, J., concurring). Only four of the nine members of the Supreme Court agreed with both of the \textit{Williams} decisions: Justice Frankfurter, Justices Stanley Reed and Owen Roberts, and Chief Justice Harlan Stone.

\textsuperscript{60} Id. at 248 (Rutledge, J., dissenting).
law notion of domicile was not an appropriate basis for allocation of constitutional authority. Justice Hugo Black’s dissent, joined by Justice Douglas, expressed particular concern that the Court was sustaining criminal convictions in North Carolina, based on conduct by the parties that was entirely valid and legal in Nevada. These convictions, he wrote, “cannot be harmonized with vital constitutional safeguards designed to safeguard individual liberty and to unite all the states of this whole country into one nation.”

Though the second Williams decision made migratory divorce uncertain once again, the Supreme Court issued a pair of decisions three years later that created a safe harbor for consensual migratory divorce. In Sherrer v. Sherrer, the Court considered a Florida divorce obtained by a Massachusetts resident. Mrs. Sherrer moved from Massachusetts to Florida in April 1944, and filed a divorce petition there in July. Her husband retained a lawyer in Florida, and he appeared personally to testify at the divorce hearing in November. After the divorce was granted, the former wife remarried, and several months later she returned to Massachusetts with her new husband. In a later proceeding in Massachusetts, her first husband challenged the validity of the Florida divorce on the basis that the wife had not established a genuine Florida domicile.

---

61 Id. at 262 (Black, J., dissenting). Justice Black’s concern with the fact that this was a criminal case links this case to the unanimous ruling of the Supreme Court in Loving v. Virginia, 388 U.S. 1 (1967), which reversed criminal convictions under a Virginia statute prohibiting interracial marriage as “invidious racial discrimination” in violation of the constitution. The Lovings were married in the District of Columbia and were prosecuted when they returned to Virginia.

62 Sherrer v. Sherrer, 334 U.S. 343 (1948); see also Coe v. Coe, 334 U.S. 378 (1948). In Johnson v. Muelburger, 340 U.S. 581 (1951), the Court extended this rule, holding that when both of the parties were bound by a divorce decree, third parties would also be prevented from challenging it in a subsequent proceeding.
This time, the Supreme Court concluded as a matter of res judicata that the Florida divorce was not subject to collateral attack, because the husband was present and participated in the Florida proceeding, and had full opportunity to contest the validity of her Florida domicile at that time.

Once again, the Supreme Court was divided, with Justices Frankfurter and Murphy arguing in dissent that divorce was a matter of public interest rather than a personal dispute between private parties, and that a married couple should not be permitted to “bargain away” these interests. Frankfurter’s opinion complained that the Court’s approach would “endow with constitutional sanctity a Gresham’s Law of domestic relations,” and concluded: “I cannot bring myself to believe that the Full Faith and Credit Clause gave to the few States which offer bargain-counter divorces constitutional power to control the social policy governing domestic relations of the many States which do not.” As Justice Frankfurter understood, the combined effect of the Williams cases and Sherrer was to validate the emerging practice of consensual migratory divorce.

63 The facts of the case suggest that Mr. Sherrer was not interested in continuing the marriage, but rather in achieving more favorable terms for their divorce.

64 Id. at 358-59 (Frankfurter, J, dissenting.) Frankfurter writes: “If the marriage contract were no different from a contract to sell an automobile, the parties thereto might well be permitted to bargain away all interests involved, in or out of court. . . . Nowhere in the United States, not even in the States which grant divorces most freely, may a husband and wife rescind their marriage at will as they might a commercial contract.”

65 Id. at 367.

66 Id. at 377.

67 Frankfurter notes that Sherrer “offers a way out only to that small portion of those unhappily married who are able to afford a trip to Nevada or Florida, and a six-week or three-month stay there,” and suggests that providing this outlet for affluent individuals will make it less likely that
With *Sherrer*, the Supreme Court’s attention shifted away from the competing interests of states and began to focus on the individual interests at stake in a divorce proceeding. Thus, the Court rejected the husband’s challenge based on his actual participation in the Florida proceeding. On the same day, the court decided *Estin v. Estin*, which considered an *ex parte* Nevada divorce obtained by a husband after more than a year’s residence in the state. The divorce was clearly entitled to full faith and credit under the *Williams* decisions, but the former spouses disputed whether the husband’s Nevada decree could cut off the wife’s rights under a prior separate maintenance decree entered in New York. Although a divorce decree would ordinarily have this effect, the Supreme Court concluded that the Nevada decree could not, because the wife had not been subject to the personal jurisdiction of the Nevada court. Justice Douglas’s majority opinion acknowledges that the result of this approach “is to make the divorce divisible – to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony.”

The decisions from *Williams* through *Estin* are based on a full faith and credit analysis, but the contemporary understanding of these cases is that the financial aspects of divorce cannot

---


69 *Estin*, 541 U.S. at 549. Douglas suggested that this division “accommodates the interests of both Nevada and New York in this broken marriage by restricting each State to the matters of her dominant concern.” In his dissent, Justice Jackson complained that the majority “reaches the Solomon-like conclusion that the Nevada decree is half good and half bad under the full faith and credit clause.” Id. at 554 (Jackson, J., dissenting).
be litigated without full personal jurisdiction over an absent spouse.\textsuperscript{70} Justice Jackson argued in these cases that \textit{ex parte} divorce was a violation of the Due Process Clause, and that full personal jurisdiction over both spouses should be a prerequisite to divorce jurisdiction.\textsuperscript{71} The Court had previously rejected this conclusion in 1877 in \textit{Pennoyer v. Neff},\textsuperscript{72} however, and the Court has still never returned to the question whether the Due Process Clause has any independent effect on \textit{ex parte} divorce proceedings.

\textsuperscript{70} See Clark, supra note 4, at 452-54. In addition to the financial issues addressed in \textit{Estin} and \textit{Vanderbilt}, the Court ruled in \textit{May v. Andersen}, 345 U.S. 528 (1953), that states were not obligated to give full faith and credit to custody decrees that were not based on full personal jurisdiction. See generally Geoffrey C. Hazard, Jr., \textit{May v. Anderson: Preamble to Family Law Chaos}, 45 Va. L. Rev. 379 (1959).

Note also that this is the same period during which the Court developed the “minimum contacts” approach to personal jurisdiction over corporations in a line of cases beginning with \textit{International Shoe v. Washington}, 326 U.S. 310 (1945). In \textit{Kulko v. Superior Court}, 436 U.S. 84 (1978), the Court extended its minimum contacts theory to a family law problem in a case involving payment of child support. Ironically, the Court in \textit{Kulko} set a notably higher threshold for the level of contact required to sustain personal jurisdiction over an out-of-state defendant in family disputes. For an argument that it should not be more difficult to obtain jurisdiction in family law cases than in commercial disputes, see Clark, supra note 4, at 447.

\textsuperscript{71} E.g. \textit{Williams I}, 317 U.S. at 316-21 (Jackson, J., dissenting). As Justice Jackson puts the point, “[S]ettled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill.”

\textsuperscript{72} \textit{Pennoyer v. Neff}, 95 U.S. 714, 734-35 (1877), noted that personal jurisdiction over the absent spouse is not required in an \textit{ex parte} divorce proceeding.