A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction

Barbara Freedman Wand

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A CALL FOR THE REPUDIATION OF THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION

BARBARA FREEDMAN WAND†

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I. Introduction

The appropriate scope of federal court jurisdiction is a subject that is under constant reexamination by scholars, courts and legislators. The major contours of federal court jurisdiction

2. See infra notes 147-258 and accompanying text.
are delineated by the Constitution\(^4\) and Congress\(^5\) and are framed in terms of what cases can be heard by federal courts. There exist, however, two major judicially created exceptions to the jurisdiction of federal courts: the probate exception\(^6\) and the do-

4. See U.S. Const. art. III, § 2, cl. 1. Article III provides in pertinent part: The judicial Power [of the United States] shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States,—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id.

The Constitution created only one federal court, the Supreme Court, and left the creation of inferior federal courts to the discretion of Congress. Id. art. III, § 1.

5. The original jurisdiction of federal district courts with which this article is primarily concerned is set forth in 28 U.S.C. §§ 1330-1363 (1982). The question of the applicability of the domestic relations exception to federal jurisdiction arises primarily with respect to cases filed in federal court under diversity jurisdiction. See id. § 1332. Section 1332 provides in pertinent part as follows:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interests and costs, and is between—

1. citizens of different States;
2. citizens of a State and citizens or subjects of a foreign state;
3. citizens of different States and in which citizens or subjects of a foreign state are additional parties; and
4. a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Id. § 1332(a).

The applicability of the domestic relations exception may also be pertinent in cases arising under federal question jurisdiction. See, e.g., Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982); La Montagne v. La Montagne, 394 F. Supp. 1159 (D. Mass. 1975). The federal question statute provides that “[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” 28 U.S.C. § 1331 (1982). For a general discussion of the exception in federal question cases, see Comment, Federal Jurisdiction and the Domestic Relations Exception: A Search for Parameters, 31 UCLA L. Rev. 843, 864-71 (1984).

Since this article considers the applicability of the domestic relations exception to both diversity and federal question cases, references to the domestic relations exception herein refer to federal jurisdiction in general, as opposed to the designation in some commentary as the “domestic relations exception to diversity jurisdiction.” See, e.g., Note, The Domestic Relations Exception to Diversity Jurisdiction, 83 Colum. L. Rev. 1824 (1983) [hereinafter cited as Columbia Note]; Note, The Domestic Relations Exception to Diversity Jurisdiction: A Re-evaluation, 24 B.C. L. Rev. 661 (1983) [hereinafter cited as B.C. Note].

mestic relations exception.\(^7\) While these exceptions have a significant impact on the number and types of cases being decided by federal courts,\(^8\) until recently they have not been the subject of the rigorous evaluation and examination directed toward the statutorily created contours of federal jurisdiction.\(^9\)

\(^7\) See generally C. WRIGHT, supra note 6, § 25; Vestal & Foster, supra note 6. In addition to the domestic relations and probate exceptions to federal jurisdiction, there exist a number of other judicially-created restrictions on the exercise of jurisdiction by federal courts. For example, federal courts may invoke abstention doctrines and decline to exercise jurisdiction in cases concededly within their power under the Constitution and jurisdictional states. C. WRIGHT, supra note 6, § 52. While the domestic relations exception and abstention doctrines are similar in that they may preclude federal courts from entertaining suits which would appear to fall within the plain language of constitutional and statutory grants of jurisdiction, certain differences among these doctrines lead most commentators to consider them as discrete phenomena requiring separate analytical treatment. Compare C. WRIGHT, supra note 6, § 25 (exceptions) with id. § 52 (the abstention doctrines) and id. § 52A (“Our Federalism”). See also 1A J. MOORE, MOORE'S FEDERAL PRACTICE, ¶¶ 0.201, 0.203-204 (2d ed. 1974).

One basic distinguishing factor is that the domestic relations exception has been characterized as an implied exception to the constitutional and statutory grants of federal jurisdiction. See infra notes 76-78 and accompanying text. Given this characterization, the changing nature of domestic relations law and the changing balance of power between the states and the federal government in the domestic relations field are of limited relevance to a federal court faced with the applicability of the exception. See infra note 80 and accompanying text. Once a case is characterized as a domestic relations case, jurisdiction does not exist under the present statute. See id.

Abstention doctrines, on the other hand, are characterized as prudential declinations or postponements of concededly proper jurisdiction. See 1A J. MOORE, supra ¶ 0.202. These doctrines are not grounded on interpretations of the jurisdictional statutes, but rather on the sensitivity of federal courts to the concepts of equity, comity and federalism. Thus, they can be more responsive to changes in the balance of power between the state and federal government at particular points in the history of our nation with respect to particular areas of law. It is true that some rigidity in the application of abstention doctrines has been noted. See Soifer & Macgill, The Younger Doctrine: Reconstructing Reconstruction, 55 TEX. L. REV. 1141, 1167-68 (1977). However, this rigidity is not compelled by the doctrines' foundation in the same way as the domestic relations exception.

The greater flexibility of abstention doctrines has led some commentators to suggest that these doctrines be used to limit the number of domestic relations cases heard in the federal courts, thereby avoiding the rigidity inherent in the domestic relations exception. See Atwood, Domestic Relations in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 HASTINGS L.J. 571, 574 (1984); Note, Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction, 1983 DUKES L.J. 1095, 1120.

8. For example of case involving the domestic relations exception, see cases discussed infra at notes 147-258 and accompanying text. For cases involving the probate exception, see Moore v. Lindsey, 662 F.2d 354. (5th Cir. 1981); Rice v. Rice Found. 610 F.2d 471 (7th Cir. 1979); Starr v. Rupp, 421 F.2d 999 (6th Cir. 1970).

9. The domestic relations exception has been examined by a number of
This article examines the domestic relations exception to federal court jurisdiction both in the context of the ongoing debate regarding the appropriate scope of federal court jurisdiction and in light of current domestic relations law. In recent years, the field of domestic relations law has undergone tremendous expansion and change. New causes of action have been recognized\textsuperscript{10} and there is increased awareness of the problems of interstate domestic relations conflicts.\textsuperscript{11} Many of these new causes of action, new theories of recovery, and interstate domestic relations conflicts are finding their way to federal forums. As a consequence, the federal courts are faced with the difficult task of determining whether these cases are within the judicially-created domestic relations exception to federal jurisdiction. The task of the federal courts is made even more difficult because of the murky origins of the exception,\textsuperscript{12} the lack of uniformity among the courts as to the nature and scope of the exception,\textsuperscript{13} and, until quite recently, the dearth of scholarly commentary of the exception.\textsuperscript{14} The unsatisfactory state of the law in this area was noted by Judge Gibbons of commentators in the past few years. See Atwood, supra note 7; Rush, Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective, 60 NOTRE DAME LAW. 1 (1984); Comment, supra, note 5; Comment, Enforcing State Domestic Relations Decrees in Federal Courts, 50 U. CHI. L. REV. 1357 (1983); B.C. Note, supra note 5; COLUMBIA Note, supra note 5, Note, Federal Jurisdiction—The Domestic Relations Exception and the Tort of Interstate Child Snatching: Bennett v. Bennett, 16 CREIGHTON L. REV. 815 (1983). For a recent discussion of the probate exception, see Note, The "Probate Exception" to Federal Diversity Jurisdiction: Matters Related to Probate, 48 Mo. L. REV. 564 (1983).

\textsuperscript{10} See, e.g., Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982) (recognition of tort of interference with child custody rights); Marvin v. Marvin, 19 Cal. 3d 660, 557 F.2d 106, 134 Cal. Rptr. 815 (1977) (recognizing a variety of potential theories of recovery upon the dissolution of a nonmarital cohabitation relationship); Butcher v. Superior Court, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983) (extension of loss of consortium action to cohabitants).


\textsuperscript{12} For a discussion of the historical origins of the domestic relations exception, see infra notes 16-75 and accompanying text.

\textsuperscript{13} For a discussion of the lack of uniformity in the interpretation of the domestic relations exception, see infra notes 76-140 and accompanying text.

\textsuperscript{14} For a list of recent commentary on the exception, see supra note 9.
the Court of Appeals for the Third Circuit: "[T]here is no well-established domestic relations exception. Rather there is a collection of misstatements of ancient holdings and of ill-considered dicta."15

The article will first examine the origins of the domestic relations exception and its interpretation by lower courts. The article will then review the application of the exception both to traditional types of domestic relations cases and to recently recognized causes of action. It will be argued that continued adherence to the exception by lower federal courts no longer can be justified by either the substantive or procedural reasons commonly relied upon by courts in applying the exception. The article concludes that repudiation of the exception is the appropriate course of action.

II. THE ORIGINS OF THE DOMESTIC RELATIONS EXCEPTION

The task of federal courts faced with the problem of applying the domestic relations exception to particular cases is made difficult by the fact that the exception did not originate in an unequivocal direct holding by the Supreme Court of the United States, but rather evolved from dicta in several Supreme Court decisions in the nineteenth century. Tracing the history of the exception is important as a predicate to understanding the exception and for evaluating the compulsion that the origins of the exception impose upon federal courts today.16

The first Supreme Court case to suggest the existence of a domestic relations exception to federal court jurisdiction was Barber v. Barber.17 In that 1859 case, a wife residing in New York sued her husband, a Wisconsin resident, on the equity side of the federal district court in Wisconsin to enforce a New York decree granting her a divorce a mensa et thoro18 and an award of alimony.19 The basis of federal jurisdiction in Barber was diversity of

16. For an analysis of the precedential value of the Supreme Court cases, see infra notes 334-85 and accompanying text.
18. A divorce a mensa et thoro is a limited divorce, similar to what is today more commonly referred to as a legal separation, which gives the parties the right to live apart, but does not permit the parties to remarry. H. CLARK, LAW OF DOMESTIC RELATIONS § 11.1 (1968).
19. The husband had left New York after a divorce proceeding ending with a decree in the wife's favor "for the purpose of placing himself beyond the jurisdiction of the court which could enforce it." 62 U.S. at 588. Although a divorce
citizenship. The major issues addressed by the Court were whether the wife could acquire a domicile apart from her husband which would entitle her to sue him in a federal court to recover past due alimony, and whether a court of equity was the appropriate tribunal. Before dealing with these issues, the Court gratuitously commented on the types of cases it would not hear:

Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for an allowance of alimony. That has been done by a court of competent jurisdiction. The [federal] court in Wisconsin was asked to interfere to prevent that decree from being defeated by fraud.

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident of divorce \(a\ vinculo\), or to one from bed and board. Following this disclaimer, the Court addressed the jurisdictional issues raised by the record and concluded that the federal court was entitled to grant the wife the relief she had sought. No explanation for the disclaimer of jurisdiction was enunciated.

Justice Daniel, joined by Chief Justice Taney and Justice Campbell, dissented, partially on the ground that the wife in Barber could not become a citizen of a state different from that of her husband during the existence of the marriage. Therefore, there was no diversity of citizenship. The dissent also argued, however, that federal courts did not have the power to grant relief in

\[a\ mensa\ et\ thoro\] authorized a husband and wife to live apart, it did not free the parties from all obligations of marriage. A husband remained obligated to support his wife, and this obligation was enforced through a judicially imposed monetary award designated as alimony. H. Clark, supra note 18, § 14.1, at 420. The concept of alimony came to be applied in the United States to absolute divorces, which completely severed the marital relationship between the parties, although theoretically it is questionable why a man had any continuing obligation to support a woman after the matrimonial bond was severed. Id., at 421.

21. Id.
22. Id. at 584-90. The Court held that a wife “under a judicial sentence of separation from bed and board is entitled to make a domicile for herself.” Id. at 597-98. The Court also held that equity was an appropriate forum for the wife’s action since equity courts in England were permitted to compel alimony payments decreed by an ecclesiastical court. Id. at 590.
23. Id. at 600-02 (Daniel, J., dissenting). The dissent argued that the Court should have adhered to the traditional rule that a married woman’s domicile is the same as her husband’s. Id. See H. Clark, supra note 18, § 4.3, at 149-50.
While the majority’s “disclaimer” language could be construed to mean that federal courts possessed the power to hear domestic relations cases but chose to surrender that power, the dissent focused on the absolute lack of power:

The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which those families form parts, and is essential to the order and to the very existence of such communities.

Justice Daniel viewed the paramount interest of the states in regulating the domestic relations of its citizens as one reason for an exception to federal court jurisdiction in this area. The dissent stated that “[i]t is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society. . . .”

A second reason the dissent gave for the federal courts’ lack of power in the domestic relations area was an historical one. The scope of federal court chancery jurisdiction was traditionally defined in terms of the boundaries of the English chancery’s jurisdiction at the time the Constitution was adopted. The dissent noted that in England the subject of alimony was the province of the ecclesiastical court, not of the chancery. Thus, Justice Daniel concluded, the chancery jurisdiction of the federal courts did not extend to the subject matter of the suit.

Unlike the majority, the dissent did not distinguish between suits to obtain an award of alimony and suits to enforce alimony. Because the right to alimony, even alimony previously awarded, might be forfeited under certain circumstances, the dissent saw the enforcement of the right to alimony as a subject that should

25. Id. at 602 (Daniel, J., dissenting).
26. Id.
be under the control of the state courts. It was the state courts, according to the dissent, that were the proper tribunals for evaluating the circumstances leading to the original award or to its termination.30

Thus, even in this seminal case there was disagreement as to the nature and scope of the domestic relations exception. As discussed in a subsequent section of this article, this disagreement has endured to the present day and can be noted in the differing ways in which lower courts explain and apply the exception.31

The next Supreme Court case to mention a domestic relations exception to federal court jurisdiction was *In re Burrus,* which involved a child custody dispute. The child's father had left the child with grandparents in Nebraska to remain there during the illness of the child's mother. The mother died. The father remarried and attempted to regain custody of the child. The grandparents refused, and the father, a resident of Ohio, applied to the United States District Court for the District of Nebraska for a writ of habeas corpus to recover the care and custody of the child. The court issued the writ, ruled that custody was properly in the father, and ordered the grandparents to return the child to the father. The grandparents failed to comply, and the district judge held the grandfather in contempt. The grandfather challenged the contempt order on the ground that the district court had no jurisdiction in the original habeas corpus proceeding.32

The Supreme Court held that the district court had no jurisdiction to issue the writ of habeas corpus and ordered the peti-

30. *Id.* at 603 (Daniel, J., dissenting). The dissent noted that under state law the wife's entitlement to alimony was "always dependent upon the personal merits and conduct of the wife," and that proof of criminality or misconduct could be the basis for forfeiture of alimony allowances. *Id.* The dissent concluded:

The essential character, then, of this allowance, viz: its being always conditional and dependent, both for its origin and continuance, upon the circumstances which produced or justified it, is demonstrative of the propriety and the necessity of submitting it to the control of that authority whose province it was to judge of those circumstances. That authority can exist nowhere but with the power and the right to control the private and domestic relations of life. The Federal Government has no such power; it has no commission of *censor morum* over the several States and their people.

*Id.*

31. For a discussion of the confusion among lower federal courts over the rationale and scope of the domestic relations exception, see *infra* notes 76-140 and accompany text.

32. 136 U.S. 586 (1890).

33. *Id.* at 587-89.
tioner to be released.\textsuperscript{34} The Court based its holding on the limited jurisdiction of district courts. At the time \textit{Burrus} was decided, only the circuit courts had jurisdiction in diversity cases.\textsuperscript{35} The \textit{Burrus} Court reviewed alternative bases for district court jurisdiction, but noted that no argument had been made that the child was being restrained under, or by virtue of, the authority of the United States. Nor had it been contended that the restraint was in violation of the Constitution, laws or treaties of the United States. Therefore, no federal question sufficient to support jurisdiction had been raised. In the context of its exploration of alternative bases of jurisdiction, the \textit{Burrus} Court made a statement which is often quoted as authority for the existence of a domestic relations exception to federal court jurisdiction: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."\textsuperscript{36}

This sentence is frequently invoked to support the domestic relations exception even though the two sentences following it make clear that the sentence referred not to cases where there existed a settled basis for federal jurisdiction such as diversity, but rather to the question of whether federal laws or concerns in the area of domestic relations would themselves supply the basis for federal question jurisdiction:

As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. Whether the one or the other is entitled to the possession does not depend upon any act of Congress, or any treaty of the United States or its Constitution.\textsuperscript{37}

Cases relying on \textit{In re Burrus} have also ignored the fact that the Court's holding was expressly limited to the since-revised jurisdictional authority of district courts. The \textit{Burrus} Court specifi-

\textsuperscript{34} Id. at 596-97.
\textsuperscript{35} Id. at 596. Under the Judiciary Act of 1789, only circuit courts were granted diversity jurisdiction. See Judiciary Act of 1789, ch. 20, 1 Stat. 73. Subsequently, Congress abolished circuit courts and merged their jurisdiction into the jurisdiction of the district courts. See Judicial Code of 1911, ch. 231, 36 Stat. 1087. See generally C. Wright, supra note 6, § 1, at 3-7.
\textsuperscript{36} In re Burrus, 136 U.S. at 596.
\textsuperscript{37} Id. at 594.
cally reserved judgment on the appropriateness of federal jurisdiction in domestic relations cases where jurisdiction was based on diversity of citizenship:

But whether the diverse citizenship of parties contesting this right to the custody of the child, could, in the courts of the United States, give jurisdiction to those courts to determine that question has never been decided by this court that we are aware of. Nor is it necessary to decide it in this case, for the order for the violation of which the petitioner is imprisoned for contempt is not a judgment of the Circuit Court of the United States, but a judgment of the District Court of the same District. 38

In 1899, the Supreme Court in *Simms v. Simms* 39 cited both *Barber* and *Burrus* as authority for the existence of a domestic relations exception. In *Simms*, the wife had been awarded alimony and counsel's fees by a territorial court of Arizona and the award had been upheld by the Supreme Court of the Territory of Arizona. The husband appealed to the Supreme Court of the United States, but the wife challenged the Court's jurisdiction. She argued both that the jurisdictional amount of $5000 had not been satisfied and that because the decree below involved divorce and alimony, the case was not within the jurisdiction of federal courts. Addressing the wife's jurisdictional claims, the Court first quoted the "disclaimer" language in the *Barber* opinion. 40 It then stated:

It may therefore be assumed as indubitable that the Circuit Courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court. 41

The Court then cited *In re Burrus* for the proposition that "[w]ithin the States of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not to the laws of the United States." 42

Despite its apparent approval of the domestic relations ex-

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38. *Id.* at 596-97.
39. 175 U.S. 162 (1899).
40. For a discussion of *Barber*, see supra notes 17-31 and accompanying text.
41. 175 U.S. at 167.
42. *Id.* (citing *Burrus*, 136 U.S. at 593-94).
ception, the Simms Court held that the exception had "no application to the jurisdiction of the courts of a Territory, or to the appellate jurisdiction of this court over those courts." After reviewing the relevant statutes, the Court concluded that "the original jurisdiction of suits for divorce is vested in the district courts of the Territory," and that the Supreme Court had appellate jurisdiction over the orders of the district court. Consequently, although Simms cited Barber and Burrus, in no way did Simms rest its holding on the domestic relations exception. Nevertheless, Simms is often cited along with Barber and Burrus as authority for the existence of the exception.

A fourth case, De La Rama v. De La Rama, is also frequently cited in lower court opinions as authority for the domestic relations exception. Yet, De La Rama, like Simms, held that the general rule of Barber had "no application to the jurisdiction of the

43. Id. at 167-68.
44. Id. at 168.
45. Id. The Court went on to hold that it had no jurisdiction to review the divorce decree because it involved "a matter the value of which could not be estimated in money." Id. at 168-69. Thus, the decree did not meet the Court's $5,000 amount in controversy requirement which was in effect when Simms was decided. See Act of Sept. 24, 1789, ch. 20, § 22, 1 Stat. 73. This holding is especially significant because it correctly demonstrates that the amount in controversy requirement will rarely be satisfied in cases involving determinations of status. If such a threshold jurisdictional deficiency exists, then the question of the applicability of the domestic relations exception is moot. Curiously, however, courts rarely forego the opportunity to invoke the exception, even in cases that clearly fail to satisfy the threshold amount in controversy requirement. See, e.g., Hernstadt v. Hernstadt, 373 F.2d 316, 318 (2nd Cir. 1967) (action for declaratory judgment construing custody and visitation provisions of divorce decree dismissed under domestic relations exception and because jurisdictional amount not met).

Another interesting aspect of the Simms opinion is the distinction it makes between the Court's jurisdiction to review the divorce decree and its jurisdiction to review the alimony award. The Court stated that although the alimony award was "in one sense an incident to the suit for divorce," it was also "a distinct and severable final judgement . . . for a sum of money of a sufficient jurisdictional amount, and is therefore good ground of appeal." 175 U.S. at 169. Thus, the Court's decision to review the alimony award but not the divorce decree depended not upon any policy concerns regarding the appropriate role of federal courts in domestic relations matters, but instead upon straightforward considerations of whether the jurisdictional amount had been satisfied.

46. For examples of cases citing Simms, Barber and Burrus, see infra note 52.
47. 201 U.S. 303 (1906). In De La Rama, a wife sued for divorce a mensa et thoro in a territorial trial court, and was awarded alimony and one-half of the property of the marriage. The Supreme Court of the Phillipine Islands reversed the order of the trial court after finding that the wife had committed adultery. The wife appealed the reversal to the United States Supreme Court. Id. at 304-05.

48. For examples of cases citing De La Rama, Barber, In re Burrus and Simms, see infra note 52.
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territorial courts or of the appellate jurisdiction of this [Supreme] Court over those courts."\(^{49}\) De La Rama characterized the domestic relations exception as "a long established rule,"\(^{50}\) but offered reasons different from those advanced by the Barber dissent:

[T]he courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the future reason that a suit for divorce in itself involves no pecuniary value.\(^{51}\)

The Supreme Court in De La Rama therefore characterized the exception as evolving not from lofty policy considerations such as the appropriate balance of state and federal power, nor from any historical restriction on the jurisdiction of federal courts, but rather from the potential difficulty which domestic relations cases face in satisfying either the diversity of citizenship requirement or the amount in controversy requirement.

These four cases—Barber, In re Burrus, Simms, and De La Rama—have become the foundation of a domestic relations exception to federal court jurisdiction.\(^{52}\) Today, the question of the applicability of the exception arises most often in diversity cases.\(^{53}\) Yet none of these seminal cases involved the denial of ju-

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49. 201 U.S. at 307-08. The De La Rama opinion went a little further than Simms in upholding federal court review of domestic relations cases from territorial courts. In De La Rama, the grounds for granting the divorce had an impact on the wife's entitlement to alimony. \textit{Id.} at 310. In order to review appropriately the appellant's contention that the alimony award was in error, the Court had to examine the propriety of the divorce itself. Thus, although the Simms Court considered its jurisdiction to review the divorce as a separate matter from its jurisdiction to review the alimony award, the De La Rama Court looked to the interrelationship between various parts of the judgment, and concluded that the Court could examine the entire decision where the propriety of an alimony award or division of conjugal property depended upon evidence relating to the right to a divorce. \textit{Id.}

50. \textit{Id.} at 307.

51. \textit{Id.} For a discussion of the Barber dissent, see \textit{supra} notes 23-30 and accompanying text.


53. The recent increase of civil rights actions involving domestic relations
risdiction in a domestic relations case based upon diversity. In Barber, jurisdiction was upheld in a diversity case to enforce an alimony award. In re Burrus involved the denial of jurisdiction in a habeas corpus case in a no longer existing form of federal court. In Simms the Court denied jurisdiction to review a divorce granted by a territorial court because the case did not meet the amount in controversy requirement, but upheld the jurisdiction of the Supreme Court to review alimony awards of territorial courts that met the requirement. And De La Rama upheld the jurisdiction of the Supreme Court to review territorial courts’ decisions regarding both the granting of a divorce and the award of alimony. Given this shaky foundation, it is no wonder that the domestic relations exception has been a source of debate and difficulty in the federal courts.

It was not until 1930 that the Supreme Court appeared to hold for the first time, on the basis of the domestic relations exception, that federal courts did not have jurisdiction in a domestic relations case. In Ohio ex rel. Popovici v. Agler, the Vice Consul of Romania challenged the jurisdiction of an Ohio state court to hear a divorce action which had been instituted by his wife. He claimed that pursuant to Article III, Section 2 of the Constitution and the federal statutes implementing that constitutional

issues is forcing federal courts to address the application of the domestic relations exception in the context of federal question cases. See Comment, supra note 5, at 864-72.

54. For a discussion of Barber, see supra notes 17-31 and accompanying text.

55. For a discussion of In re Burrus, see supra notes 32-38 and accompanying text.

56. For a discussion of Simms, see supra notes 39-46 and accompanying text.

57. For a discussion of De La Rama, see supra notes 47-51 and accompanying text.

58. For a discussion of interpretations of the exception by lower federal courts, see infra notes 76-140 and accompanying text.


One treatise characterizes Popovici as the “first square holding” applying the domestic relations exception. P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler’s The Federal Courts and the Federal System 1190 (2d ed. 1973). In fact, the holding of Popovici is very limited. See infra notes 70-75 and accompanying text. See also Solomon v. Solomon, 516 F.2d 1018, 1030-31 n.3 (3d Cir. 1975) (Gibbons, J., dissenting) (Popovici holds only that Ohio state courts have jurisdiction to hear a divorce case involving consuls).

60. 280 U.S. 379 (1930).

61. See U.S. CONST., art. III, § 2, cl. 2. Article Three provides in part that “[i]n all Cases affecting the Supreme Court shall have original Jurisdiction,” Id.
provision, the federal courts had exclusive jurisdiction over all suits and proceedings against consuls or vice-consuls.

The Supreme Court acknowledged that a plain reading of the constitutional and statutory language appeared to encompass the divorce suit. Yet the Court held that "like all language [the jurisdictional provisions have] to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used." The "tacit assumptions" of which the Court spoke were those found in *Barber*, *In re Burrus*, *Simms*, and *De La Rama* regarding the existence of a domestic relations exception.

The Court noted that the statutory language did not control the case "if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce." It then reasoned that "[i]f when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly." Thus, the Court concluded that the constitutional provision conferring exclusive jurisdiction upon federal courts in suits involving consuls and vice-consuls was to be interpreted "to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts."

At first glance, the *Popovici* decision appears to be a clear statement by the Supreme Court that a domestic relations exception to federal jurisdiction does indeed exist. A closer examination of the decision, however, highlights its very narrow and even conservative nature. In the first place, *Popovici* involved a narrow constitutional and statutory basis for federal jurisdiction—that conferring jurisdiction in suits involving ambassadors, public ministers, consuls and vice-consuls. While one might argue that the reasoning of *Popovici* could be extended easily to other more

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63. 280 U.S. at 382-83.
64. Id. at 383.
65. Id.
66. Id. The Court relied on *Barber*, *Simms* and *De La Rama* in holding that federal courts have always denied jurisdiction over divorces and alimony. Id.
67. Id.
68. Id. at 383-84.
69. Id. at 384.
70. See id. at 384.
frequently invoked bases of federal jurisdiction, no Supreme Court case has so extended Popovici. Secondly, the language used by the Supreme Court in Popovici is far from an unequivocal approval of the domestic relations exception. The Court spoke not of a brightly defined exception, but rather of "tacit assumptions." The Court did not positively state that the domestic relations exception has existed for three quarters of a century. Rather, it spoke of the propriety of state court jurisdiction "if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce." The Court did not expressly hold that at the time the Constitution was adopted, it was the common understanding that domestic relations jurisdiction was reserved to the states. Rather, the Court stated that, "[i]f when the Constitution was adopted, the common understanding was that domestic relations . . . were matters reserved to the States," the Constitution should be interpreted in light of that understanding. The decision refused to upgrade the basis of the domestic relations exception beyond the "tacit assumptions" of which the Court spoke.

Another aspect of Popovici that restricts its precedential value is that the case involved a suit for divorce, which is a domestic relations case, even under the narrowest definition of that term. Moreover, Popovici failed to define what is encompassed by the term "domestic relations," thereby leaving lower courts with the onerous task of construing the appropriate boundaries of the exception. Thus, although Popovici has been described as "the most extreme case" of application of the domestic relations exception, the circumstances of that case were so unique as to severely circumscribe its usefulness as a guide to interpreting the domestic relations exception. An indication that lower courts do not consider Popovici to be the definitive holding on the domestic relations exception is that courts do not cite Popovici as having supplanted Barber, Burrus, Simms, and De La Rama as a precedent for the domestic relations exception. Rather, it is cited together with these older cases as indicative of the existence of the exception.

71. Id. at 383.
72. Id. (emphasis added).
73. Id. at 383-84 (emphasis added).
74. C. Wright, supra note 6, § 25, at 144 n.10.
75. See, e.g., Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968); McCarty v. Hollis, 120 F.2d 540, 542 (10th Cir. 1941); Robinson v. Robinson, 523 F.
III. THE DOMESTIC RELATIONS EXCEPTION: A POWER LIMITATION OR DISCRETIONARY DISCLAIMER?

During the fifty years since Popovici was decided, lower courts have advanced substantially divergent interpretations of the nature and scope of the domestic relations exception. The differences derive in part from the confusion that exists in the seminal Supreme Court opinions giving rise to the exception.

The most important issue of disagreement is whether the exception derives from a lack of constitutional and/or statutory power, or whether it arose as a result of a disclaimer of jurisdiction by the Supreme Court. The majority in Barber spoke in terms of disclaiming jurisdiction in domestic relations cases. The Barber dissent, however, explained the exception in terms of a lack of power to hear domestic relations cases. This difference of opinion has survived among the lower federal courts. Some emphatically characterize the domestic relations exception as a question of power. Other federal courts claim that the exception is a discretionary surrender of, or abstention from, jurisdiction in favor of state courts.

The power-disclaimer issue has great significance, for it defines the amount of discretion a court can exercise in a particular case. If a court bases the existence of the domestic relations exception on a lack of constitutional or statutory power, then a court's sole means for exercising discretion lies in its initial determination of whether the case does in fact involve "domestic relations." If, however, a court views the exception as a discretionary...

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76. For a discussion of the disclaimer rationale of the Barber majority, see supra note 21 and accompanying text.
77. For a discussion of the power rationale of the Barber dissent, see supra notes 24-29 and accompanying text.
78. See, e.g., Williamson v. Williamson, 306 F. Supp. 516, 518 (W.D. Okla. 1969) ("subject matter jurisdiction...is wholly lacking in a federal court in spite of the fact that" the jurisdictional requirements of § 1332 have been satisfied). See also Solomon v. Solomon, 516 F.2d 1018, 1024 (3d Cir. 1975) ("federal courts do not have jurisdiction in domestic relations suits"); McGovern v. Blaha, 496 F. Supp. 964, 965 (W.D.N.Y. 1980) (action for child support payment is "jurisdictionally prohibited").
79. See, e.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981) ("federal courts traditionally have refrained from exercising jurisdiction over cases which in essence are domestic relations disputes"). See also Crouch v. Crouch, 566 F.2d 486, 487-88 (5th Cir. 1978) (applicability of domestic relations exception is determined in light of policy considerations); Kilduff v. Kilduff, 473 F. Supp. 873 (S.D.N.Y. 1979) (federal court may decline jurisdiction even in tort action if tortious conduct arose from marital relationship).
disclaimer based upon reasons of policy, then not only may the
court use its discretion in the determination of whether the case
involves domestic relations, but it may also determine whether a
given case implicates the policy considerations that gave rise to
the exception.80 This latter approach permits a court to consider
changes in the court system and changes in domestic relations
law, while such a flexible approach is more difficult to use when
the exception is viewed as arising from a lack of constitutional or
statutory power.

In addition to those courts justifying the exception in terms
of lack of power and to those adopting the disclaimer rationale
are those courts that combine both rationales in their analyses.
Since the alternative characterizations of the exception are just
that—alternatives rather than potential complements—unifying
the two rationales produces confusion and unpredictability. For
example, in *Welker v. Metropolitan Life Insurance Co.*,81 the plaintiff
brought an action in federal district court to recover insurance
benefits as a putative spouse.82 The district court dismissed the
action on the basis of the domestic relations exception. Initially,
the court stated that since the primary issue in the case involved
the status of husband and wife, the district court "should decline
jurisdiction."83 But the court went on to state that the case was
"not within the power granted to the federal courts by the Consti-
tution."84 The court concluded that "based on notions of feder-
alism and the competency of the federal courts to decide state
domestic relations issues, this action must be dismissed for lack of
subject matter jurisdiction."85 Thus, both the lack of power and
the disclaimer rationales are present in *Welker*.

Another approach that combines both rationales was recently
adopted by the Ninth Circuit in *Csibi v. Fustos*.86 In *Csibi*, the court
distinguished between two types of domestic relations cases, ap-

80. See Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978). *Crouch* identifies
the following policy considerations for applying the exception: a strong state
interest in domestic matters, the special competence of state courts, the possibil-
ity of conflicting federal and state decrees, and the problem of congested federal
courts. *Id.* at 487.
82. *Id.* at 269. Plaintiff and decedent were married before divorces from
their respective spouses had become final. *Id.* For a definition of the term "pu-
tative spouse," see infra note 149.
83. *Id.* at 269 (emphasis added).
84. *Id.* at 270 (emphasis added).
85. *Id.*
86. 670 F.2d 134 (9th Cir. 1982).
plying the power rationale to one category and the discretionary disclaimer rationale to the other. The first category was described by the court as "at the core of the domestic relations exception" and included cases where federal courts are asked to grant a divorce or annulment, to determine support payments or to award custody of a child. As to these cases, the federal courts have no subject matter jurisdiction. The second category of domestic relations cases to which the exception applied included those "where domestic relations problems are involved tangentially to other issues determinative of the case." As to this second category of cases, Csibi concluded that federal courts may exercise discretion in deciding whether to accept jurisdiction.

Nothing in the seminal Supreme Court opinions suggests that a two-tiered analysis is appropriate for determining which cases may be heard in federal court. The Supreme Court decisions advanced different rationales for the exception and different interpretations of the scope of the exception. Perhaps the Csibi court sought to synthesize the disparate approaches with a two-tiered analysis, rather than attempt to choose between the differing conceptions of the exception. Nevertheless, Csibi is further evidence of the lack of uniformity among lower courts in interpreting both the historical basis for the exception and its boundaries.

IV. LOWER COURT INTERPRETATIONS OF THE SCOPE OF THE DOMESTIC RELATIONS EXCEPTION

Not only did the majority and the dissent in the Barber case disagree on the nature of the domestic relations exception, they also disagreed on its scope. The Barber majority distinguished between requests for the allowance of alimony, with respect to

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87. Id. at 137.
88. Id. These actions were chosen as core cases because they resembled historical ecclesiastical actions. Id.
89. Id. As an example of an action falling into this second category, the court cited a suit to enforce a defaulting spouse's obligations under a state decree. Id.
90. For a discussion of the divergent Supreme Court rationales, see supra notes 25-29, 34-36, 40-42 & 50 and accompanying text.
91. For a discussion of the divergent interpretations of the scope of the exception, see supra notes 30, 37-38, 43-45 & 49 and accompanying text.
92. See also Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981). In Sutter, the First Circuit also distinguished between two categories of domestic relations cases. Like the Csibi court, the Sutter court found that federal courts had no jurisdiction over cases in the first category, while they should abstain from adjudicating cases in the second. Id. at 843.
which it disclaimed jurisdiction, and suits to enforce alimony awards, which it felt were properly within the jurisdiction of federal courts.\footnote{For a discussion of the majority opinion in Barber, see supra notes 20-22 and accompanying text.} The dissent, however, argued that federal courts did not have jurisdiction to enforce an alimony award. The dissent stated that since alimony awards were modifiable they were properly a subject for state control,\footnote{For a discussion of the dissent's argument that alimony awards are modifiable, see supra note 30 and accompanying text.} and that federal courts lacked jurisdiction over divorce and alimony because those matters were reserved in England to the ecclesiastical courts.\footnote{For a discussion of the role of ecclesiastical courts in England, see supra notes 27-29 and accompanying text.}

Although the Barber majority distinguished between different types of domestic relations cases,\footnote{Barber, 62 U.S. at 584. In Barber, the Court's disclaimer language was only addressed to suits "upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce a vinculo, or to one from bed and board." Id.} the language in In re Burrus is substantially more encompassing: "The whole subject of the domestic relations of husband and wife, parent and child belongs to the laws of the States and not to the laws of the United States."\footnote{Burrus, 136 U.S. at 593-94. For a discussion of Burrus, see supra notes 32-38 and accompanying text.} Simms compounded the confusion by referring to both the narrow disclaimer language of Barber and the expansive description of the exception in In re Burrus.\footnote{Simms, 175 U.S. at 167. For a discussion of Simms, see supra notes 39-46 and accompanying text.}

Given the uncertain history of the exception, it is not surprising that lower courts have offered differing interpretations of its scope. At one end of the spectrum are courts that define "domestic relations" expansively and avoid the difficult line-drawing process.\footnote{See, e.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981)("suit whose substance is domestic relations generally will not be entertained in a federal court"); Kamhi v. Cohen, 512 F.2d 1051, 1056 (2d Cir. 1975)(federal court's policy will remain "to keep hands off actions which verge on the matrimonial"); Welker v. Metropolitan Life Ins. Co., 502 F. Supp. 268, 269 (C.D. Cal. 1980)(federal court should decline jurisdiction where primary issue in diversity case involves status of parent and child or husband and wife).} Under this approach, any litigation involving parent and child or husband and wife is labeled as a domestic relations case and thus within the exception.\footnote{See, e.g., Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.), cert. denied, 414 U.S. 805 (1973). In Gargallo, a father sought both an injunction and damages for his ex-wife's illegal removal of their children from Ohio. Id. at 1220. The Sixth Circuit summarily held that this case fell within the domestic relations exception,}
Domestic Relations Exception

trum are courts that hear cases appearing to implicate the domestic relations exception, with no discussion at all as to the propriety of jurisdiction. In between these two extremes are the majority of lower courts struggling to find a test to determine whether a case involves "domestic relations" for purposes of the exception.

There appears to be little controversy that a suit for a divorce, an original alimony award, a division of property, or a determination of child custody fall within the exception. Such cases are rarely brought to federal court. For the most part, the cases that raise the question of the scope of the domestic relations exception are cases involving enforcement, modification or challenges to existing decrees, or suits based upon tort, contract or constitutional law theories which in some way involve family relations. As discussed below, courts have not responded in a uniform way to the issues posed by such cases. The variety of

although the court made no attempt to specifically analyze the issues presented in the case to determine whether the entire case actually fell within the exception. See also Kilduff v. Kilduff, 473 F. Supp. 873 (S.D.N.Y. 1979). In Kilduff, a mother sued her ex-husband for false imprisonment of their children after he violated the custody agreement by failing to return the children following a trip. Id. at 874. The district court dismissed the action, holding that even though the action sounded in tort, the case essentially focused on an alleged breach of a custody agreement and therefore was clearly a domestic relations case within the exception. Id.

101. See, e.g., Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980) (affirming damage award against plaintiff's ex-husband and his relatives for taking and concealing their children in violation of a custody order); Hinton v. Hinton, 436 F.2d 211 (D.C. Cir. 1970) (complaint charging a child's grandmother with inducing child not to return to parents stated a cause of action); Carr v. Wisecup, 263 F.2d 157 (3d Cir. 1959) (suit by wife against husband for damages under contracts executed in anticipation of divorce); Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978) (action against ex-husband for taking plaintiff's child from her in violation of custody order). The fact that none of the parties may have raised jurisdictional questions in these actions does not explain the court's hearing these cases, since "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Fed. R. Civ. P. 12(h)(3) (emphasis added). It is well settled that a jurisdictional defect is nonwaivable and may be asserted on the court's motion either at the trial level or the appellate level. See 5 C. Wright & A. Miller, Federal Practice and Procedure § 1393 (1969).

102. See, e.g., Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981) (federal courts have no diversity jurisdiction to grant divorces, determine alimony and resolve custody dispute); Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980) ("district courts have no original diversity jurisdiction to grant a divorce, to award alimony, to determine child custody, or to decree visitation").

103. The rarity of these core domestic relations cases in federal courts is probably due to the insurmountable problem of satisfying the threshold diversity and amount in controversy requirements. For a discussion of the difficulty in meeting these threshold requirements, see infra notes 326-29 and accompanying text.
approaches utilized by courts demonstrates their present confusion as to the appropriate boundaries of the exception.

A. The Status-Property Rights Test

Some courts apply a "status" test to determine whether a particular case falls within the domestic relations exception.\(^\text{104}\) Under this analysis, if a case requires a determination of marital or familial status, then the exception is invoked. For instance, in \(\text{Buechold v. Ortiz}\),\(^\text{105}\) a case involving paternity and child support, the Ninth Circuit stated that federal courts "must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife."\(^\text{106}\) Finding that the case before it involved a determination of the status of parent and child, the \(\text{Buechold}\) court upheld the lower court's dismissal for lack of jurisdiction. Similarly, in \(\text{Welker v. Metropolitan Life Insurance Co.}\),\(^\text{107}\) the plaintiff sought a declaration that she was the putative spouse of the decedent, which would have entitled her to the benefits of a group life insurance policy under which the decedent was insured.\(^\text{108}\) Following the rationale of \(\text{Buechold}\), the district court dismissed the case on the grounds that the primary issue required a determination of marital status.\(^\text{109}\)

By contrast, other federal courts have asserted their power to make marital status determinations if the issue was raised in a

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104. \textit{See, e.g., Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968); Welker v. Metropolitan Ins. Co., 502 F. Supp. 268 (C.D. Cal. 1980). Professors Vestal and Foster also favor application of a status test. \textit{See Vestal & Foster, supra note 6, at 31. Under their formulation, federal courts should refuse jurisdiction in cases "where a problem of status arises. Where only property rights are involved jurisdiction should be taken." \textit{Id.}}

105. 401 F.2d 371 (9th Cir. 1968).

106. \textit{Id. at 372.}


108. \textit{Id. at 269. For a definition of putative spouse, see infra note 149.}

109. \textit{Id. One problem with utilizing a status-property test is the difficulty in determining what constitutes an adjudication of "status." For example, in a case with facts similar to those in \textit{Welker}, the district court reached the opposite conclusion from \textit{Welker} on the ground that the question of whether a person was a putative spouse did not involve the adjudication of marital status, but merely an inquiry into responsibilities. \textit{See Lee v. Hunt, 431 F. Supp. 371, 376 (W.D. La. 1977).}

Another problem with the status-property rights test is its lack of uniform application among the courts. Some courts have invoked the domestic relations exception in cases which clearly involve property rights, and not status determinations. \textit{See, e.g., Allen v. Allen, 518 F. Supp. 1234 (E.D. Pa. 1981) (postnuptial property settlement agreement); Danel v. Lovelace, 428 F. Supp. 30 (W.D. Okla. 1976) (dispute over division of property under a property settlement contract).}
challenge to an already existing divorce decree. In Southard v. Southard, the Second Circuit stated that Barber would not preclude a diversity action for a declaratory judgment to declare a divorce decree invalid. The court stated that "there is no reason why a declaratory action should not prima facie lie to determine the controverted status of the parties." Another case involving a determination of status is Vann v. Vann, where a wife brought an action in federal court seeking a declaratory judgment to void a divorce decree obtained by her husband in a Tennessee court. The wife asserted two grounds in support of her request. She claimed first that the notice given her was insufficient to comply with due process requirements, and second, that the pleadings and proof upon which the divorce judgment was rendered contained fraudulent misrepresentations. The district court denied the husband's motion to dismiss. The court held that the domestic relations exception did not apply where the validity of a judgment was being questioned under the Constitution, and that a federal district court had "the long recognized power to deprive parties before it of the fruits of a judgment of divorce procured by fraud which goes to the validity of the judgment."

B. The Modifiability Test

Some courts, in analyzing and defining the appropriate scope of the domestic relations exception, draw a distinction between actions involving obligations which are modifiable and actions involving obligations which are not modifiable. Under this approach, nonmodifiable obligations may be enforced in federal court, while modifiable obligations may not. Thus, actions to enforce property division awards, which generally are not modifi-

110. 305 F.2d 730 (2nd Cir. 1962).
111. Id. at 731 (citing Barber, 62 U.S. (21 How.) 582 (1859)). The plaintiff had sought a declaratory judgment because a Connecticut court had failed to give full faith and credit to a Nevada divorce decree. Id. The Second Circuit, however, ultimately dismissed the suit on the ground that it was barred by res judicata. Id. at 732.
112. Id. at 731.
114. Id. at 194. Not all courts agree with the Vann court's statement that the domestic relations exception is inapplicable to federal question cases. See supra note 5. See also Comment, supra note 5, at 864-72.
115. For examples of courts embracing this modifiability test, see Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) (characterizing separation agreement as a contract to pay money); Morris v. Morris, 273 F.2d 678 (7th Cir. 1960) (viewing separation agreement as a modifiable instrument and reversing district court judgment for unpaid installments).
able, are held to be within a federal court's jurisdiction. Disputes involving alimony, custody, or child support awards, which generally are modifiable, are excluded from jurisdiction by the domestic relation exception.

The theory behind the modifiability test is that when a federal court is called upon to modify a domestic relations award, or to enforce an award that is modifiable, the court entertaining the action must necessarily examine factors which the state domestic relations statutes set forth as relevant to modification. Such factors are seen as matters of particular interest to state courts, and within their special expertise, thus calling for the invocation of the domestic relations exception. In contrast, the enforcement of nonmodifiable domestic relations obligations is viewed as analogous to the enforcement of any other nonmodifiable debt, and not involving the federal court directly in domestic relations law. Thus, such actions are often held to be within the jurisdi-

118. See H. Clark, supra note 18, § 14.8. In some states an alimony award is modifiable not only with respect to future installments, but also with respect to accrued, unpaid installments. Id. § 14.9, at 454-55. Thus, if an obligee sues in federal court to recover past due installments, the obligor can defend by raising circumstances which justify modification of the unpaid obligation.
119. See, e.g., Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) (in part upholding dismissal of counterclaim to reduce child support and increase visitation rights).
120. For example, the Indiana Code provides that modification of a child support or spousal support award is to be allowed "only upon a showing of changed circumstances so substantial and continuing as to make the terms [of the existing award] unreasonable." Ind. Code § 31-1-11.5-17 (1984). Thus, in order to determine whether the existing award is unreasonable, the court must examine the goals of the award and determine whether they were being served by that award.
121. This point was recently emphasized by the Seventh Circuit:
[The] efforts by the district court to assume the broad equitable powers of a divorce court in passing upon the questions which might arise as to the continuance of the obligation of defendant to make the periodic payments, despite the possibility of changing circumstances in the future, would involve the district court in the administration of divorce law in a very real way . . . . [W]e feel that the [lower] court's precipitate action is not consonant with the view expressed by the federal judiciary in the [Barber line of] cases.
122. See, e.g., Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978) (suit for breach of separation agreement involves none of the justifications for the do-
tion of federal courts.

This categorization often leads to problems for litigants seeking relief. For example, an alimony award may be nonmodifiable under state law with respect to accrued but unpaid installments, but prospectively modifiable with respect to future installments.\(^2\)\(^3\) Similarly, the law may allow damages for interference with an existing child custody award without reconsideration of the propriety of the award, and yet not permit an injunction to order continued enforcement without considering present circumstances.\(^4\)\(^5\) Most litigants seeking redress for past breaches of existing alimony or custody awards are also concerned with potential future breaches. They seek, in addition to damages, injunctive relief or some alternative means of enforcing continued compliance.\(^6\)\(^7\) Courts utilizing the distinction between modifiable and nonmodifiable obligations have reached a schizophrenic result as to their power to hear such cases. Several courts facing this problem have concluded that federal courts have jurisdiction to remedy past breaches, but lack jurisdiction to enforce future

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\(^1\) Domestic relations exception); Turpin v. Turpin, 415 F. Supp. 12, 13-14 (W.D. Okla. 1975)(former wife's suit for ex-husband's breach of property settlement agreement was primarily a contract dispute, thus rendering domestic relations exception inapplicable).

The fact that a plaintiff relies on a separation agreement will not always mean that the dispute will pass the modifiability test. Often alimony, custody and child support disputes will be settled with a separation agreement which will be submitted to the court for approval. See H. Clark, supra note 18, § 16. Although there is some case law to the contrary, the fact that the court-approved award is based upon a separation agreement will not alter the general modifiability of alimony, custody and child support agreements. Id. § 16.3.


\(^3\) See, e.g., Lloyd v. Loefler, 694 F.2d 489, 493 (7th Cir. 1982) (tort of wrongful interference with custody may be litigated independently of custody proceedings); Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982). In Bennett, the Court of Appeals for the District of Columbia held that a child snatching tort suit was within the competence of federal courts, since the case involved determination solely of the existence of a legal duty, the breach of that duty, and the damages flowing from the breach. Id. at 1042. With respect to plaintiff's request for an injunction, however, the court noted that "[t]he decision whether or not to grant injunctive relief in this case would not merely depend on the past rights and wrongs of the parties to the suit. Rather, it would also require an inquiry into the present interest of the minor children. . . ." Id. Therefore, the court concluded there was no federal jurisdiction over the injunctive claim. Id. at 1044.

\(^4\) See, e.g., Lloyd v. Loefler, 694 F.2d 489 (7th Cir. 1982). For a discussion of Loefler, see infra notes 241-49 and accompanying text.
This result leaves the litigant in the unfortunate position of having to accept only a partial remedy if a federal forum is chosen. This may be particularly unsatisfactory if the breaching obligor is beyond the jurisdiction of the state court that originally imposed the obligation. In this situation, enforcement would be much simpler if a federal court issued an injunction ordering continued compliance.\(^2\)

Some lower federal courts do not accept the modifiability test as defining the appropriate boundaries of the domestic relations exception. These courts have refused to hear actions involving nonmodifiable awards on the grounds of the exception.\(^2\)

126. See, e.g., Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982); Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982). But cf. Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983) (stating in dictum that the domestic relations exception does not bar the granting of an injunction to compel the return of a child in accordance with a state custody decree).

127. The decision to grant retrospective relief in the form of damages, but not prospective relief in the form of either an injunction or escalating punitive damages, leaves a plaintiff in the unenviable position of having to bring repeated suits to obtain compensation for the continuing tortious conduct of the defendant. This approach is clearly more time consuming and expensive for a plaintiff than obtaining complete relief in one suit.

Plaintiff could, of course, seek an injunction in state court if the federal court refused to grant prospective relief. However, in addition to the wasted judicial resources required by two lawsuits, it is unclear that the state court remedy would be obtainable or effective. If plaintiff were fortunate and the defendant remained in the same state that handed down the original decree, then that state court could continue to exercise jurisdiction and issue an injunction ordering compliance, or simply hold the defendant in contempt. H. CLARK, supra note 18, §§ 14.10, 17.7. Yet this would be an unusual situation since in most cases where federal diversity jurisdiction properly could be invoked, the defendant will no longer be within the state that issued the original decree. An injunction or contempt order issued by that state would not be per se enforceable beyond its borders. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 (1971).

While states may be required to recognize and enforce certain decrees rendered by a sister state under either the full faith and credit clause of the Constitution or the Parental Kidnapping Prevention Act, certain decrees may not fall within the mandate of either provision. See H. CLARK, supra note 18, §§ 11.5, 14.11, 15.4 (inapplicability of full faith and credit clause to modifiable custody, alimony and child support). See also 28 U.S.C. § 1738A(a)-(c) (1983) (defining those categories of child custody determinations entitled to the protection of the federal act). In such situations, while state courts may choose to enforce such an order, there has been no definitive Supreme Court ruling requiring enforcement. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 102 (1971).

Another method a litigant might use to enforce compliance with an out-of-state domestic relations decree would be to domesticate the original decree. If the litigant is successful, the state that has adopted the decree could use all remedies to enforce the judgment which it utilizes for other domestic decrees. See H. CLARK, supra note 18, § 14.12. The domestication process is discretionary, however, and involves both time and financial resources. It will also be of limited usefulness where the defendant moves frequently to avoid enforcement.

128. See, e.g., Solomon v. Solomon, 516 F.2d 1018, 1019 (3d Cir. 1975) (dismissing suit for nonpayment of support "based in contract upon a separa-
according to this view, the fact that such disputes arose from the marital relationship is sufficient to brand the case as a domestic relations case and thus within the exception.

C. The Centrality of the Domestic Relations Issue

Courts encounter special difficulty in administering the domestic relations exception when a suit involving domestic relations issues is based on theories of contract, tort or constitutional law. The question arises as to whether the court may delve into the facts constituting the claim and characterize the suit as a "domestic relations" case subject to the exception. Furthermore, if scrutiny of the facts is permitted, the courts must also decide to what extent the suit involves a domestic relations issue in order to determine whether the entire case falls within the domestic relations exception.

With respect to the power of federal courts to scrutinize the facts to determine whether the case may indeed be a domestic relations case for purposes of the exception, most courts allow some level of scrutiny. What varies is the depth of that scrutiny and the perspective of the court undertaking the task. For example, in Cole v. Cole an ex-husband brought a suit in federal court for compensatory and punitive damages against his ex-wife and several other defendants alleging malicious prosecution, abuse of process, arson and conversion. Although it was unclear from the pleadings whether the acts complained of occurred before or after the divorce, the appellate court proceeded on the assumption that the parties were married at the time of the actions giving rise to the claim. The trial court had dismissed the action on the basis of the domestic relations exception. On appeal, the Fourth Circuit reversed, stating, "[a] district court may not simply avoid all diversity cases having intrafamily aspects. Rather it must consider the exact nature of the rights asserted or of the breaches alleged." The Cole court then reviewed the facts of the case and concluded that the case "does not present any true domestic
The breaches of duty alleged in the complaint did not arise solely from domestic relations law, and the court felt it inappropriate to "deny jurisdiction simply on the grounds of the supposed etiology of the emotions underlying either the alleged breach by the defendant or the decision by the plaintiff to bring the suit." Finding that the case would not require the district court to adjust family status or to set or enforce any duties under family relations law, the court held that the case did not fall within the exception.

Not all courts take such a narrow view of the exception in tort and contract cases. In Bacon v. Bacon, a woman sought to recover from her ex-husband for intentional infliction of emotional distress during the eight years subsequent to their divorce. Unlike the court in Cole, the Bacon court felt compelled to review the emotions which gave rise to the alleged acts, and concluded that "[s]tripped of its verbiage, this is no more—and no less—than a domestic relations case." Thus, despite the fact that a suit for intentional infliction of emotional distress might be brought between strangers, the Bacon court held the domestic relations exception prohibited the exercise of jurisdiction in this case.

Courts describe in differing ways the place a domestic relations issue must occupy in a tort or contract action in order to transform the case into a domestic relations case for purposes of the exception. The Ninth Circuit describes its criterion as the "primary issue test," while the District of Columbia Circuit has

132. Id.
133. Id.
134. Id. at 1089. The court also looked to whether the claims asserted could have arisen between strangers. Id. It concluded that the duty to refrain from the alleged acts did not arise from a past or present family relation. Id. at 1088. Thus, jurisdiction was proper in federal court. Id. at 1089.
136. Id. at 1020. The court went on to state:
While it may be true, as Plaintiff's counsel has urged, that there are instances where estranged parties may properly sue each other in federal courts, this is not one. This case is not the result of separate transactions between the parties where, for example, one may default on a contract, "executed after arms length negotiations." . . . Indeed, it is this court's distinct impression that the Bacons never have been at "arms length." The language of the complaint shows this to be part of an ongoing series of disputes centering around [sic] the dissolved but still stormy relationship and the status of—and harm to—their children.

138. See Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968) (domestic
focused on the "essence" of the case.\textsuperscript{139} As might be expected, interpretations of the terms "primary" and "essence" in different contexts have led to a body of law that is lacking in predictability and logic.\textsuperscript{140}

The tests discussed above represent some of the attempts of the lower federal courts to fix boundaries on the amorphous domestic relations exception to federal jurisdiction. An examination of the case law, however, indicates that these attempts have been unsuccessful. Federal courts in one circuit accept jurisdiction in cases involving determinations of status,\textsuperscript{141} while courts in another circuit do not.\textsuperscript{142} A nonmodifiable property settlement agreement may be enforced in some federal courts,\textsuperscript{143} but not in others.\textsuperscript{144} A suit between ex-spouses based on tort theories is considered a domestic relations case in one federal court,\textsuperscript{145} while another considers the case as cognizable in federal court as any other tort action involving diverse parties.\textsuperscript{146}

The lack of agreement among lower federal courts as to the appropriate scope of the domestic relations exception represents more than differing approaches to achieving a consistent series of results. The disagreement is more basic. It reflects the inability of federal courts to define the basic contours of the exception. The result of this basic disagreement is an exception to federal jurisdiction without workable boundaries.

V. THE APPLICABILITY OF THE DOMESTIC RELATIONS EXCEPTION TO PARTICULAR TYPES OF ACTIONS

In addition to examining the general standards used by federal courts to define the scope of the exception, it is helpful to relation exception must be invoked if the primary issue of the case involves the status of husband and wife or parent and child).

\textsuperscript{139} See Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982) ("[s]uits whose essence is in, for example, tort or contract, and which do not require the federal court to exceed its competence, will be heard"). For a discussion of Bennett, see infra notes 237-40 and accompanying text.

\textsuperscript{140} Compare Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1983) (suits whose "essence" was in tort were cognizable in federal court) with Csibi v. Fustos, 670 F.2d 134 (9th Cir. 1982) (applying the "primary issue" test, but holding that "tort allegations shall not all provide a means for circumventing" the domestic relations exception).

\textsuperscript{141} See supra notes 104-09 and accompanying text.

\textsuperscript{142} See supra notes 110-14 and accompanying text.

\textsuperscript{143} See supra notes 115-27 and accompanying text.

\textsuperscript{144} See supra note 128 and accompanying text.

\textsuperscript{145} See supra notes 129-34 and accompanying text.

\textsuperscript{146} See supra notes 135-37 and accompanying text.
examine the application of the exception to particular categories of actions. The lack of uniform analysis, even with respect to the same category of action, is indicative of the unsettled state of the exception.

A. Determination of Status—Husband and Wife, Parent and Child

As previously discussed, some federal courts view actions involving a determination of familial status as falling within the domestic relations exception. For example, in *Huffman v. Nebraska Bureau of Vital Statistics*, a prisoner filed a habeas corpus petition which depended upon the ascertainment of putative spouse status with respect to a woman who had been allowed to testify against him. Invoking the exception, the district court dismissed the petition on the ground that it would require the court to determine the issue of the petitioner’s marital status. The court stated that “[t]he legal conditions and boundaries of marriage traditionally have been reserved to the states.” Similarly, federal courts generally have been unwilling to hear cases involving the establishment of a parent-child relationship.

Yet the reluctance to hear cases involving status determinations is not shared by all federal courts. In *Spindel v. Spindel*, District Judge Weinstein held that his court had jurisdiction to hear an ex-wife’s action for damages and for a declaratory judgment that a Mexican divorce obtained by her husband was invalid.

147. For a discussion of the status test, see supra notes 104-14 and accompanying text.
149. *Id.* at 156. “[Putative marriage] is usually defined as a marriage which has been solemnized when one or both parties were ignorant of an impediment which made the marriage void or voidable.” H. CLARK, supra note 18, § 2.4, at 54. Once a putative marriage has been established, the party or parties who entered into the marriage in good faith are entitled to certain benefits normally incident to marriage, such as community property rights. *Id.* In *Huffman*, the plaintiff sought a finding of putative marriage in order to claim entitlement to the traditional husband-wife testimonial privilege, to challenge the prison’s removal of his putative wife’s name from his approved mailing list, and to require the Nebraska Bureau of Vital Statistics to change the name on his son’s birth certificate to reflect the surname of the child’s father. 320 F. Supp. at 156-57. For a discussion of the husband-wife testimonial privilege, see H. CLARK, supra note 18, § 13.7, at 396-97.
150. 320 F. Supp. at 157.
151. See, e.g., Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (federal courts do not have jurisdiction over actions brought to establish paternity and to obtain child support); Albanese v. Richter, 161 F.2d 688 (3d Cir.) (domestic relation exception includes determination of putative father-illegitimate child relationship), cert. denied, 332 U.S. 782 (1947).
In his opinion, Judge Weinstein denounced the domestic relations exception, both as to its historical bases and as to its contemporary justifications under the doctrine of abstention. He concluded that a federal court was competent to decide the issues presented, even though they related to marital status. While the Second Circuit has not entirely adopted Judge Weinstein's conclusions, the Spindel opinion has become an influential force in the deliberations of many courts considering the scope and applicability of the domestic relations exception.

Spindel is not alone in holding that questions regarding familial status may be decided by federal courts. Thus, even as to this most basic of all domestic relations issues, courts cannot agree upon the scope of the domestic relations exception.

153. Id. at 806-13.

154. Id. at 806-12. Judge Weinstein found that "[t]he historical reasons relied upon to explain the federal courts' complete lack of matrimonial jurisdiction are not convincing." Id. at 806. Furthermore, "[t]here appears to be no ground for application of a generalized doctrine of abstention in matrimonial cases." Id. at 811. For a further discussion of the rejection of the historical basis of the exception, see infra note 336. For a further discussion of the doctrine of abstention, see supra note 7 and infra notes 308 & 482-84.

155. See Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir. 1973). In Phillips, the Second Circuit reviewed the seminal Supreme Court cases on the domestic relations exception, and concluded:

We have no disposition to question . . . whether the history was right or not . . . . More than a century has elapsed since the Barber dictum without any intimation of Congressional dissatisfaction. It is beyond the realm of reasonable belief that, in these days of congested dockets, Congress would wish the federal courts to seek to retain territory, even if the cessation of 1859 was unjustified. Whatever Article III may or may not permit, we thus accept the Barber dictum as a correct interpretation of the Congressional grant. 490 F.2d at 514 (citing Spindel, 283 F. Supp. at 802-03).

Although the Second Circuit found that the domestic relations exception had continued vitality, it stated that the exception has been narrowly confined. Id. at 514-15. In support of that conclusion, the court cited its previous decision in Southard v. Southard, 305 F.2d 730 (2d Cir. 1962) upholding jurisdiction in a case involving status. The question in Southard was whether a Connecticut divorce decree was invalid under the Constitution because the court granting it had failed to give full faith and credit to a previous Nevada divorce decree. Id. at 730-31.

156. See, e.g., Lloyd v. Loeffler, 694 F.2d 489, 491 (7th Cir. 1982); Jagiella v. Jagiella, 647 F.2d 561, 564 n.11 (5th Cir. 1981). The importance of the Spindel opinion as a thorough critique of the domestic relations exception is recognized by legal scholars as well as by the courts. See, e.g., Atwood, supra note 7, at 594-95.

All divorce statutes provide a mechanism for adjusting the property rights of parties upon divorce. In most states, this adjustment takes the form of a judicial division of property.\textsuperscript{158} Parties can, of course, agree to adjust their property rights through a property settlement agreement, which the court may then incorporate into its final decree.\textsuperscript{159}

There is little dispute that federal courts will not hear suits requesting an initial division of property.\textsuperscript{160} After the divorce, however, disputes may arise between the parties as to the validity, fairness, or enforcement of the property division. One or both of the parties may have left the state that granted the divorce, and thus an ex-spouse may bring a diversity suit in federal court to correct perceived grievances. Federal courts must, therefore, determine whether such cases are domestic relations cases for purposes of the exception.

If the property division was effected by a property settlement agreement, federal courts are more likely to find the domestic relations exception inapplicable. For example, in \textit{Turpin v. Turpin},\textsuperscript{161} a woman brought a diversity suit against her ex-husband alleging that he had breached a property settlement agreement. The district court held the action was not primarily a marital dispute, but rather involved allegations based in tort and contract, neither of which appeared to have arisen out of the parties' marital relationship.\textsuperscript{162} Therefore, the court found that jurisdiction was proper. Several other cases have also either held, discussed, or implied that disputes regarding existing property settlement decrees can be heard by federal courts.\textsuperscript{163} Most of these decisions emphasize the similarity between these actions and ordinary

\textsuperscript{158} For a summary of the types of statutes adopted by states for the division of property at divorce, see Freed & Foster, \textit{supra} note 11, at 376-81.
\textsuperscript{159} \textit{See generally} H. Clark, \textit{supra} note 18, § 16.10.
\textsuperscript{160} For a discussion of the uniform application of the domestic relations exception to cases involving the initial division of property, see \textit{supra} notes 102-03 and accompanying text.
\textsuperscript{162} \textit{Id.} at 14.
\textsuperscript{163} \textit{See, e.g.}, Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978) (separation agreement involves "little more than a private contract to pay money"); Block v. Block, 196 F.2d 930 (7th Cir. 1952) (dicta that federal jurisdiction would extend to an attack on a property settlement agreement if plaintiff alleged fraud); Schoonover v. Schoonover, 172 F.2d 526 (10th Cir. 1949) (dispute over validity of separation agreement without mention of a possible domestic relations exception); Cohen v. Randall, 137 F.2d 441 (2d Cir.) (same), \textit{cert. denied}, 320 U.S. 796 (1943).
civil actions to enforce or overturn a contract and conclude that since federal courts often hear cases involving contracts, property settlement disputes are also within their competence and expertise.\(^6\) The fact that the property settlement contract dispute involves former spouses is not seen as sufficient to bring these cases within the domestic relations exception.

As with most matters involving the domestic relations exception, not all courts agree with the foregoing characterization of property settlement disputes. Some courts focus on the interrelationship between the property division dispute and other disputes which fall more clearly within the exception. For example, in *Thrower v. Cox*,\(^1\) a former wife brought a diversity action attacking the validity of a property settlement she had signed. She claimed that at the time she entered the agreement she was mentally incompetent, under emotional duress, without assistance of counsel and ignorant as to the extent of the property involved. She asked that the agreement be declared null and void, that the court require an accounting and a redivision of the property and that the court award damages and other relief. After initial discovery, plaintiff sought to amend her complaint to add allegations of adultery and a request for alimony. In discussing whether it had jurisdiction to hear the case, the court conceded that “\[i\]t has quite uniformly been held . . . that liquidated obligations arising from domestic relations suits, such as accrued alimony or property settlements, may be enforced in the district courts if diversity of citizenship and the jurisdictional amount exists.”\(^6\) The court went on to find, however, that since the former wife had joined her request for a review of the property division with a request for alimony, the general rule was inapplicable. The court refused to accept plaintiff’s argument that her request for alimony should be granted as relief incident to the contract action. Without indicating how it arrived at its evaluation, the court stated that “the greater portion of the case would be occupied by the issues of adultery and recrimination, which can hardly be characterized as contractual causes of action.”\(^7\) The court concluded that “the nature of the issues presented and relief sought is so completely permeated by domestic relations law that it can only be rationally

164. See, e.g., *Crouch*, 566 F.2d at 488 (no special competence of state courts in this area); *Block*, 196 F.2d at 933 (no difference between this dispute and those involving other types of settlement agreements).
166. *Id.* at 573.
167. *Id.* at 574.
and logically characterized as an action arising from that field."\textsuperscript{168} The court dismissed the action, making no attempt to sever and address those claims for relief over which it did have jurisdiction.\textsuperscript{169} Instead, the court found that the alimony request tainted the property division issue, so as to disqualify the entire case.

\textit{Allen v. Allen}\textsuperscript{170} presents another example of the effect that tangential familial disputes between the parties have upon the decision of a federal court to hear a property division case. In \textit{Allen}, a husband filed an action against his wife in state court alleging his wife had breached a postnuptial property settlement separation agreement by refusing to pay certain sums as provided in the agreement. The wife removed the case to federal court on the basis of diversity, and filed a counterclaim. The allegations of the counterclaim formed the basis of a separate diversity action filed by the wife.\textsuperscript{171} The husband moved to remand the actions to state court on the basis of the domestic relations exception. In its review of the record, the district court listed seven pending state court actions between the parties. Although none of the state suits involved the exact issue raised in the removed actions,\textsuperscript{172} the federal court stated that the contract and fraud theories of the complaint "must be interpreted against the background of extreme acrimony emanating from the parties' marital dispute."\textsuperscript{173} The court pointed to the "overlapping factual and legal matrices"\textsuperscript{174} of the state and federal actions, "the dominant theme of which is a dispute over the ownership of marital property."\textsuperscript{175}

\textsuperscript{168} Id.

\textsuperscript{169} In other contexts, federal courts faced with multiple theories for relief have dismissed claims over which they did not have jurisdiction while retaining jurisdiction over appropriate severable claims. See, e.g., Phillips v. Carborundum Co., 361 F. Supp. 1016 (W.D.N.Y. 1973) (dismissing claim arising under state equal pay provision but retaining claim arising under similar federal provision); Rakes v. Coleman, 318 F. Supp. 181 (E.D. Va. 1970) (permitting declaratory relief claims but dismissing claims for injunctive relief).


\textsuperscript{171} Id. at 1235. In the counterclaim, the wife sought an injunction prohibiting her husband from recording a deed to a piece of property in Pennsylvania, a declaration that the property settlement was void, and the return of property which she claimed her husband had confiscated from her. \textit{Id.} at 1235.

\textsuperscript{172} Id. at 1236. The court did note, however, that the property settlement agreement at issue in the federal court proceeding was also relevant to some of the state court actions. \textit{Id.} at 1237. As an example, the court noted that the agreement provided for the transfer of property that was also involved in an equitable distribution action in state court. \textit{Id.} at 1237 n.6.

\textsuperscript{173} Id. at 1237.

\textsuperscript{174} Id.

\textsuperscript{175} Id.
The court accused the parties of trying to play one court system off against another and remanded the suits. Thus, Allen suggests that federal courts may refuse to hear a property settlement dispute not only where that dispute is combined in the same action with a dispute falling more clearly within the domestic relations exception, but also where related disputes falling within the exception are pending in state court.

C. Alimony and Child Support

When a family unit is dissolved through divorce, the law provides a mechanism for the continued support of those family members in need of support by those family members with the resources to provide it. Where the support is to be provided to an ex-spouse, that support is designated as alimony or maintenance. Support for children is designated child support. There appears to be little dispute that, whatever the scope of the domestic relations exception, it is broad enough to encompass original requests for alimony and child support. Beyond that, little else is certain.

Those courts that broadly construe the exception view an action to enforce an alimony award as so inextricably related to the domestic relations nature of the case as to bring the enforcement action within the exception. According to these courts, "[t]he mere obtaining of a divorce decree, without more, does not remove the case from the arena of domestic relations and permit the intervention of federal courts to adjudicate issues unaffected by the decree." They argue that an enforcement action raises questions which are best left to state courts.

176. See generally H. Clark, supra note 18, § 14.
177. Although they are synonymous, some statutes use the term "maintenance" instead of "alimony." See, e.g., Ind. Code § 31-1-11.5-9(c) (1984).
178. See generally H. Clark, supra note 18, § 15.
179. For a discussion of the scope of the domestic relations exception in cases involving original requests for alimony and child support, see supra notes 102-03 and accompanying text.
180. See, e.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981) (dismissal of ex-wife's action for declaratory and injunctive relief with respect to husband's failure to meet obligations under divorce decree); Walker v. Walker, 509 F. Supp. 853, 854 (E.D. Va. 1981) (dismissal of suit to enforce obligations under divorce decree on principle that federal courts should "keep our federal hands off actions which verge on the matrimonial") (quoting Kamhi v. Cohen, 512 F.2d 1051, 1056 (2d Cir. 1975)).
Other federal courts, however, take a narrower view of the exception in this situation. In *Zimmermann v. Zimmermann,*\(^ {183}\) the district court denied the defendant's motion to dismiss an action brought by his ex-wife to enforce defendant's child support and alimony obligations under the divorce decree. The court viewed the suit as essentially a contract action: "What is presented is simply a dispute between two persons, who for over nine years have been divorced and living apart and between whom there have been no domestic relations, as to whether there has been compliance with two contracts existing between them."\(^ {184}\)

One characteristic of both alimony and child support cases which often influences the domestic relations exception analysis is the modifiability of these awards.\(^ {185}\) To the extent that enforcement is sought for a sum which is modifiable according to the applicable domestic relations law,\(^ {186}\) or to the extent that actual modification is sought, many federal courts will refuse to hear alimony and child support cases on the grounds that hearing them would involve federal courts too directly in domestic relations issues.\(^ {187}\) All that can be obtained in these courts is partial relief.\(^ {188}\) Neither modification nor an injunction ordering future compliance will be adjudicated.

\(^{183}\) See, e.g., *Jagiella v. Jagiella,* 647 F.2d 561 (5th Cir. 1981) (competence of state courts to settle family disputes militates in favor of federal court's refusal to exercise jurisdiction over ex-husband's request for modification of divorce decree); *Morris v. Morris,* 273 F.2d 678 (7th Cir. 1960) (federal courts have no power to enforce divorce decree if past due support payments are subject to modification or annulment under state law); *McGovern v. Blaha,* 496 F. Supp. 964 (W.D.N.Y. 1980) (award of child support which was subject to modification under state law was not a final judgment for purposes of enforcement in federal court).

\(^{184}\) See, e.g., *Jagiella v. Jagiella,* 647 F.2d 561 (5th Cir. 1981) (district court properly exercised jurisdiction over ex-wife's claim for arrearages under an "enforceable" divorce decree and refused jurisdiction over ex-husband's request for modification of decree).
The Fourth Circuit, however, has noted the problems arising from the reluctance of federal courts to order prospective compliance with support awards. In *Harrison v. Harrison*, the court ruled that a federal district court had the power both to issue a judgment as to past due alimony and child support and to issue an injunction ordering compliance with the judgment in the future. Were the plaintiff restricted to a judgment at law for past due alimony, the court noted, she would be compelled “to sue on each alimony payment as it became due, (certainly a severe hardship).” In addition, such a cumbersome procedure might afford the defendant “too easy an opportunity to evade executions issued on such judgments.” The court characterized the position that it had adopted as one “grounded in reason and flavored with common sense.”

Therefore, depending upon both the inclination of the federal court and the specific features of the statutory scheme regulating modification of support awards, federal courts reaching differing conclusions as to whether the domestic relations exception applies to disputes regarding alimony and child support awards.

**D. Nonmarital Cohabitation**

The absence of a concrete definition of the term “domestic relations” for purposes of the exception presents special problems with disputes arising from nonmarital cohabitation arrangements. During the past decade the increase in nonmarital cohabitation has been accompanied by an increase in the

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190. Id. at 574.
191. Id. at 573.
192. Id.
193. Id. at 574. In a later case, the Fourth Circuit made it clear that federal courts within the circuit did not have discretion with respect to whether to enforce an alimony award as to future payments. See *Keating v. Keating*, 542 F.2d 910 (4th Cir. 1976). Rather, the court stated, “[u]nder *Harrison*, the plaintiff is entitled to the full breadth of relief afforded by the Ohio decree . . . .” Id. at 912 (emphasis added).
194. In the ten-year period between 1970 and 1980, the number of unrelated, unmarried couples (defined as two adults of the opposite sex) living together rose from 523,000 to 1,560,000, an increase of approximately 200%. *Bureau of the Census, U.S. Dep’t of Commerce, Marital Status and Living Arrangements: March 1980*, a5 4-5 (Current Population Reports, Population Characteristics Series P-20, No. 365, (1981)). These statistics may include living arrangements outside the scope of the term “nonmarital cohabitation” as it is currently used in the field of family law. The 1980 statistics indicate that only one percent of unmarried-couple households had a person 65 years or older
number of lawsuits brought by aggrieved parties at the termination of those relationships.\textsuperscript{195} The most publicized of those cases, \textit{Marvin v. Marvin},\textsuperscript{196} has been cited widely by litigants for its delineation of the various remedies relating to property and support rights available upon the termination of a nonmarital cohabitation relationship. Given our increasingly mobile population,\textsuperscript{197} it is quite probable that diversity of citizenship may exist in many of these cases. The question then becomes whether the federal courts will entertain such suits, or whether these cases fall within the domestic relations exception to federal jurisdiction.

Federal courts have reached divergent conclusions as to their power to hear cohabitation claims. For instance, \textit{Korby v. Erickson}\textsuperscript{198} involved a claim that the parties had orally agreed to equally divide their property upon separation. Reviewing the defendant's jurisdictional challenge, the court found that the scope of the exception was restricted to cases involving a "true marital relationship and . . . the incidental rights that flow therefrom . . . ."\textsuperscript{199} The court characterized the issues presented by the contract claims as "of a common garden variety that not only do not require the special competence of the state courts, but are routinely determined by the federal courts in diversity actions."\textsuperscript{200} Thus, the federal court saw no reason to decline jurisdiction.

sharing living quarters with an unrelated person under 35 who was of the opposite sex. Sixty-three percent of all unmarried couples comprised two adults under the age of 35. \textit{Id.} at 4.


\textsuperscript{196} 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). In \textit{Marvin}, Michelle Marvin brought an action against actor Lee Marvin, with whom she had lived for six years. Michelle alleged that she and Marvin entered into an oral agreement which provided that during the time they lived together they would combine their earnings and efforts and share equally all property accumulated, and that Marvin would provide for her financial support for the rest of her life. Michelle sought a declaration of her property and contract rights under the alleged oral agreement. \textit{Id.} at 666-67, 557 P.2d. at 110-11, 134 Cal. Rptr. at 819-20.

\textsuperscript{197} For a discussion of the significance of the mobility of the modern American population, see \textit{infra} notes 282-83 and accompanying text.

\textsuperscript{198} 550 F. Supp. 136 (S.D.N.Y. 1982).

\textsuperscript{199} \textit{Id.} at 138. The \textit{Erickson} court found that "[t]he fact that as an incident of the alleged agreement to combine their skills, earnings and investments the parties also agreed to live together and did live together as husband and wife did not create a matrimonial status so as to come within the exception." \textit{Id.}

\textsuperscript{200} \textit{Id.} (citing Crouch \textit{v. Crouch}, 566 F.2d 486, 487 (5th Cir. 1978); Graning \textit{v. Graning}, 411 F. Supp. 1028, 1029 (S.D.N.Y. 1976)).
The United States District Court for the District of New Jersey reached a conclusion different from the court in Korby when faced with a similar question. In Anastasi v. Anastasi, a woman brought an action against the man with whom she had cohabited, claiming breach of an agreement “to provide plaintiff with all her financial support and needs for the rest of her life.” Ruling on defendant’s motion to dismiss, the court originally held the domestic relations exception inapplicable. Although New Jersey law at that time allowed recovery for contracts made by nonmarital cohabitants, the court found that state law “had not given special significance to the phenomenon of unmarried couples.” The district court reconsidered its ruling, however, after the New Jersey Supreme Court handed down a decision which the district court perceived as indicating a new recognition of a significant state interest in nonmarital cohabitation arrangements. That case, Crowe v. De Gioia, held that temporary support payments could be awarded to a litigant in a lawsuit involving the termination of a nonmarital cohabitation relationship. De Gioia led the district court to reverse its earlier decision in Anastasi regarding federal subject matter jurisdiction, and to hold that the domestic relations exception barred jurisdiction. The case was remanded to state court.

The test employed to determine the applicability of the domestic relations exception and the results reached in the second Anastasi decision are problematic. The test focused on two inquiries. First, does the state exhibit a significant interest in the rela-

202. Id. at 866.
204. Id. at 724. The court stated that “[t]he most that can be said is that the state recognizes and accepts the existence of such a status and will enforce any financial arrangements to which the parties have agreed.” Id. In addition to cohabitation arrangements, the court also noted that while some of the matters that it would be forced to consider would be similar to matters arising in a support action, the court’s basic role was analogous to the traditional role of a court in awarding damages in contract action. Id. The court reached this conclusion in spite of the fact that it also recognized that its contract-based determinations might involve matters relevant to an alimony or child support action. See id. at 724-25.
206. The court in De Gioia emphasized that it was not awarding alimony, which could only be awarded in matrimonial actions. The court limited its holding to approving the temporary relief that had been granted by the trial court as a proper application of traditional equitable principles to prevent irreparable harm pending adjudication of a lawsuit. Id. at 132-35, 447 A.2d at 176-77.
tionship at issue akin to the state’s interest in marriage? Second, are the inquiries that the court will be forced to make similar to the types of inquiries that traditionally have called for application of the domestic relations exception? The initial problem with applying this test is having to determine what constitutes a significant state interest in the nonmarital relationship. The first Anastasi decision did not consider the recognition of contractual rights between nonmarital cohabitants by New Jersey courts as evidence of a significant state interest in the relationship, despite the fact that some jurisdictions have refused to recognize such rights on public policy grounds. Moreover, the decision of the New Jersey Supreme Court in De Gioia was interpreted by the district court as evidence of a state interest in nonmarital cohabitation sufficient to bring into play the domestic relations exception; it did this even though the New Jersey Supreme Court explained its decision, not in terms of protection of the nonmarital relationship, but rather as a general exercise of the equitable power of courts to grant preliminary relief to preserve the status quo pending a lawsuit. The district court’s interpretation of De Gioia illustrates the difficulty inherent in defining “a significant state interest in nonmarital relationships.” For example, would state recognition of remedies for nonmarital cohabitants such as contracts implied in law, constructive trusts, or resulting

208. See id. at 867-88.

209. See, e.g., Rehak v. Mathis, 239 Ga. 541, 238 S.E.2d 81 (1977) (cohabitation is “immoral consideration” and precludes cohabitant from relief based on contract); Roach v. Button, 6 Fam. L. Rep. (BNA) 2355 (Hamilton Cty. Ct. Tenn. Feb. 29, 1980) (plaintiff is without a right to equitable relief because live-in relationship was “immoral”).

210. Crowe v. De Gioia, 90 N.J. 126, 135-36, 447 A.2d 173, 176-77 (1982). The narrowness of the De Gioia holding is further exemplified by its affirmance of the lower court’s denial of other relief on the ground that statutory authorization for the additional relief applied only to matrimonial, not cohabitational, actions. Id. at 136, 447 A.2d at 178.

211. If one party has been unjustly enriched at the expense of another, the law may find an implied contract, often described as a “quasi-contract,” to rectify the perceived injustice. See J. Calamari & J. Perillo, Contracts § 1-12 (2d ed. 1977); Restatement of Restitution § 1 (1937). Cases granting this remedy in nonmarital cohabitation situations include: Sanguinetti v. Sanguinetti, 9 Cal. 2d 95, 69 P.2d 845 (1937); Edgar v. Wagner, 572 P.2d 405 (Utah 1977); Doyle v. Giddley, 3 Fam. L. Rep. (BNA) 2730 (Dane Cty. Ct. Wis., Sept. 8, 1977).

212. An equitable counterpart to the quasi-contractual remedy is the constructive trust. This occurs where one holds property under circumstances in which he or she would be unjustly enriched if permitted to retain it. The court can then impose a constructive trust upon the property whereby the party unjustly enriched is deemed to be holding the property in trust for another. See G.C. Bogert & G.T. Bogert, Handbook of the Law of Trusts § 77 (5th ed. 1973); Restatement of Restitution § 160 (1937). For an example of the use
trusts\textsuperscript{213} also signify such a state interest?

Focusing on this elusive state interest in nonmarital relationships has the additional drawback of predicking access to federal courts upon the law of the state to be used in adjudicating the nonmarital dispute.\textsuperscript{214} Such a scheme is neither desirable nor consonant with the principle that federal courts should be equally available to all citizens meeting federally created jurisdictional standards.

Problems also exist in employing a test that examines the nature of the inquiries that a court must make to determine whether the case falls within the domestic relations exception. In the first \textit{Anastasi} opinion, the district court recognized that some of the inquiries it would be called upon to make were similar to those that would be considered in a support action.\textsuperscript{215} The court nevertheless analogized the issues to those found in contract actions, with which federal courts were familiar. In the second \textit{Anastasi} decision, the court changed its decision, not by reevaluating the issues presented by the litigants, but rather by examining the issues presented by \textit{De Gioia}.\textsuperscript{216} It did this even though the plaintiff in \textit{Anastasi} had not requested the preliminary relief sought in \textit{De Gioia}.

of this remedy in a case involving nonmarital cohabitation, see Omer v. Omer, 11 Wash Ct. App. 386, 523 P.2d 957 (1974).

\textsuperscript{213} A resulting trust may be decreed when a court finds that one party purchased property with consideration furnished entirely or in part by another party, and that the circumstances surrounding the purchase demonstrate that the title holder intended to hold the property or an interest in the property in trust for the person providing the consideration. G.G. BOGERT & G.T. BOGERT, \textit{supra} note 212, § 74. For cases utilizing this remedy in situations involving nonmarital cohabitation, see Albae v. Hardin, 249 Ala. 201, 30 So.2d 459 (1947); Padilla v. Padilla, 38 Cal. App. 2d 319, 100 P.2d 1093 (1940).

\textsuperscript{214} The extent to which states recognize nonmarital cohabitation varies widely from state to state. Compare Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976) (agreements between nonmarried cohabitants fail only to the extent that they rest upon an explicit consideration of meretricious sexual services) and Tyranski v. Piggins, 44 Mich. App. 570, 205 N.W. 2d 595 (1973) (illicit cohabitation does not render unenforceable all agreements between the parties) with Hewitt v. Hewitt, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979) (public policy disfavors grant of mutually enforceable property rights to unmarried cohabitants).

\textsuperscript{215} For a discussion of the first \textit{Anastasi} decision, see \textit{supra} notes 201-04 and accompanying text.

\textsuperscript{216} \textit{Anastasi}, 544 F. Supp. at 868. The \textit{Anastasi} court noted that to arrive at a temporary support award in the \textit{De Gioia} case, a court would necessarily inquire into the minimal needs of the plaintiff, including such matters as medical, dental, and pharmaceutical needs. The court considered these as "the kinds of inquiries and judgments which the state courts are best equipped to handle . . . [and which] may not be made by federal courts." \textit{Id.} The validity of this conclusion is questionable since it is unclear the extent to which these issues are any different from the types of inquiries federal courts routinely undertake in diversity actions
It is questionable whether an approach that does not focus upon the actual issues a federal court would be called upon to resolve is appropriate. In addition, it is doubtful that one can get a uniform and meaningful answer to the question of what types of issues call the exception into play.

This disagreement among courts as to the applicability of the domestic relations exception to disputes involving nonmarital cohabitation further emphasizes the unworkable nature of the exception. The field of domestic relations law is rapidly changing to accommodate new lifestyles. Many of these changes are reflected in new types of lawsuits. And because of our society's increased mobility, some of these suits may be filed in federal courts based on diversity of citizenship. The federal courts have no consistent guidelines for evaluating which cases are within the exception and which are not. The conflicting conclusions just described evidence the unsettled state of the exception.

E. Child Custody

When a marriage is dissolved and the couple has minor children, the court generally makes an award of child custody to one of the parents, although other types of awards are possible. If dearth of reported cases is any indication, few litigants attempt to bring original requests for custody before the federal court. As involving personal injury claims, where medical, dental or pharmaceutical needs are in question.

217. See e.g., Marvin, 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831 (“The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.”). For a discussion of the increasing number of nonmarried cohabitants, see supra note 194 and accompanying text.

218. See generally H. CLARK, supra note 18, § 17. There is a growing trend to encourage joint custody awards, rather than the traditional custody awards under which one of the divorcing parents is awarded sole custody of the child. See generally Folberg & Graham, Joint Custody of Children Following Divorce, 12 U.C.D. L. REV. 523 (1979); Mills & Belzer, Joint Custody As A Parenting Alternative, 9 PEPPERDINE L. REV. 853 (1982); Trombetta, Joint Custody: Recent Research and Overloaded Courtrooms Inspire New Solutions to Custody Disputes, 19 J. FAM. L. 213 (1981). If neither parent is a fit custodian, custody may be awarded to a third party. See generally H. CLARK, supra note 18, § 17.5.

219. Requests for an original custody decision, as well as for alimony, child support and property division are generally made in the divorce petition. See id. § 17.3. Diversity is unlikely to exist at this stage if the family relationship has only recently disintegrated. Another possible reason for the scarcity of custody adjudications in federal courts may be that the decision is seen as so clearly a domestic relations issue as to be within the scope of the exception, however narrowly defined.
with alimony disputes, most of the litigation raising the issue of the applicability of the domestic relations exception to disputes regarding child custody involves suits to enforce child custody awards. In these cases, federal courts tend to construe broadly the term "domestic relations" for purposes of the exception.

In Cherry v. Cherry,220 a mother and her parents brought a diversity action alleging that the custodial parent, the father, had breached the terms of a separation agreement which provided visitation rights for the mother.221 The district court held that it had no jurisdiction over the controversy on the ground that the domestic relations exception prohibits "federal jurisdiction in domestic relations cases in general, and child custody cases in particular."222 The court made no attempt to analyze any potential distinctions between cases involving original child custody awards and suits involving breach of existing custody awards. Since the suit "involved" child custody, the dispute fell within the exception. A similar position was taken by the Second Circuit in Hernstadt v. Hernstadt.223 A father had brought a declaratory judgment action in federal district court seeking construction of the custody and visitation provisions of a Connecticut divorce decree. In support of the district court's dismissal of the action, the Second Circuit stated that "federal courts do not adjudicate cases involving the custody of minors and, a fortiori, rights of visitation."224 The decision suggests that the mere fact that the agreement related to child custody was sufficient to invoke the domestic relations exception.225

221. Id. It is usual for the court to grant the noncustodial parent periodic visitation at the time it awards custody rights. See H. CLARK, supra note 18, § 17.4, at 590.
222. 438 F. Supp. at 89.
223. 373 F.2d 316 (2d Cir. 1967).
224. Id. at 317.
225. Id. The plaintiff attempted to avoid the impact of the domestic relations exception by arguing that the assertion of a full faith and credit claim raised a constitutional question which rendered the exception inapplicable. Id. at 317-18 (citing Southard v. Southard, 305 F.2d 730 (2d Cir. 1962)). The court rejected this argument on several grounds. First, the court characterized the plaintiff's assertion of a federal question as "frivolous." Id. at 318. The court explained that since the custody decree was modifiable under Connecticut law, the demands of full faith and credit could be satisfied whether or not the terms of the original decree were obeyed. Second, the court held that Southard could not be applied "where the District Court could become enmeshed in factual disputes." Id. The court reasoned that since the custody and visitation decree was modifiable, any enforcement action would necessarily include a reexamination of the decree in light of any changed circumstances, a task barred by the domestic relations exception. Third, the court noted that even if the domestic rela-
In recent years, however, "child-snatching" tort actions have been increasingly recognized by states as appropriate remedies for the unauthorized taking of children from their proper custodians. These suits serve both compensatory and deterrent functions by making the improper seizure and retention of children very costly not only to the person actually seizing the children, but also to those assisting the snatcher. As the number of such suits has grown, federal courts have had to face the question of the applicability of the domestic relations exception to these actions. In general, federal courts have been receptive to hearing these suits sounding in tort, notwithstanding their refusal to hear suits couched in terms of enforcing a custody award. In fact, some federal courts have entertained child-snatching tort actions without even discussing the exception.

In Wasserman v. Wasserman, the Fourth Circuit did address the question of the applicability of the domestic relations exception to child-snatching torts, and concluded that the exception was inapplicable. In Wasserman, a mother brought an action against her former husband and others to recover for child enticement and intentional infliction of emotional distress for the alleged removal of the couple's children from the mother's custody.

Id. 226. See, e.g., Lloyd v. Loeffler, 694 F.2d 489, 495-96 (7th Cir. 1982) (Wisconsin recognizes tort of wrongful interference with child custody); Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.) (ex-wife's allegations of child enticement and intentional infliction of emotional distress as "generally cognizable common law torts"), cert. denied, 459 U.S. 1014 (1982); Fenslage v. Dawkins, 629 F.2d 1107, 1109 (5th Cir. 1980) (Texas Supreme Court would recognize child-snatching tort).

227. Child-snatching tort suits have been allowed against third parties, as well as against the non-custodial parent. See, e.g., Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980) (suit against child's father and his relatives); Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978) (suit against infant's father and father's stepfather and brother); McEvoy v. Helikson, 277 Or. 781, 562 P.2d 540 (1977) (suit against attorney whose alleged negligence and malpractice facilitated child-snatching); Cramlet v. Donohue, No. 80-C-1737 (removed to D. Colo. May 13, 1983) (suit against television personality Phil Donahue, two broadcasting corporations and certain employees of those corporations for failure to disclose information regarding father who had taken child illegally from custodian parent).

228. See, e.g., Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980); Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978). The failure to discuss the exception may be based either on unfamiliarity with the exception or on an assumption by both the court and the parties that because the action is framed in terms of tort theories rather than as a direct enforcement action, the exception is inapplicable.

The district court dismissed the action on the basis of the domestic relations exception. On appeal, the Fourth Circuit reversed. In holding the exception inapplicable, the court first considered whether the causes of action in the complaint were dependent on either a present or prior family relationship. The court found that they were not, and that the complaint alleged "generally cognizable common law torts." In the second part of its analysis, the court reviewed the nature of the issues that would arise in adjudicating the dispute. It concluded that no rule "particularly marital" in nature would be involved in resolving the case, particularly because the plaintiff was not "seeking a determination of entitlement to custody or any other adjustment of family status." Absent such a request, the court concluded that the types of inquiry involved in the case were within the jurisdiction of the federal courts. Other federal courts have reached similar conclusions.

Not all federal courts, however, agree with the Wasserman analysis. In Gargallo v. Gargallo, a father brought an action alleging that his former wife had illegally removed their children from the state of Ohio. He sought $50,000 in compensatory and punitive damages and a restraining order prohibiting the defendant from removing the children from the country. Upon its own motion, the district court dismissed for lack of subject matter jurisdiction. On appeal, the Sixth Circuit affirmed the dismissal with the sole explanation that "[t]his is essentially a child custody case," falling within the domestic relations exception. The Gargallo court made no attempt to distinguish the case from origi-
nal requests for child custody.\textsuperscript{236}

In at least two recent child-snatching tort cases, federal courts addressed their inquiry to particular requests for relief, rather than to the entire dispute. In \textit{Bennett v. Bennett},\textsuperscript{237} the District of Columbia Circuit held that a district court had jurisdiction to hear a request for damages in a child-snatching tort suit, but that federal courts did not have jurisdiction to issue an injunction ordering compliance with an existing custody order.\textsuperscript{238} Jurisdiction to hear the request for damages was proper because the federal court was "entirely competent . . . to determine traditional tort issues."\textsuperscript{239} Lack of jurisdiction to grant the injunction was based on the discretionary nature of a decision to grant equitable relief.\textsuperscript{240}

The Seventh Circuit took the reasoning of \textit{Bennett} a step further in \textit{Lloyd v. Loeffler}.\textsuperscript{241} In \textit{Loeffler}, the court concluded that federal district courts had jurisdiction to entertain a child-snatching tort suit and to award the plaintiff both compensatory and punitive damages.\textsuperscript{242} In dicta, however, the court questioned whether the district court had jurisdiction to award, as it did, prospective punitive damages of $2000 per month for each month following

\textsuperscript{236} \textit{Id.} Similarly, a New York district court refused to hear an action brought by a woman against her ex-husband and his mother for false imprisonment of the couple's two minor daughters. \textit{See} Kilduff v. Kilduff, 473 F. Supp. 873 (S.D.N.Y. 1979). In reaching its conclusion the court looked beyond the designated causes of action: "It is painfully apparent from a reading of the complaint that the dispute between the parties, no matter how labeled, is essentially one arising with respect to the provisions of a property and custody agreement, visitation rights and other incidents of a matrimonial dispute." \textit{Id.} at 874. Having thus characterized the action, the court concluded that the case came clearly within the domestic relations exception and dismissal was therefore in order. \textit{Id.} Although acknowledging that other courts had declined to apply the domestic relations exception in cases sounding in tort, the court concluded that a federal court could decline jurisdiction where "the tortious conduct is part of an ongoing series of disputes centering around [sic] the marital relationship." \textit{Id.} (quoting 13 C. \textsc{Wright} \& \textsc{Miller}, \textit{supra} note 101, § 3609, at 667).

\textsuperscript{237} 682 F.2d 1039 (D.C. Cir. 1982).

\textsuperscript{238} \textit{See id.} at 1042-44.

\textsuperscript{239} \textit{Id.} at 1042.

\textsuperscript{240} \textit{Id.} at 1042-44. A court considering the granting of an injunction can inquire into the interests of third parties, in this case the children. \textit{See} \textsc{Restatement} (Second) of \textsc{Torts} § 942 (1979). Such an inquiry, the court concluded, was "within the peculiar province, experience, and competence of the state courts. For a federal court to try its hand at the task, even during the course of a tort suit, would—in the absence of an overriding federal interest—seriously compromise the principles underlying the domestic relations exception." 682 F.2d at 1043 (footnotes omitted).

\textsuperscript{241} 694 F.2d 489 (7th Cir. 1982).

\textsuperscript{242} \textit{Id.} at 491-93. The district court had awarded compensatory and punitive damage payments of $70,000 and $25,000, respectively. \textit{Id.} at 491.
the judgment until the child was restored to plaintiff's lawful custody. The court analogized the variable punitive damage award to the granting of an injunction:

[T]he variable award is also the practical equivalent of an injunction ordering the McMahans to return Carol. It is as if the district court had issued an injunction, the McMahans had disobeyed it, and the court had then found them in civil contempt of its decree and ordered them to pay the plaintiff $2,000 a month until they complied. Of course there was no injunction and no finding of contempt and perhaps that is reason enough to doubt the propriety of the relief. But in any event it would seem that, before entering the kind of judgment it did, the district court should have considered whether it had the power to enjoin the McMahans directly.

While the Loeffler court cited Bennett for the proposition that an injunction in a child-snatching tort suit is within the domestic relations exception, a close examination of the opinions in Bennett and Loeffler reveals two quite dissimilar sets of concerns. Bennett found that issuing an injunction to comply with an existing child custody award was within the domestic relations exception because the district court would have to inquire into the effects of the injunction upon the children. The court stated that this inquiry was similar to a child custody determination, which was "within the peculiar province, experience, and competence of the state courts."

In contrast, the Loeffler court spoke not of the competence of federal courts to grant a variable punitive damage award or an injunction, but rather of the coercive effect a variable punitive damage award would have on those who had physical, as opposed to legal custody of the child. The court feared that the mounting damage award would pressure the defendants to surrender the child to the parent with rightful custody. To apply such indirect pressure, the court noted, was "implicitly to answer the ques-

243. Id. at 493-94. Since no party to the appeal actually challenged the portion of the decree which awarded the variable punitive damage award, the court expressed reservations about vacating that part of the award. Id. at 494. Nevertheless, the court felt it was necessary to question the district court's subject matter jurisdiction to grant the prospective award because of the analogy to an injunction. Id.

244. Id.

245. Bennett, 682 F.2d at 1043.

246. Loeffler, 694 F.2d at 494.
tion [of] who should have custody of [the child] today."247 Yet the court did not address the potential coercive effects of a compensatory damage award of $70,000 and a punitive damage award of $25,000 for the past wrongful conduct of the defendants. Given the court's clear indication that the plaintiff could sue again as additional damages accrued,248 the existence of the award of $95,000 would most likely also have a coercive effect on the wrongdoers.249 To the extent that the Loeffler court refused to take any injunctive action which might affect the actual custody of the child, its analysis is flawed by its failure to give adequate weight to the coercive impact of a $95,000 damage award for past wrongful conduct.

The bifurcated approach to jurisdiction in the Bennett and Loeffler decisions is unsatisfactory in a number of respects and is further evidence of the need to reexamine the continued viability of the domestic relations exception to federal jurisdiction. First, bifurcation poses obvious practical problems to litigants seeking to obtain speedy effective redress. Further, on a policy level, the refusal of federal courts to order compliance with state court custody decrees, or to grant otherwise proper awards of damages because such awards may coerce compliance with state court custody decrees, runs counter to two of the articulated reasons for the exception—the special state interest in domestic relations matters250 and state court expertise in these matters.251 These interests would be furthered if federal courts would cooperate in enforcing state court custody decrees instead of refusing to take direct enforcement action. The fact that a state court might consider changed circumstances or the effect on third persons when asked to enforce previously granted custody decrees does not mean that federal courts should be precluded from enforcing existing decrees. Federal courts could enforce existing decrees eas-

247. Id.
248. Id.
249. Id. The court in Loeffler was aware that "so long as Kenneth is free to bring fresh suits against the Loefflers and the McMahan for damages incurred by him after the date of the judgment below, the same financial pressure will be brought to bear on the McMahan to return the child regardless of what is best for her." Id. The court found the pressure deriving from the contingency of a future suit to be of the same kind, but of a lesser degree, than the pressure deriving from the escalating punitive damages award in the district court's decree. Id.

250. For a discussion of the state's special interest in domestic relations matters, see infra notes 271-87 and accompanying text.

251. For a discussion of state expertise in domestic relations matters, see infra notes 288-309 and accompanying text.
ily, while leaving any modification or reexamination of existing circumstances to state courts. By this approach, no disrespect would be cast on state court decrees.

Alternatively, the federal court could undertake to review only those circumstances pertinent to the request for the issuing of an injunction. This could be done with a clear understanding that the court would not be reviewing the original decree, but rather undertaking a much more circumscribed inquiry as to the propriety of an injunction under the present circumstances. Such a limited review would not infringe significantly on state interests or expertise. If the federal court decided to issue the injunction, the result would be to assist a state in the enforcement of its decrees. If the federal court, in the exercise of its discretion, decided not to issue the injunction, that decision would not void the state decree. Moreover, it would not reflect an evaluation of the propriety of the underlying decree itself. It would merely reflect some questions as to the present effect of an injunction on third parties such as the children. The original decree still could be enforced through a child-snatching tort action or a criminal charge, or through a contempt action by the state court issuing the original custody decree. Thus, the decision of whether to issue an injunction need not substantially infringe on either state rights or expertise. The failure of the Bennett and Loeffler courts to consider the actual implications of federal court intervention on the interest of the states in domestic relations matters is representative of the superficial approach that federal courts have adopted in ruling on the applicability of the exception.

F. Other Disputes

Thus far, this article has concentrated upon those categories of disputes which, because of their nature, lead to the frequent invocation of the domestic relations exception to federal jurisdiction. The exception also has been raised in other types of disputes in which the domestic relations nature of the suit is less apparent. Here, too, the results are inconsistent.

Questions regarding the jurisdiction of federal courts to hear domestic relations disputes have appeared in a variety of contexts. These include: an action for compensatory and punitive damages for malicious prosecution, abuse of process, arson, con-

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252. The proliferation of child snatching has prompted a number of states to make child snatching a crime. See Freed & Foster, supra note 11, at 410-14.
version and conspiracy;\textsuperscript{253} an action for damages for intentional infliction of emotional distress;\textsuperscript{254} an action for damages for fraudulent inducement of marriage and fraudulent procurement of divorce;\textsuperscript{255} an action to challenge a garnishment on the grounds that the divorce creating the obligation was fraudulently procured;\textsuperscript{256} an action for the recovery of money on the ground of provisions of necessaries;\textsuperscript{257} and an action for attorney's fees for services rendered in conjunction with a divorce action.\textsuperscript{258} No pattern emerges in the resolution of the jurisdictional issue in these claims. The decision in each case appears to rest primarily on the particular judge's perception of the rationale for the exception and its proper scope.

VI. A CRITIQUE OF CONTEMPORARY JUSTIFICATIONS FOR THE DOMESTIC RELATIONS EXCEPTION

A. Why Reexamination Is Appropriate Now

One may ask why a critique of the domestic relations exception to federal jurisdiction should be undertaken now, some 125 years after the Supreme Court first intimated its existence in Barber v. Barber.\textsuperscript{259} Should not questions as to the wisdom of the exception have been raised at a much earlier time, before the exception became so entrenched in case law? While, of course, such an earlier examination might have been preferable, there are several aspects of contemporary American society that make reexamination at this time particularly appropriate.

First, in recent years, overcrowded federal dockets have prompted a general examination of the appropriate contours of

\begin{itemize}
  \item \textsuperscript{253} Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980) (federal jurisdiction upheld because suit was based on breaches of duties that did not arise exclusively from family relations law).
  \item \textsuperscript{254} Bacon v. Bacon, 365 F. Supp. 1019 (D. Or. 1973) (federal jurisdiction denied because claim was part of ongoing family dispute).
  \item \textsuperscript{255} Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968) (federal jurisdiction upheld because federal court was competent to apply state divorce policy).
  \item \textsuperscript{256} Overman v. United States, 563 F.2d 1287 (8th Cir. 1977) (federal jurisdiction upheld only with respect to federal defendants).
  \item \textsuperscript{257} Bercovitch v. Tanburn, 103 F. Supp. 62 (S.D.N.Y. 1952) (federal jurisdiction denied because complaint gave rise to marital issues).
  \item \textsuperscript{258} Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir. 1973) (stay of federal action pending initiation of state proceedings would have been appropriate if defendant had timely moved; because of lateness of defendant's motion, however, it was not an abuse of discretion for district court to have denied stay).
  \item \textsuperscript{259} 62 U.S. (21 How.) 582 (1859). For a discussion of Barber, see supra notes 17-31 and accompanying text.
\end{itemize}
federal jurisdiction, especially with respect to suits based on diversity. An examination of one particular judicially-created jurisdictional doctrine certainly can provide insights useful to shaping the future of federal jurisdiction.

Second, the rapid and far-reaching changes in the field of family law in recent years have spawned new questions regarding the appropriate scope of the domestic relations exception. It is reasonable to predict that such questions will be raised with increasing frequency in coming years.

Third, the traditional reluctance of the federal government to intrude into regulation of the domestic affairs of state citizens has weakened substantially. Recent federal involvement in such domestic relations matters as child support, child custody, child abuse, and juvenile delinquency is well documented. Thus, a major premise underlying the exception no longer may be valid.

Fourth, the very fact that lower courts often feel compelled to rationalize their continued adherence to the exception suggests an uneasiness with the doctrine. Were the exception a fully recognized and accepted part of contemporary law governing federal jurisdiction, nothing more than a citation to the Supreme Court

See, e.g., Frank, supra note 1, at 403; Rowe, supra note 1, at 963. See also H.R. 3689-90, 98th Cong., 1st Sess., 129 CONG. REC. H5918 (daily ed. July 28, 1983) (bills to eliminate or modify diversity jurisdiction).

For a discussion of one such change, the proliferation of remedies for unmarried cohabitants, see supra notes 10 & 194-217 and accompanying text.

See, e.g., supra notes 10 & 194-217 and accompanying text.


See, e.g., Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 42 U.S.C. §§ 5101-5115 (1982). Among other provisions, this act requires states to enact child abuse and neglect reporting statutes as a prerequisite to obtaining federal assistance for child abuse programs. Id. § 5103(b)(2)(A)-(C).

See, e.g., Juvenile Justice and Delinquency Prevention Act of 1974, 42 U.S.C. §§ 5601-5751 (1982). One provision of this act, for example, conditions federal funding upon a state's providing separate correctional and rehabilitation programs for juvenile delinquents and status offenders. Id. § 5633(a)(10).

For a further discussion of the relevance of federal involvement in family law, see infra notes 408-14 and accompanying text.
decisions giving rise to the exception would be necessary. Yet many federal courts feel constrained to include in their decisions lengthy discussions of why the domestic relations exception is good law.266 For these reasons, a critique of the justifications for continued application of the domestic relations exception is in order.

B. Justifications Cited by Contemporary Federal Courts for Continued Adherence to the Domestic Relations Exception

Although early cases justified the existence of the domestic relations exception in terms of lack of constitutional or statutory power,267 most contemporary courts268 and legal scholars269 recognize that the power argument is no longer viable because it was based upon erroneous historical analysis. Instead, a variety of other justifications are given by lower federal courts for continued adherence to the domestic relations exception.266 See, e.g., Solomon v. Solomon, 516 F.2d 1018, 1021-27 (3d Cir. 1975); Phillips, Nizer, Benjamin, Krim, & Ballon v. Rosenstiel, 490 F.2d 509, 512-16 (2d Cir. 1973).

267. See supra notes 25-29 and accompanying text.

268. See, e.g., Lloyd v. Loeffler, 694 F.2d 489, 491 (7th Cir. 1982) ("[t]he historical account is unconvincing"); Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1981) ("historical inaccuracies and doctrinal distortions . . . mark the birth and early years of this exception"); Cherry v. Cherry, 438 F. Supp. 88, 89 (D. Md. 1977) (neither the Constitution nor federal statutes mandate the refusal to hear domestic relations cases); Spindel v. Spindel, 283 F. Supp. 797, 799-801 (E.D.N.Y. 1968) (federal courts have constitutional power to hear domestic relations cases, but may be precluded from granting divorces under language of the diversity statute). Even those courts which express an unwillingness to second-guess history do not rest their adherence to the domestic relations exception on the historical justifications, but rather on either policy of precedential concerns. See, e.g., Solomon v. Solomon, 516 F.2d 1018, 1025-26 (3d Cir. 1975) (precedent requires application of the exception); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973) (congested federal dockets militate in favor of applying the exception).

269. See, e.g., COLUMBIA Note, supra note 5, at 1834-39; B.C. Note, supra note 5, at 684-88. Cf. Rush, supra note 9, at 12-19. While most scholars recognize that historical justifications no longer can support the exception, they fail to focus on the fact that contemporary courts rarely give explicit approval of the historical analysis. Instead, when contemporary courts discuss lack of power to hear domestic relations cases, they focus on the holdings of Supreme Court cases, to which the lower courts feel bound by the doctrine of stare decisis. See, e.g., McGovern v. Blaha, 496 F. Supp. 964, 965 (W.D.N.Y. 1980); Vann v. Vann, 294 F. Supp. 193, 194 (E.D. Tenn. 1968). There is little evidence that these courts are independently convinced of the correctness of historical arguments. Thus, more attention must be focused on the validity of the precedential concerns of contemporary courts. The Columbia Note states summarily that "[m]odern courts should not be constrained by the Supreme Court's inaccurate view of history . . . ." but does little to give lower courts the tools necessary to justify departure from those cases. COLUMBIA Note, supra note 5, at 1840. For a discussion of attempts to provide courts with these tools, see infra notes 334-414 and accompanying text.
ued adherence to the exception. These justifications fall into two main categories: (1) justifications based upon policy considerations and (2) justifications based upon the existence of unchallenged precedent supporting the exception. A third justification for the exception, although not expressly articulated by federal courts, is evident from reading federal court opinions: the distaste with which federal judges view domestic relations disputes and their disinclination to hear these cases. Recent commentary has explored the first of these categories of justification, policy considerations, but no attention has been paid to the latter two. This article will first review and expand upon the critique of the policy justifications. It will then argue that neither the existence of unchallenged precedent nor distaste for domestic relations cases are appropriate justifications for continued adherence to the exception.

1. Policy Justifications for the Domestic Relations Exception

a. Special State Interest

The most common policy justification for the domestic relations exception is that domestic relations matters are of special interest to the states, and that there is no concomitant federal interest present. Therefore, federal courts should not usurp the states' interest by becoming involved in the adjudication of such cases. This justification fails for a number of reasons. First, the very existence of diversity jurisdiction is evidence of a federal interest in providing a neutral federal forum to litigants despite the fact that the law to be applied in adjudicating their disputes is state law. One purpose of diversity jurisdiction was to mitigate the effects of local prejudice towards out-of-state litigants. While scholars and others recently have questioned whether local

270. See, e.g., Comment, supra note 5, at 851-53; COLUMBIA Note, supra note 5, at 1846-51; B.C. Note, supra note 5, at 688-91.

271. See, e.g., Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973) (marital and custody issues are strong interests of the states); Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972) (child support cases should be handled by local state courts); Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968) (domestic relations cases are peculiarly unsuited to federal adjudications); Cherry v. Cherry, 438 F. Supp. 88, 90 (D. Md. 1977) (federal courts do not possess the proficiency of state courts in domestic relations cases).

272. The United States Supreme Court has made clear that § 34 of the Federal Judiciary Act of 1789 requires federal courts in diversity cases to utilize substantive state law in adjudicating those disputes. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

273. See C. WRIGHT, supra note 6, § 23, at 133.
bias remains a sufficient justification for diversity jurisdiction in general,\textsuperscript{274} nonetheless legislative attempts to abolish diversity jurisdiction have been unsuccessful thus far.\textsuperscript{275} To the extent that the local bias rationale has validity, domestic relations is one area of the law in which such local bias is most likely to surface. Indeed, the enactment in all states of the Uniform Child Custody Jurisdiction Act\textsuperscript{276} and Congress' enactment of the Parental Kidnapping Prevention Act of 1980\textsuperscript{277} were direct responses to the unfortunate tendency of states to seize jurisdiction and relitigate previous custody orders when one of the parents and/or the child was within their borders.\textsuperscript{278}

\textsuperscript{274} For an excellent discussion of the debate over the continued necessity for diversity jurisdiction, and a listing of pertinent articles, see C. Wright, \textit{supra} note 6, § 23.

\textsuperscript{275} Bills to abolish diversity jurisdiction have been proposed several times in the last decade, but none has been enacted. See, e.g., H.R. 3689, 98th Cong., 1st Sess., 129 CONG. REC. H5918 (daily ed. July 28, 1983); S. 2589, 95th Cong., 2nd Sess., 124 CONG. REC. 30-32 (1978).

\textsuperscript{276} \textit{UNIF. CHILD CUSTODY JURISDICTION ACT} §§ 1-27, 9 U.L.A. 116 (1968). Faced with conflicting state judicial responses to child custody decrees and modifications, the National Conference of Commissioners on Uniform State Laws promulgated the UCCJA "to bring some semblance of order into the existing chaos." \textit{Id.} pref. note, 9 U.L.A. at 114. The draftsmen outlined the structure of the UCCJA as follows:

It limits custody to the state where the child has his home or where there are other strong contacts with the child and his family. It provides for the recognition and enforcement of out-of-state custody decrees in many instances. Jurisdiction to modify decrees of other states is limited by giving a jurisdictional preference to the prior court under certain conditions. Access to a court may be denied to petitioners who have engaged in child snatching or similar practices.

\textit{Id.} (citing \textit{UNIF. CHILD CUSTODY JURISDICTION ACT} §§ 3, 8, 13-15 (1968)). According to the commissioners,

[underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions which have done serious harm to innumerable children, a court in one state must assume major responsibility to determine who is to have custody of a particular child; that his court must reach out for the help of courts in other states in order to arrive at a fully informed judgment which transcends state lines and considers all claimants, residents and nonresidents, on an equal basis and from the standpoint of the welfare of the child.

\textit{Id.} For a discussion of the impact of this act, see \textit{supra} note 11 and \textit{infra} notes 434-39 and accompanying text.

\textsuperscript{277} Federal Kidnapping Prevention Act, 28 U.S.C. § 1738A (1982). For a further discussion of this act, see \textit{supra} note 11 and \textit{infra} notes 440-48 and accompanying text.

\textsuperscript{278} The United States Department of Justice has recognized that state courts tend to rule in favor of their own state residents in domestic relations cases. In a letter to Congressman Peter W. Rodino regarding proposed legislation to remedy child-snatching, Assistant Attorney General Patricia M. Wald noted that when individuals who have lost custody of their children attempt to evade that state's jurisdiction by fleeing with the child to another state, "[t]he second state will often switch custody to the parent within its jurisdiction. . . ."
Even conceding the special interest of states in domestic relations matters, the exercise of diversity jurisdiction in such cases will not harm these state interests. The *Erie* doctrine, which mandates that state substantive law be applied to disputes reaching a federal diversity court,\(^2\) ensures that state law will control in domestic relations disputes in diversity cases. Furthermore, the Supreme Court, in *Kulko v. Superior Court*,\(^2\) recognized that the interest of a particular state in a domestic relations dispute can be properly protected by choice of law doctrines if the dispute is being adjudicated in another state. *Kulko* involved a request for modification of child support. The Supreme Court rebuffed the argument of the state of California that it was the proper forum for the action because of its special interest in the welfare of children within its borders. The Court stated that any interest California might have was properly protected by choice of law doctrine rather than by control of the forum.\(^2\) Although *Kulko* involved a choice between two state court forums, the principle that choice of law protects state interest in domestic relations matters can be applied with equal force where a federal forum is involved, thereby countering the "special state interest" argument made in support of the domestic relations exception to federal jurisdiction.

In addition, the time may have come to question the strength of the state interest in domestic relations matters altogether. The mobility of today's society stands in marked contrast to the stability of family life one hundred years ago. At a time when family members normally lived their entire lives within the confines of a single state, it was understandable that a state would exhibit a special interest in the regulation of that family. In contrast, modern families frequently change their state of residence several times.\(^2\) In addition, the family unit may dissolve,\(^2\) with its

\(^{279}\) *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

\(^{280}\) *Kulko* case involved a due process challenge to the assertion of personal jurisdiction by a California court over a New York resident in an action to modify a child support order. *Id.* at 86-92.

\(^{281}\) *Id.* at 98. The Court concluded that basic considerations of fairness pointed to New York as the proper judicial forum. *Id.*

\(^{282}\) A government survey of geographical mobility from March 1975 to March 1980 noted that 45% of all persons five years of age or older moved during the 1975-80 period. Of that number, approximately 20%, or nearly 18.5 million persons, moved to a different state. *Bureau of the Census, U.S. Dep't*
members dispersing to several states. These factors suggest a substantial diminution of the states' interest in domestic relations matters. Some evidence of this declining interest can be found in the waning state involvement in the formation and termination of marriage.\textsuperscript{284}

The growing mobility of contemporary society also calls into question a complement to the special state interest argument, i.e., the contention that federal courts have no interest in the area of domestic relations law. In testimony before a congressional subcommittee considering the proposed Parental Kidnapping Prevention Act, Senator Alan Cranston stated that while domestic relations issues were traditionally within the domain of the state, "[i]t is within the province of the Federal Government to resolve problems that are interstate in origin and which the States, acting independently, seem unable to resolve."\textsuperscript{285} The subsequent enactment of the Parental Kidnapping Prevention Act, as well as federal legislation in the areas of child abuse, juvenile delinquency, and child support, are strong indications that the states no longer are the sole governmental units with interests in domestic relations matters.\textsuperscript{286} Developments in the field of constitutional law also manifest a federal interest in domestic relations law. The Supreme Court has expanded the constitutional right of privacy to encompass many aspects of domestic relations, thereby circumscribing the states' power to regulate these areas of domestic life.\textsuperscript{287} Thus, one may question whether a "special state inter-

\textsuperscript{283} The growth of the divorce rate during this century is a well known phenomenon. Between 1940 and 1978, the annual rate of divorce grew from approximately 2 per 1,000 population to 5.1 per 1,000. \textit{Bureau of the Census, U.S. Dep't of Commerce, Divorce, Child Custody, and Child Support I} (Current Population Reports, Series P-23, No. 84, 1979).

\textsuperscript{284} For a discussion of the declining state involvement in the formation and termination of marriage, see W. Weyrauch & S. Katz, \textit{American Family Law in Transition} 352-53 (1983).

\textsuperscript{285} \textit{Joint Hearing, supra} note 278, at 2 (opening statements of Senator Alan Cranston, Chairman of the Subcomm. on Child and Human Development of the Comm. on Labor and Human Resources).

\textsuperscript{286} For a discussion of recent federal legislation in these areas of domestic relations, see \textit{supra} notes 262-65 and accompanying text.

\textsuperscript{287} \textit{See B.C. Note, supra} note 5, at 691-95. \textit{See also} Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to use contraceptives); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to establish a home and bring up children). For a further discussion of Supreme Court decisions in this area, see \textit{infra} notes 362-65 and accompanying text.
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est” is a sufficient justification for continued adherence to the domestic relations exception.

b. State Court Expertise in Domestic Relations Matters

Another justification for adherence to the exception is the purported superior expertise of state courts in domestic relations matters. An implied corollary of this justification is that federal courts lack the requisite expertise.

The immediate response to this argument is that any perceived disparity between the expertise of state and federal judges in this area may be the result, rather than the cause, of the domestic relations exception. It may be argued that if the exception were repudiated and federal courts were to begin adjudicating domestic relations disputes, their expertise would soon equal or perhaps surpass that of the state judiciary.

A more fundamental objection to the state expertise justification arises if one questions the validity of its premise. There is certainly no innate difference between the background of the state and federal judiciary that makes the former more competent in the field of domestic relations than the latter. The existence of diversity jurisdiction, taken in conjunction with the Erie doctrine, assumes that federal judges have the expertise necessary to interpret and apply state law. There is nothing in the inherent nature of domestic relations cases that puts them uniquely beyond the competence of the federal judiciary.

There are, in fact, affirmative indications that federal courts do possess the expertise necessary to decide domestic relations cases. For instance, federal courts frequently make determinations involving marital status for purposes of tax law and immi-

288. See, e.g., Bennett v. Bennett, 682 F.2d 1039, 1043 (D.C. Cir. 1982) (domestic relations are within the “peculiar province, experience, and competence of the state courts”); Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975) (state courts have “developed both a well-known expertise in these cases and a strong interest in disposing of them”); Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968) (state courts deal with child support cases daily and have developed an expertise that should discourage federal intervention); Cherry v. Cherry, 438 F. Supp. 88, 90 (D. Md. 1977) (state courts have traditionally adjudicated domestic relations cases and thus have developed a “proficiency and expertise in the area that is almost completely absent in the federal courts”).

289. See B.C. Note, supra note 5, at 688-89.

290. For a discussion of the significance of the Erie doctrine in domestic relations cases, see supra note 272.

291. See, e.g., Donigan v. Commissioner, 68 T.C. 632 (1977) (Internal Revenue Code and New York law do not recognize separation agreements as conferring upon petitioner the status of an unmarried individual); Potson v.
Additionally, in immigration cases federal courts may be called upon, not only to determine marital status, but also to determine whether the couple actually intended to remain married. If federal courts are competent to decide these questions of marital status for purposes of tax law or immigration law, they also would appear competent to decide similar issues in more conventional contexts, such as whether a party in a divorce action perceives his marriage to be irretrievably broken. Moreover, if federal courts are competent to grant equitable remedies in property disputes between unrelated litigants, they also should be competent to equitably divide property acquired by parties during their marriage. In diversity cases, the federal judiciary is perceived competent to adjudicate a variety of complex areas of fact and law, even where juries are perceived as incompetent to do so.

Commissioner, 22 T.C. 912, 929 (1954) (individuals who lived together as husband and wife were entitled to marital exemption even though they were never formally married), aff’d, 239 F.2d 396 (7th Cir. 1956).

292. See, e.g., United States v. Rubenstein, 151 F.2d 915, 919 (2d Cir.) (where spouses agreed to terminate marriage once alien spouse became a United States citizen, court will not recognize the marriage), cert. denied, 326 U.S. 766 (1945). See also 8 U.S.C. § 1151 (1982) (marriage by alien to United States citizen places alien in a preferred status for entry into the United States); id. § 1430 (marriage by alien to United States citizen exempts alien from immigration requirements of § 1427(a) concerning minimum time of residency required for naturalization).

293. It is a federal crime for an alien to enter the United States by means of a willfully false or misleading representation, or the willful concealment of a material fact. 18 U.S.C. § 1001 (1982). Thus, in a prosecution under § 1001, the government can introduce evidence that an alien, although validly married under state law, may have concealed from the government the material fact that the marriage was contracted for the limited purpose of securing the alien’s entry into this country. In these cases, federal courts must determine whether “two parties have undertaken to establish a life together and assume certain duties and obligations.” Lutwak v. United States, 344 U.S. 604 (1953) (validity of marriage between United States citizen and alien is immaterial for purposes of determining alien’s immigration status if it appears that alien intended to dissolve the marriage after becoming a citizen).

294. See, e.g., In re F.W. Koenecke & Sons, Inc., 605 F.2d 310 (7th Cir. 1979) (imposing a constructive trust upon an accountant who received misappropriated funds from bankrupt corporation); GAF Corp. v. Amchem Prods., 514 F. Supp. 943 (E.D. Pa. 1981) (refusing to impose constructive trust over patents where petitioner failed to prove entitlement to patent); United States v. King, 469 F. Supp. 167 (D.S.C. 1979) (government entitled to have constructive trust imposed upon property purchases by former consular official with money obtained through bribes).

295. For a discussion of property divisions at the time of divorce, see supra notes 158-59 and accompanying text.

296. See, e.g., In re Japanese Elec. Prod. Antitrust Litig., 631 F.2d 1069 (3d Cir. 1980) (trial by judge without a jury does not violate seventh amendment where suit is too complex for a jury).
sufficiently superior expertise to justify continued adherence to the domestic relations exception.

The state court expertise argument is further undercut by recent changes in the nature of domestic relations law and disputes. With all states adopting some form of no-fault divorce statutes, divorce suits no longer revolve around the lengthy and difficult determination of who was "at fault" for the breakdown of a marriage. Rather, the focus is more often on the equitable distribution of the couple's property. Questions in such cases may include the valuation of stock options, pension plans and professional degrees. These are certainly areas in which federal court judges have expertise equaling that of the state judiciary. Even in jurisdictions where fault is relevant to property division or alimony decisions, the determination is analogous to the nebulous "fault" determination frequently at issue in other federal court cases.

297. See, e.g., Mo. ANN. STAT. § 452.305 (Vernon 1977).

The nature of divorce litigation has turned abruptly from trial by character assault to one of "locate, valuate, and divide." That is, an abandonment of "who did what to whom" in favor of a logical systemized method for identifying marital property, evaluating all its components, and an allocation of the property in ways that satisfy the desires and aspirations of concerned clients.

299. See Freed & Foster, supra note 11, at 388-409.
303. For a discussion of the significance of fault in property and alimony awards, see Freed & Foster, supra note 11, at 382-84.
304. See, e.g., Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.) (question of
Courts that rely on the state expertise argument often seek to bolster the argument by pointing to the existence of specialized state tribunals to adjudicate domestic relations cases\(^\text{305}\) or to the availability of community services to assist state judges in making their decisions.\(^\text{306}\) The majority of states, however, do not have separate domestic relations courts or community service agencies.\(^\text{307}\) It is, therefore, inappropriate to adhere to the domestic relations exception as a general bar to federal jurisdiction simply because some jurisdictions may have specialized family courts. In cases where federal courts should defer to an existing state judicial scheme, ordinary abstention doctrines can be invoked.\(^\text{308}\) With respect to using community resources to aid the judge in making a decision, there does not appear to be any reason why a federal court could not request evaluations from outside agencies in the same way that state courts do. The costs of such evaluations can be charged to the parties, just as they are in many state courts.\(^\text{309}\)

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\(^{306}\) See, e.g., Thrower v. Cox, 425 F. Supp. 570, 573 (D.S.C. 1976) (state courts often work in close conjunction with social welfare agencies that are not available to aid federal courts).

\(^{307}\) See Family Court Committee of Family Law Section of ABA, Family Courts—A Status Report, 3 Fam. Advoc. 26 (1980). In a 1980 survey, 29 states had no specialized family courts, while eight others had an incomplete system consisting of either pilot projects or family courts in one or more cities. Id. at 26-28.

\(^{308}\) See Note, supra note 7, at 1111-14. The author of this note suggests that federal courts should not abstain "unless there is a state interest of substantial concern and either an issue of unsettled state law, or a complex administrative scheme with which federal review would interfere." Id. at 1111 (citing Burford v. Sun Oil Co., 319 U.S. 315 (1943)). Under this analysis, the existence of specialized state family courts would militate in favor of abstention by federal courts in domestic relations matters. A similar argument about the possible use of Burford abstention is made by Professor Barbara Atwood in a recently published article. Professor Atwood concludes that "when the state itself views the subject of domestic relations as one of unique importance and has so indicated by creating specialized forums or programs, the case for abstention is strong." Atwood, supra note 7, at 607 (footnote omitted). For further discussions of abstention doctrines, see supra note 7 and infra notes 481-84 and accompanying text.

c. Inconsistent State and Federal Decrees

Although federal courts most frequently cite state interest and state expertise as the policy justifications for continued adherence to the domestic relations exception, the courts have advanced other reasons as well. Among them is the argument that rejection of the exception would increase the possibility of conflicts between existing state decrees and later federal judgments affecting the decrees. This concern is usually stated in a conclusory way, without any analysis of the actual dimensions of the perceived problem. No explanation is offered of why the possibility of inconsistent decrees between state and federal courts differs at all from the possibility of inconsistent decrees from courts in separate states. In fact, it is unclear whether the term "inconsistency" is appropriate at all. In the event a federal court is asked to enforce or modify a state court decree, principles of res judicata and collateral estoppel would operate to prevent the federal court from relitigating any causes of action or issues previously litigated between the parties. Thus, an action in federal court to enforce or modify an existing state court judgment would not be inconsistent in any way with the state court

310. See, e.g., Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982) (federal jurisdiction would result in "piecemeal, duplicative, or inexpert handling of what is substantially a single controversy"); Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981) (expressing fear of incompatible state and federal decrees since state court has continuing jurisdiction).

311. If a litigant is barred from bringing suit to enforce a domestic relations decree in a federal court because of the domestic relations exception, the litigant could alternatively sue in state court in the state where the obligor resides. See H. CLARK, supra note 18, § 14.11. The same possibility of "inconsistency" between a federal and state court adjudication exists when a state court adjudicates a matter related to a prior decree of another state.

312. Res judicata, often described as claim preclusion, provides that "a valid and final judgment on a claim precludes a second action on that claim or any part of it." C. WRIGHT, supra note 6, § 100A, at 680 (footnote omitted).

313. See id. Professor Wright defines collateral estoppel as follows: The general rule of issue preclusion [also referred to as collateral estoppel] is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. Id. at 682 (footnote omitted).

314. See 28 U.S.C. § 1738 (1982). Section 1738 requires federal courts to give the same res judicata and collateral estoppel effects to a state court judgment as would the state court itself. This same obligation is placed upon the states by the full faith and credit clause of the Constitution. U.S. CONST. art IV, § 1. Thus, federal courts would be under the same constraints as other state courts in not relitigating issues or causes of action previously litigated by the state court rendering the initial judgment.
judgment. A new federal court judgment would be based upon an adjudication of facts not previously litigated. In addition, the mere possibility of inconsistent decrees is insufficient reason for federal courts to decline jurisdiction in cases where they would otherwise have jurisdiction.\footnote{315}{See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 (1976) (while "exceptional circumstances 'make abstention appropriate here,' the mere potential for conflict in the results of adjudications, does not, without more, warrant staying exercise of federal jurisdiction").}

d. Problems with Continuing Jurisdiction

A fourth reason advanced by some courts to justify the exception is the practical difficulty which would result if federal courts were forced to maintain continuing jurisdiction over certain types of domestic relations decrees, such as custody and alimony awards which remain open for later modification.\footnote{316}{See, e.g., Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982) (actions to enforce decrees are outside diversity jurisdiction when the decrees are subject to modification by the issuing court); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978) (federal courts should refuse to exercise diversity jurisdiction if state decree remains subject to state court modification); Thrower v. Cox, 425 F. Supp. 570, 573 (D.S.C. 1976) (federal courts would be overtaxed if forced to retain jurisdiction over child custody and alimony cases).} Yet it is clear that in other contexts federal courts have the power to retain jurisdiction over decrees they have rendered.\footnote{317}{See, e.g., United States v. United Shoe Mach. Corp., 391 U.S. 244, 248-49, 251 (1968) (district courts have power to modify decrees if situation warrants a change); System Federation No. 91, Ry. Employees' Dep't v. Wright, 364 U.S. 642, 646-48 (1961) (same); United States v. Swift & Co., 286 U.S. 106, 114 (1932) (federal court has power to modify injunction).}

The Supreme Court has held that "a sound judicial discretion may call for the modification of the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of issuance have changed, or new ones have since arisen."\footnote{318}{System Federation, 364 U.S. at 647.} Federal courts often have exercised the discretion described by the Supreme Court and modified existing decrees.\footnote{319}{See, e.g., Association Against Discrimination in Employment v. City of Bridgeport, 710 F.2d 69 (2d Cir. 1983) (decree to remedy discrimination in hiring); Libby Rod & Gun Club v. Moraski, 519 F. Supp. 643 (D. Mont. 1981) (decree enjoining construction of dam).}

In addition, the perceived burden on federal courts of retaining jurisdiction to modify domestic relations decisions is overestimated. State courts do not actively monitor modifiable domestic relations orders.\footnote{320}{While some states have optional procedures allowing child support payments to be deposited with the court for forwarding to the obligee, this ad-}
modify an award. Until such a petition is filed, the burden placed upon the court is no greater than that imposed by any other type of decree.

e. Federal Court Congestion

Even where courts are not fully convinced that continued adherence to the domestic relations exception can be supported by the policy considerations discussed above, they have upheld the exception on the theory that repudiation would result in a significant addition to the workload of the already overcrowded federal docket. This justification can be attacked on two separate grounds. First, one may question whether the fear of a flood of domestic relations cases in federal courts is justified. Repudiation of the domestic relations exception will not create a new category of federally cognizable cases based solely on the existence of a domestic relations issue. Domestic relations cases still will have to meet one of the traditional bases of federal jurisdiction in order to be cognizable in federal court.

Although some courts have suggested that the domestic relations exception applies in cases involving federal questions, other federal courts have held the exception inapplicable in such contexts. It is unlikely that repudiation of the exception would

321. See generally H. Clark, supra note 18, at 456, 500. But see id. at 598 (in some cases courts have modified custody decrees on their own motion).

322. See, e.g., Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973) ("[i]t is beyond the realm of reasonable belief that, in these days of congested dockets, Congress would wish the federal courts to seek to regain territory . . . "); Cherry v. Cherry, 438 F. Supp. 88, 90 (D. Md. 1977) (court expressing its unwillingness to increase its already overburdened workload).

323. See Columbia Note, supra note 5, at 1847-48 (other jurisdictional requirements would continue to limit access to federal courts); B.C. Note, supra note 5, at 689-90 (elimination of the exception would not result in an increased burden on federal courts).

324. See, e.g., Zak v. Pilla, 698 F.2d 800, 801 (6th Cir. 1982) (per curiam) (federal courts lack jurisdiction to hear action brought under § 1983 if case involves domestic relations); La Montagne v. La Montagne, 394 F. Supp. 1159, 1161 (D. Mass. 1975) (controversy involving domestic relations is outside jurisdiction of federal courts even when "couched in terms characterizable as a constitutional context").

325. See, e.g., Franks v. Smith, 717 F.2d 183 (5th Cir. 1983) (federal courts have jurisdiction over nonfrivolous actions grounded upon fourth amendment violation even though action involves domestic relations); Overman v. United States, 563 F.2d 1287, 1292 (8th Cir. 1977) (federal courts should hear domestic relations cases presenting "important concerns of a constitutional dimension").
make any substantial difference in the workload of federal courts in federal question cases. In the absence of a federal question, the requirements for diversity jurisdiction would have to be satisfied. While some domestic relations cases may meet these requirements, many will not. Especially in the paradigm domestic relations suit—a divorce case—diversity of citizenship probably will not exist if the family has only recently broken down. Moreover, even where actual diversity of citizenship exists, the amount in controversy requirement also must be satisfied. Since cases involving the adjudication of marital status or child custody do not present claims capable of monetary valuation, it is unlikely that such actions will satisfy the $10,000 amount in controversy requirement. These requirements will limit significantly the number of domestic relations cases which may be heard in federal court if the domestic relations exception were abolished.

Even if one concedes that repudiation of the domestic relations exception will increase to some degree the workload of federal courts, it still may be argued that the potential for an increased workload is by itself an insufficient justification to refuse to exercise jurisdiction in cases otherwise falling within the constitutional and statutory boundaries of federal jurisdiction. The Supreme Court has recognized that federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." While doctrines have been developed to allow a

327. Citizenship for diversity purposes has been interpreted to require that parties be domiciled in different states. C. Wright, supra note 6, § 26. Domicile requires more than transient residency; it requires residence within a state with an intent to remain indefinitely. Id. Usually, where a family has recently broken down and a divorce petition is filed, the parties still will be domiciliaries of the same state, thus precluding diversity jurisdiction. Also mitigating against a finding of diversity is the common law rule that a wife's domicile follows that of her husband. H. Clark, supra note 18, § 4.3. Although strict application of the rule has been modified to allow the wife, under certain circumstances to acquire her own domicile, the rule is still a basic rule of thumb in many states and may prevent a showing of diversity in domestic relations cases. Id.
328. See 28 U.S.C. § 1332 (1983) (diversity jurisdiction exists only in those cases where the amount in controversy exceeds $10,000). The relevant text of § 1332 is excerpted supra at note 5.
329. See, e.g., Herrnstadt v. Herrnstadt, 373 F.2d 316, 318 (2d Cir. 1967) (custody and visitation rights are incapable of being reduced to a monetary value). See also B.C. Note, supra note 5, at 690 ("the amount in controversy requirement severely limits which cases can be brought in federal court").
330. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976) (discussing obligation of federal courts to hear cases pending in
federal court to abstain from hearing various cases brought before it, mere congestion of federal court dockets has been rejected as a sufficient reason to refuse jurisdiction. To refuse to hear domestic relations cases because of crowded federal court dockets is both a breach of the duty of federal courts to take jurisdiction over cases where statutory jurisdiction exists and a violation of the litigant's right to choose a federal forum where jurisdictional requirements are satisfied.

2. Reasons for Continued Adherence to the Domestic Relations Exception Based on Precedent

Courts usually justify the use of a particular legal doctrine by citing an existing case as precedent. It is relatively unusual, however, for a court to preface its adherence to a particular line of cases with a rejection of the reasoning behind the precedents. Yet, this rejection of reasoning and resigned acceptance of precedent can be found in several cases upholding the domestic relations exception to federal jurisdiction. For example, in Lloyd v. Loeffler, the Seventh Circuit rejected the traditional justification for the exception that it derives from the ecclesiastical origins of state courts. See also England v. Medical Examiner, 375 U.S. 411, 415 (1964) (federal court has duty to exercise jurisdiction over a case where jurisdiction granted by law).

331. For a general discussion of abstention principles, see supra note 7 and infra notes 481-84 and accompanying text. See generally C. WRIGHT, supra note 6, § 52.

332. See Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976). In Thermtron, the Supreme Court held that a diversity action which had been removed to federal court could not be remanded to state court solely on the ground of congested federal court dockets. The Court declared that “an otherwise properly removed action may no more be remanded because the district court considers itself too busy to try it than an action properly filed in the federal court in the first instance may be dismissed or referred to state courts for such reason.” Id. at 344 (emphasis added).

333. See Wilcox v. Consolidated Gas Co., 212 U.S. 19, 40 (1909) (suit to enjoin state enforcement of maximum rates for public utilities). In Wilcox, the Court made the following statement concerning the right of litigants to invoke federal jurisdiction:

When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction. . . . That the case may be one of local interest only is immaterial, so long as the parties are citizens of different States or a question is involved which by law brings the case within the jurisdiction of a Federal court. The right of a party plaintiff to choose a Federal court where there is a choice cannot be properly denied.

Id. (citation omitted).

334. 694 F.2d 489 (7th Cir. 1982). For a discussion of Loeffler, see supra notes 241-44 and accompanying text.
domestic relations jurisdiction in England. Noting historical inaccuracies, the court stated that "[t]he historical account is unconvincing." Yet the court went on to conclude that the exception was simply too well established to be challenged by a lower court. Similarly, in *Solomon v. Solomon*, the Third Circuit acknowledged that the domestic relations exception had its critics, but concluded that until Congress or the Supreme Court saw fit to repudiate the exception, it remains "an historically engrained limitation upon us." The dissent in *Solomon* argued that the history of the exception was little more than a "collection of misstatements of ancient holdings and of ill-considered dicta." The dissent characterized the majority opinion as giving "new currency to a hoary heresy."

As suggested by the *Solomon* majority, the precedential justifications for continued adherence to the exception fall into two main categories. First, courts cite the seminal Supreme Court cases giving rise to the exception as binding precedent. Second, the courts state that the failure of Congress to amend the diversity statute represents tacit approval of the exception. The following two sections of this article argue that neither justification compels lower federal courts to adhere to the exception.

335. 694 F.2d at 491. For a discussion of the early Supreme Court opinions which traced the domestic relations exception to English ecclesiastical courts, see *supra* notes 25-29 and accompanying text.

336. 694 F.2d at 491 (citing Spindel v. Spindel, 283 F. Supp. 797, 802-03, 806-09 (E.D.N.Y. 1968)). In *Spindel*, Judge Weinstein discussed at length the theory that the exception derived from the distinction in England between temporal and ecclesiastical courts. 283 F. Supp. at 806-09. He concluded that jurisdiction over domestic relations matters was only theoretically within the exclusive province of the ecclesiastical courts, and that as a practical matter temporal courts often exercised jurisdiction. *Id.* at 807. For a further discussion of judicial criticism of the historical analysis, see *supra* notes 152-56 and accompanying text. See also *Note*, *supra* note 7, at 1098-99.

337. 516 F.2d 1018 (3d Cir. 1975) (suit by former wife seeking money damages for non-support under separation agreement).

338. *Id.* at 1025.

339. *Id.* at 1030 (Gibbons, J., dissenting).

340. *Id.* For an excerpt from Judge Gibbons dissent, see *supra* text accompanying note 15.

341. For a discussion of the five seminal Supreme Court opinions, see *supra* notes 17-75 and accompanying text. For a discussion of the subsequent cases which cite the seminal Supreme Court opinions as binding precedent for the domestic relations exception, see *supra* notes 46, 48, 52 & 75 and accompanying text.

342. For a discussion of the argument that inaction by Congress is tacit approval of the exception, see *infra* notes 386-414 and accompanying text.
a. Existence of Supreme Court Cases Creating the Exception

Federal courts invoking the domestic relations exception usually cite one or more of the five Supreme Court cases handed down between 1859 and 1931 which discuss the existence of the exception. Yet it can be argued that lower federal courts could repudiate the exception without violating the principle of stare decisis. Of those five cases, four—Barber, Burrus, Simms, and De La Rama—did not involve direct holdings that federal courts lacked jurisdiction over domestic relations cases. While courts often cite these cases in support of the domestic relations exception, the language cited is dicta.

The fifth decision, Popovici, is the clearest Supreme Court authority for the domestic relations exception to federal jurisdiction. Nevertheless, there are a number of factors that restrict the precedential value of the case. As has been shown, Popovici dealt with a specialized grant of federal jurisdiction—cases affecting ambassadors, public ministers and consuls—rather than the broad diversity grant. Popovici, therefore, is not compelling support for the proposition that the contemporary diversity statute and the federal question statute are limited by the exception. Additionally, Popovici involved a suit for a divorce, clearly the paradigm domestic relations case. Thus, Popovici

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343. See, e.g., Gargallo v. Gargallo, 472 F.2d 1219, 1220 (6th Cir.) (per curiam) (citing Barber; Burrus), cert. denied and app. dismissed, 414 U.S. 805 (1973); Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968) (citing all five cases).

344. Stare decisis is "[t]he doctrine or principle that decisions should stand as precedents for guidance in cases arising in the future." Ballantine's Law Dictionary 1209 (3d ed. 1969).

345. For a discussion of the language and holdings of these cases, see supra notes 17-58 and accompanying text.

346. For a discussion of Popovici, see supra notes 60-75 and accompanying text.

347. For a discussion of the factors which limit Popovici as authority for the domestic relations exception, see supra notes 70-74 and accompanying text.

348. See supra note 70 and accompanying text.


350. Id. § 1331.

351. The Supreme Court has suggested in dicta that the rationale of Popovici can be extended generally to deny federal jurisdiction in divorce proceedings. See Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979); Glidden Co. v. Zdanok, 370 U.S. 530 (1962). In both Hisquierdo and Glidden, however, the Court couched its discussion in prudential or discretionary terms, as opposed to stating that the federal courts lacked power to hear such cases. In Hisquierdo, the Court stated that "[f]ederal courts repeatedly have declined to assert jurisdiction over divorces." 439 U.S. at 581 (emphasis added)(citation omitted). In a footnote to Glidden, the Court added that "divorce proceedings [are]... beyond the ken of the federal courts. . . ." 370 U.S. at 581 n.54 (emphasis added)(citations omitted).
could be interpreted as confining the exception to suits for divorce,\textsuperscript{352} with other actions deemed beyond the mandate of the Popovici holding.

Finally, Popovici can be further limited by pointing to language in the decision which appears to condition the holding on the correctness of certain historical assumptions:

If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes.\textsuperscript{353}

Since Popovici, both courts and commentators have questioned the validity of these historical assumptions. A federal court, therefore, could properly reject Popovici as precedent for the exception by interpreting the Supreme Court’s language as conditioning its holding on the existence of a “common understanding”—an understanding that now appears not to have existed.\textsuperscript{354}

Even were a court to conclude that Popovici, when handed down, held that a domestic relations exception to federal jurisdiction did exist, the court could still repudiate the holding today without violating the principle of \textit{stare decisis}. Although as a general matter, lower federal courts are not free to disregard existing Supreme Court cases directly on point,\textsuperscript{355} there is a line of cases that clearly indicates that certain circumstances may justify a lower federal court’s failure to adhere to existing Supreme Court precedent. An example of this approach is found in the 1964 case

For a further discussion of the significance of Hisquierdo and Glidden, see infra notes 366-70 and accompanying text.

352. Both Glidden and Hisquierdo also involved divorce proceedings. See supra note 351.

353. Popovici, 280 U.S. at 383-84.

354. For a discussion of the debate over whether such a “common understanding” existed at the time the Constitution was adopted, see supra notes 268-69 and accompanying text.

of *Gold v. DiCarlo*, where plaintiff brought a substantive due process challenge to a New York antiticket-scalping statute. In its decision, the district court found that it was not constrained to follow a 1927 Supreme Court decision that had held a predecessor to the New York statute unconstitutional. The court pointed to Supreme Court cases subsequent to the 1927 decision which appeared to depart from the rationale of the earlier decision, although not directly overruling it. The district court justified its failure to adhere to the 1927 Supreme Court case with the following reasoning:

We would be abdicating our judicial responsibility if we waited for the Supreme Court to use the express words "We hereby overrule Tyson," as the plaintiffs contend we should, before recognizing that the case is no longer binding precedent but simply a relic for the constitutional historians. Judges do not have such mechanical or wooden attitudes nor are they devoid of all powers of interpretation, analogy and application of constitutional principles; they and the law must keep pace with our vibrant and dynamic society and the changes in the law which the courts have pronounced.

The doctrine expressed in *Gold v. DiCarlo* has been utilized by other lower federal courts and could be applied to repudiate

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357. *Id.* at 820 (citing but not following Tyson & Brother v. Banton, 273 U.S. 418 (1927)).

358. *Id.* at 819 (citing Ferguson v. Skrupa, 372 U.S. 726 (1963); Olsen v. Nebraska 313 U.S. 236 (1944); Nebbia v. New York, 291 U.S. 502 (1934)). The district court interpreted *Nebbia* as rejecting the standard pronounced in *Tyson*. 235 F. Supp. at 819. In addition, the court noted that Justice Black's opinion in *Ferguson* declared that the *Tyson* approach had been abandoned. *Id.* at 819.

359. *Id.* at 819-20 (emphasis added). The district court concluded that *Tyson* was "antiquated" and "legally unsound." *Id.* at 820.

360. See, e.g., Rowe v. Peyton, 383 F.2d 709, 714 (4th Cir. 1967) (rejection of Supreme Court decision concerning availability of writ of habeas corpus where "subsequent Supreme Court opinions have so eroded [the] older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead . . . to a conclusion inconsistent with an older Supreme Court case"), *aff'd*, 391 U.S. 54 (1968); Perkins v. Endicott Johnson Corp., 128 F.2d 208 (2d Cir. 1942) (rejecting 30-year old decision concerning power of courts to enforce administrative subpoena), *aff'd*, 317 U.S. 501 (1943); Barnett v. West Va. Bd. of Educ., 47 F. supp. 251 (S.D.W.Va. 1942) (rejecting prior Supreme Court decision concerning first amendment rights when Court had indicated in recent decisions that it was leaning toward overruling the prior decision), *aff'd*, 319 U.S. 624 (1943).
the domestic relations exception. While the Supreme Court has not directly questioned the continued validity of domestic relations exception to federal jurisdiction, it may be argued that the Supreme Court in a variety of ways has called into question the premises underlying the exception. For example, a basic premise underlying the domestic relations exception was articulated by the Supreme Court in *In re Burrus*, where the Court stated that "'[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.'" Yet the Supreme Court has made quite clear during this century that the federal government does indeed have a role to play in the field of domestic relations. The Court has held that the Constitution restricts the power of the states to infringe upon parental rights to direct the upbringing of their children, to restrict unduly an individual's decisions regarding marriage and procreation, or to define the term family, inappropriately. Thus, recent Supreme Court cases contradict a basic premise upon which the Court previously had relied to justify the exception.

In addition to those Supreme Court decisions expanding the constitutional protection of the family, there are other cases calling into question the Court's adherence to the concept of a broad domestic relations exception to federal jurisdiction. The Court's recent references to the exception are framed in historical terms, rather than as an ongoing part of constitutional doctrine. In *Glid-

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361. 136 U.S. 586, 593-94 (1890). For a discussion of *Burrus*, see *supra* notes 32-38 and accompanying text.

362. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (state law requiring parents to send children to private school is unconstitutional); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (state law requiring parents to send children to public school past eighth grade is unconstitutional); Meyer v. Nebraska, 262 U.S. 390 (1923) (state law forbidding the teaching of modern foreign languages to children is unconstitutional).


den Co. v. Zdanok, the Supreme Court stated in a footnote that "[u]nder Barber . . . the federal courts in the States were incompetent to render divorces . . . .” In another footnote, the Court spoke not of any constitutional or statutory infirmity in adjudicating a broad range of domestic relations cases, but rather of the fact that divorce proceedings “are beyond the ken of the federal courts in the states.” In Hisquierdo v. Hisquierdo, the Court characterized the exception as a fact of life rather than as a rule of law, stating that “[f]ederal courts repeatedly have declined to assert jurisdiction over divorces that presented no federal question.”

To the extent that Glidden and Hisquierdo do support the existence of the domestic relations exception, it should be noted that both cases discussed restraints on federal jurisdiction with respect to a very narrow group of domestic relations cases—divorce proceedings. Insofar as neither opinion refers to other types of domestic relations cases, they may represent a retrenchment from the Court’s expansive language regarding the exception in prior cases. Thus, lower courts should not feel constrained to apply the exception to a broader spectrum of domestic relations cases.

Recent references by the Court to the lack of jurisdiction of federal courts over domestic relations cases are rare, even as dicta. The Court’s citations to the Barber line of cases are usually interposed, not in support of a jurisdictional limitation, but rather to support the concept that federal courts should apply state substantive law in the adjudication of domestic relations cases. For example, in three recent cases, the Court, in considering the issue of whether federal law regarding the divisibility of federal government benefits at divorce should supplant state law, cited the language of In re Burrus: “[t]he whole subject of the domestic relations of husband and wife . . . belongs to the laws of the States and not to the laws of the United States.” But in each case this statement was cited only to support the choice of law principle

366. 370 U.S. 530 (1962) (suit challenging validity of designation of patent court and court of claims judges to federal district courts and federal courts of appeals to adjudicate certain cases).
367. Id. at 545 n.14 (emphasis added)(citation omitted).
368. Id. at 581 n.54 (emphasis added)(citation omitted).
370. Id. at 581.
that state law, and not federal law, should control in cases where federal courts exercise jurisdiction over actions involving domestic relations.373

Even in a case that specifically dealt with the appropriate reaches of federal jurisdiction, the Supreme Court declined to rest its holding on the domestic relations exception. In Lehman v. Lycoming County Children's Services Agency374 the Supreme Court held that a plaintiff could not invoke federal habeas corpus jurisdiction to challenge the constitutionality of a state statute utilized to terminate the plaintiff's parental rights.375 The Court stated that "federal habeas has never been available to challenge parental rights or child custody,"376 and cited In re Burrus.377 Yet the Court did not mention the domestic relations exception in its citation to Burrus, correctly noting that the decision in Burrus rested on the absence of a federal question.378 Burrus was cited as merely "suggesting" that federal habeas corpus was not available in child custody cases.379

It is significant that Lehman does not mention the domestic relations exception to federal jurisdiction, since the applicability

373. Ridgway, 454 U.S. at 54; McCarty, 453 U.S. at 220; Hisquierdo, 439 U.S. at 581.
375. Id. at 512. The question of whether the federal habeas statute permitted challenges to child custody differs substantially from the interpretation of the Constitution and federal jurisdictional statutes engaged in by the Supreme Court in the domestic relations cases. In Lehman, the Court was faced with the interpretation of the term "custody" in the habeas statute:

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a) (emphasis added). Because "custody" was not defined in the statute, the Court has previously addressed the question of which circumstances should be considered custody for purposes of the statute. See Hansley v. Municipal Court, 411 U.S. 345 (1973) (criminal defendant in custody even though released on his own recognizance); Carafas v. LaVallee, 391 U.S. 234, 239 (1968) (petitioner is in custody if he or she is in physical custody of state when writ is filed); Jones v. Cunningham, 371 U.S. 236, 243 (1963) (parolee is in custody). In contrast, in the seminal domestic relations exception cases, the Court was not interpreting ambiguous constitutional or statutory language, but rather inferring an exception in the face of and in opposition to the plain meaning of constitutional and statutory language conferring jurisdiction in these cases. See supra notes 17-75 and accompanying text.
376. 458 U.S. at 511 (footnote omitted).
377. Id. at 511 (citing Burrus, 136 U.S. 586).
378. Id. For a discussion of the Burrus holding, see supra notes 34-38 and accompanying text.
379. 458 U.S. at 511.
of the exception to federal habeas corpus proceedings had been discussed in circuit court opinions, and the Court had granted certiorari to resolve the conflicting decisions of the circuits. The Supreme Court in Lehman did state that its decision was influenced by "[f]ederalism concerns," and noted that "federal courts consistently have shown special solicitude for state interests in the field of family and family-property arrangements." The Court did not, however, cite any of the domestic relations exception cases in support of this perceived solicitude. Rather, it cited United States v. Yazell, a case involving not a question of whether domestic relations cases could be heard in federal courts, but the question of whether state substantive law should be utilized in construing the terms of a Small Business Administration loan issued to the defendant. Since the question before the Court in Lehman related to the scope of federal court jurisdiction, rather than to choice of law, if the domestic relations exception were still good law, a reference to the exception and to the relevant cases would have been much more clearly on point than a citation to Yazell.

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380. Id. at 507 & n.7. At least two circuits had reached divergent conclusions. Compare Rowell v. Oesterle, 626 F.2d 437, 438 (5th Cir. 1980)(per curiam)(habeas corpus action challenging state action on constitutional grounds is within federal court jurisdiction even though state action involves domestic relations) with Sylvander v. New England Home for Little Wanderers, 584 F.2d 1103, 1112 (1st Cir. 1978) (domestic relations exception bars federal court jurisdiction over habeas corpus proceeding to challenge state child custody proceeding).

381. 458 U.S. at 512. The Court explained that "[t]he writ of habeas corpus is a major exception to the doctrine of res judicata, as it allows relitigation of a final state-court judgment disposing of precisely the same claims." Id. The Court refused to extend the writ to the petitioner for prudential reasons, stating that courts should be "reluctant to extend the writ beyond its historic purpose." Id. at 512-13. Child custody was not included within that historical purpose. Id.

382. Id. at 512 (quoting United States v. Yazell, 382 U.S. 341, 352 (1966)).


384. Id. at 342-43. The family law issue in Yazell was whether Texas law preventing a married woman from personally binding herself by contract should be applied to prevent the United States from recovering on a loan made to defendant and her husband through the Small Business Administration. Id. The Supreme Court held that the federal interest in this case did not justify displacing state family law. Id. at 352-53.

385. The fact that Lehman held that a federal court was without jurisdiction in a case involving domestic relations should not be interpreted as indicative of the continued vitality of the domestic relations exception. As previously noted, the Lehman Court in no way rested its holding on the domestic relations exception. See 458 U.S. at 512-13. Rather, Lehman was concerned that a habeas corpus petition would involve a collateral attack on a state court judgment, which the Court viewed as a greater infringement on states than other methods
While of course it would be preferable for the Supreme Court itself to reconsider the domestic relations exception and either abandon the exception or provide lower courts with some guidance as to its appropriate scope, the failure of the Supreme Court to do so need not condemn lower federal courts to another fifty years of struggling to administer an amorphous exception that many courts feel lacks significant justification in our contemporary world. It has been demonstrated that doctrines do exist that would justify the lower courts' repudiation of the exception. In light of recent Supreme Court pronouncements regarding the appropriate balance of power between the states and the federal government in domestic relations matters, grave doubts are cast upon continued Supreme Court support of a broad domestic relations exception to federal jurisdiction.

b. Congressional Inaction as Implied Acceptance of the Exception

Even those courts that recognize the weak precedential compulsion of the seminal Supreme Court cases nevertheless feel constrained to adhere to the domestic relations exception because of the failure of Congress to make clear through legislation that the judicially created exception is an inaccurate interpretation of the statutes defining federal jurisdiction. For example, in the Second Circuit case of Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, Judge Friendly justified the court's adherence to the domestic relations exception on the following ground:

We have no disposition to question. . . . whether the history was right or not. . . . More than a century has elapsed since the Barber dictum without any intimation of Congressional dissatisfaction. It is beyond the realm of reasonable belief that, in these days of congested dockets, Congress would wish the federal courts to seek to regain territory, even if the cession of 1859 was unjusti-

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386. 490 F.2d 509 (2d Cir. 1973).
fled. Whatever Article III may or may not permit, we must accept the Barber dictum as a correct interpretation of the Congressional grant.387

Other federal courts have drawn similar conclusions about the significance of congressional inaction,388 yet none of the opinions relying on this concept cite any authority for the proposition that congressional inaction may bar courts from reevaluating previous judicial interpretations of a statute. Although in some circumstances congressional inaction has been held to imply congressional acceptance of previous judicial interpretations,389 courts and commentators alike have narrowly defined the appropriate circumstances for such inferences.390

387. Id. at 514 (citation omitted).
388. See, e.g., Flood v. Braaten, 727 F.2d 303, 307 (3d Cir. 1984) (after a century of silence, Congress may be said to have acquiesced to the exception); Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1981) (exception has endured for too long to abandon it without action by Congress or the Supreme Court); Cherry v. Cherry, 438 F. Supp. 88, 90 (D. Md. 1977) (100 year-old exception cannot be overruled without action by Congress).

389. See, e.g., Toolson v. New York Yankees, Inc., 346 U.S. 356 (1953). In a one paragraph per curiam opinion, the Toolson Court affirmed the decision of the Ninth Circuit, holding that federal antitrust legislation is inapplicable to baseball. Id. at 356-57. The Court noted that it had reached the same conclusion thirty years earlier and that "Congress has had the ruling under consideration but has not seen fit to bring [baseball] under [the antitrust] laws . . . ." Id. at 357. See also Herman & MacLean v. Huddleston, 459 U.S. 375, 386 (1983) (congressional inaction regarding the Securities Exchange Act has "ratified the cumulative nature of the Section 10(b) action").

390. See, e.g., Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970). The Boys Markets Court reversed its seven year stance that the anti-injunction provisions of the Norris-LaGuardia Act preclude a federal district court from enjoining a strike which violates an enforceable no-strike clause in a collective bargaining agreement. Id. at 257-58. The striking employees in Boys Markets had argued that the Court's prior decision "ought not to be disturbed because the decision turned on a question of statutory construction which Congress can alter at any time . . . [and] Congress has not modified [the prior decision] even though it has been urged to do so . . . ." Id. at 240 (footnote omitted). The Court rejected the argument that congressional silence should be interpreted as acceptance of the statutory construction, stating that "[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law." Id. at 241 (quoting Girouard v. United States, 328 U.S. 61, 69 (1946). See also Flood v. Kuhn, 407 U.S. 258, 288 (1972) (Douglas, J., dissenting) ("unbroken silence of Congress should not prevent [the Court] from correcting its mistakes"); Blonder-Tongue Labs. v. University of Ill. Found., 402 U.S. 313 (1971) (mere congressional inaction is not equivalent to congressional acceptance of prior judicial construction of a federal statute); Helvering v. Hallock, 309 U.S. 106, 119-20 (1940) (congressional silence is not a sufficient reason for refusing to reconsider a prior decision). See generally Tribe, Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence, 57 N.Y.U. L.J. 515 (1982); Hart, The Legal Process 1393-1406 (1958)(unpublished manuscript—available in Boston University Law School Library).
Distinctions have been drawn between different categories of congressional inaction. For example, in the 1971 case of Flood v. Kuhn,\textsuperscript{391} the Supreme Court compared situations involving the "positive inaction"\textsuperscript{392} of Congress with "mere congressional silence and passivity"\textsuperscript{393} and suggested that in the latter case, the courts were not bound to give conclusive weight to congressional silence.\textsuperscript{394} In Kuhn, the Court noted that Congress had considered "numerous and persistent" legislative proposals on the issue at hand, but had failed to enact legislation.\textsuperscript{395} The Court concluded that these circumstances amounted to positive inaction rather than mere congressional silence.\textsuperscript{396} Similarly, in Bob Jones University v. United States,\textsuperscript{397} the Supreme Court noted that inaction by Congress was "not often a useful guide,"\textsuperscript{398} but characterized congressional inaction in that case to be "significant"\textsuperscript{399} since Congress had considered and rejected no fewer than thirteen bills to overturn the judicial interpretation of the Internal Revenue Code provisions at issue in that litigation.\textsuperscript{400}

\textsuperscript{391} 407 U.S. 258 (1972) (antitrust suit challenging baseball's reserve system, under which players could not freely contract with major league teams other than the team for which they played).

\textsuperscript{392} Id. at 283-84.

\textsuperscript{393} Id. at 283.

\textsuperscript{394} Id. at 283-84 (citing Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241-42 (1970)). In Boys Markets, the Court noted that the failure of Congress to respond legislatively to a previous court decision should not be interpreted as acceptance of the decision, and should not bar reconsideration of the decision by the Court. 398 U.S. at 241-42.

\textsuperscript{395} 407 U.S. at 281 & n.17. The Court noted that more than fifty bills had been introduced in Congress which would have effectively invalidated the Court's prior construction of the statute in question. Id. The bills which eventually passed, however, had no effect upon the Court's statutory construction. Id.

\textsuperscript{396} Id. at 285-84. The Kuhn analysis was recently followed by the Court in Herman & MacLean v. Huddleston, 459 U.S. 375 (1983). At issue in Huddleston was whether an implied cause of action under § 10(b) of the Securities Exchange Act of 1934 was limited by the express remedy of § 11 of the Securities Act of 1933. Id. at 379. A "consistent line of judicial decisions" prior to 1975 had held that § 10(b) was not so limited. Id. at 384. The Huddleston Court found that the failure of Congress to legislatively overrule these prior decisions when it "comprehensively revised the securities laws in 1975" was indicative of congressional approval of the prior judicial decisions. Id. In attaching significance to this congressional inaction, the Huddleston Court went out of its way to note that the 1975 revisions were the most substantial revisions in the history of the federal securities laws. Id. The Court was clearly concerned that it rely on a situation of positive congressional inaction, and not mere silence or passivity.

\textsuperscript{397} 461 U.S. 574 (1983)(nonprofit private schools that prescribe and enforce radically discriminatory admission standards on the basis of religious doctrines do not qualify for tax-exempt status under the Internal Revenue Code).

\textsuperscript{398} Id. at 2033.

\textsuperscript{399} Id.

\textsuperscript{400} Id.
In contrast to the situations in *Kuhn* and *Bob Jones*, congressional inaction concerning the domestic relations exception is analogous to "mere Congressional silence and passivity." Congress has not considered legislation that would amend the federal jurisdiction statutes so as to clarify the applicability of these statutes to domestic relations cases. To ascribe significance to the silence of Congress in this situation is of questionable legitimacy. Therefore, congressional silence concerning the exception should be accorded little, if any weight.

The Supreme Court has also recognized that congressional activity seemingly at odds with a previous judicial interpretation of a statute is relevant in determining when courts may judicially repudiate that interpretation and when the repudiation must be accomplished through amendment of the statute. In *Monell v. Department of Social Services*, the Supreme Court repudiated an interpretation of a federal civil rights statute that it had announced seventeen years earlier in *Monroe v. Pape*. One of the


402. The only case involving the domestic relations exception which refers to specific federal legislation to support the congressional inaction argument is *Bennett v. Bennett*, 682 F.2d 1039, 1043 (D.C. Cir. 1982) (citing the Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (1982)). The plaintiff in *Bennett* argued that the Act was indicative of congressional intent to leave domestic relations cases in state courts, since the act did not create or recognize "a direct role for the federal courts in determining child custody." *Id.* at 1043. This argument is flawed, however, since the Act does indeed provide for a federal role in determining child custody. See *Flood v. Braaten*, 727 F.2d 303, 313 (3d Cir. 1984) (suit to compel enforcement with the Act may be heard in federal district court under federal question jurisdiction).

The only indication that Congress directly considered jurisdictional questions at the time of the enactment of the Act was the submission to the House of Representatives of two bills, H.R. 325 and H.R. 772, which would have given federal district courts jurisdiction to enforce custody orders against a parent who had taken a child in contravention of a custody order of one state and traveled with the child to another state. No hearings were ever held on the bills, and they died in the committees to which they were referred. Both bills would have granted federal courts jurisdiction over the enforcement of certain custody decrees, without the necessity of demonstrating federal question jurisdiction, diversity jurisdiction, or satisfaction of the jurisdictional amount. The bills apparently died after doubts were expressed about the constitutionality of granting jurisdiction in the absence of an affirmative constitutional basis. *Parental Kidnapping, Hearing on H.R. 1290 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 96th Cong., 2d Sess. 139 (1980)(statement of Russell M. Coombs, Associate Professor, Law School, Rutgers University, Camden, N.J.). For a further discussion of the Federal Parental Kidnapping Act, see *infra* notes 409-11 & 440-48 and accompanying text.


factors the Court considered in determining the propriety of overruling its previous interpretation was the significance of recent expressions of congressional intent. In Monell, the Court noted collateral actions by Congress since Monroe v. Pape that implied that Congress had not entirely accepted the previous judicial interpretation of the statute. The Monell Court concluded that given these collateral congressional actions, the case was not one where the Court should place "on the shoulders of Congress the burden of the Court's own error." As previously noted, the Parental Kidnapping Prevention Act of 1980 requires the states to recognize and enforce certain child custody decrees handed down by other states. Through this act, the federal government has explicitly curtailed the freedom of individual states to make determinations

(1961)). In Monroe, the Court had ruled that a municipal corporation was not included in the definition of "persons" under § 1983. 365 U.S. at 191. Monell held to the contrary. 436 U.S. at 688-89. 406. 436 U.S. at 696-99 (citing Emergency School Aid Act, 20 U.S.C. § 1605(a)(1)(A)(i)(1982)(local educational agency may be ordered to implement desegregation plan); Equal Educational Opportunities Act, 20 U.S.C. § 1702(a)(3)(1982)(implementing desegregation plans requires large expenditures); S. REP. No. 1011, 94th Cong., 2d Sess. 5 (1976)(state or local officials or bodies may be liable for attorney's fees)). 407. Id. at 696 (quoting Girouard v. United States, 328 U.S. 61, 70 (1946)). Another factor discussed in Monell which had an impact on the Court's decision to judicially repudiate its prior interpretation in Monroe was the lack of a justifiable reliance interest which would be harmed should the law be judicially altered. Id. at 699-700. The Monell Court contrasted the interests of the municipalities whose potential liability was at issue with the interests of those engaged in the area of commercial law "in which, presumably, individuals may have arranged their affairs in reliance on the expected stability of decision." Id. at 700 (quoting Monroe, 365 U.S. at 221-22 (Frankfurter, J., dissenting in part)). A similar factor was considered in Toolson, where the Court was concerned that a repudiation of its prior statutory interpretation would injure the baseball industry, which had developed in the ensuing years in reliance on the previous interpretation. See Toolson, 346 U.S. at 357. For a discussion of Toolson, see supra note 394. In the case of the domestic relations exception, it can be argued that no reliance issue is present to prevent judicial reinterpretation. Individuals do not regulate their daily lives with an eye toward the availability or nonavailability of a federal forum for their future domestic relations disputes.

408. Burrus, 136 U.S. at 593-94. For a discussion of Burrus, see supra notes 32-38 and accompanying text.


410. See id. Section 1738A provides in pertinent part that "[t]he appropriate authorities of every State shall enforce according to its terms, and shall not modify . . . any child custody determination made . . . by a court of another
regarding the custody of children living within their borders. The Act has also resulted in increased participation by the federal judiciary in domestic relations matters, with federal courts recently holding that suits to mandate compliance with the Act can properly be brought in federal court.411

The enforcement of child support orders is another area previously reserved to the states with respect to which the federal government now takes an active role due to the positive action of Congress. Indeed, a recent treatise on child support includes an entire chapter on the subject of "The Federalization of Child Support Enforcement."412 The federal government's role in this area continues to grow, with Congress having recently enacted legislation.413 Federal activity concerning juvenile delinquency and child abuse prevention also are indicative of congressional activity in the area of domestic relations law.414 These actions are persuasive evidence that Congress no longer accepts the premise underlying the judicially created domestic relations exception that family law is solely the province of the states.

Congressional inaction clearly does not compel continued adherence to the domestic relations exception. To the contrary, recent congressional activity recognizing that the area of domestic relations law does not belong exclusively to the states far outweighs any inference that may be drawn from congressional passivity in failing to amend a statute that by its plain language already gives federal courts the power to adjudicate domestic relations matters.

3. The Hidden Reason—Distaste for Domestic Relations Disputes

Although not expressly articulated in federal court opinions, there is a persistent undercurrent in many cases involving the domestic relations exception: federal courts have a distaste for domestic relations disputes. This distaste may be a significant factor

State." Id. For a further discussion of the Act, see infra notes 440-48 and accompanying text.


412. H. Krauss, supra note 262, at ch. VII.


414. See supra notes 264-65.
in the decision of many federal courts to invoke the exception.\textsuperscript{415} For example, in \textit{Phillips, Nizer, Benjamin, Krim \& Ballon v. Rosensiel},\textsuperscript{416} the Second Circuit stated that "we do not believe that the Supreme Court today would demand that federal judges waste their time exploring a thicket of state decisional law in a case such as this."\textsuperscript{417} Because the defendant did not timely move for a stay, however, the court felt that it was forced to "treat the merits, painful as that may be."\textsuperscript{418} Domestic relations disputes have been described by federal courts as "vexatious,"\textsuperscript{419} as "little family quarrel[s],"\textsuperscript{420} "intra-family feuds,"\textsuperscript{421} and "imbro-glio[s],"\textsuperscript{422} and as requiring the airing of "sordid evidence."\textsuperscript{423} In \textit{Thrower v. Cox},\textsuperscript{424} a district court discussed the exception and concluded that federal courts should continue to allow state courts "the dubious honor"\textsuperscript{425} of exclusively adjudicating domestic relations cases. Even courts accepting jurisdiction over domestic relations cases express their distaste for this type of case. In \textit{Cole v. Cole},\textsuperscript{426} the Fourth Circuit reluctantly concluded that "[s]o long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rag-and-bone shop of the heart."\textsuperscript{427}

While no court has expressly rested its invocation of the domestic relations exception on such considerations, the murky origins and nebulous contours of the exception have provided courts with the latitude to refuse to hear cases which they find distasteful or onerous, even though the letter of federal statutes indicates that such cases are properly before them. Clearly, however, considerations of distaste should not enter into the jurisdictional determination.

\textsuperscript{415} See \textit{Cole v. Cole}, 633 F.2d 1083, 1087-88 (4th Cir. 1980). In \textit{Cole}, the Fourth Circuit noted that some federal courts appeared to find the "contemplated proof . . . particularly distasteful." \textit{Id.} at 1088.

\textsuperscript{416} 490 F.2d 509 (2d Cir. 1973).

\textsuperscript{417} \textit{Id.} at 516 (footnote omitted).

\textsuperscript{418} \textit{Id.} at 517.


\textsuperscript{422} \textit{Overman v. United States}, 563 F.2d 1287, 1292 (8th Cir. 1977).

\textsuperscript{423} \textit{Cox}, 425 F. Supp. at 574.


\textsuperscript{425} \textit{Id.} at 573.

\textsuperscript{426} 633 F.2d 1083 (4th Cir. 1980).

\textsuperscript{427} \textit{Id.} at 1089.
VII. THE CASE FOR REPUDIATION RATHER THAN REDEFINITION

The foregoing discussion demonstrates that the domestic relations exception is plagued by inconsistent application and poorly analyzed justifications. Courts agree neither on the nature of the exception,\textsuperscript{428} nor on its application to particular types of domestic relations cases.\textsuperscript{429} Such an unpredictable approach is undesirable.

Were inconsistency of application the only problem with the exception, it might be argued that the development of a more tractable test to determine which cases are properly within the scope of the exception would be an appropriate solution.\textsuperscript{430} Yet the problems with the contemporary use of the exception are much more serious than inconsistency and unpredictability. From a policy perspective, the exception denies litigants access to federal courts in cases where federal jurisdiction may be especially appropriate.

As previously discussed, an often cited justification for the original constitutional and statutory grants of diversity jurisdiction is the concern that state courts might be biased against out-of-state parties.\textsuperscript{431} While some commentators question whether prejudice against out-of-state residents remains a sufficient concern in our mobile society to justify retention of diversity jurisdiction,\textsuperscript{432} studies have shown that the possibility of bias against those from out-of-state continues to enter into the decisions of attorneys as to whether to select a federal or state forum.\textsuperscript{433} To

\textsuperscript{428} See supra notes 76-92 and accompanying text.
\textsuperscript{429} See supra notes 93-258 and accompanying text.
\textsuperscript{430} For a discussion of commentators who have advocated such an approach, see infra notes 476-84 and accompanying text. Cf. Krauskopf, Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards, 45 OHIO ST. L.J. 429, 444 n.99 (1984) (the "alarming degree of inconsistency in application of the exception" is "a major reason for recommendation that the exception be abrogated entirely").
\textsuperscript{431} For a discussion of local bias as it relates to policy rationales for the domestic relations exception, see supra notes 271-81 and accompanying text. See also C. WRIGHT, supra note 6, § 23, at 128.
\textsuperscript{433} See, e.g., Goldman & Marks, Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry, 9 J. LEGAL STUD. 93 (1980). The authors of this study affirm "what critics of diversity jurisdiction deny . . . [T]he fear of local bias enters the calculus of decision in selecting a judicial forum." Id. at 104. See also Note, The Choice Between State and Federal Court in Diversity Cases in Virginia, 51 VA. L. REV. 178, 179 (1965) (60.3% of plaintiffs' counsel responding to survey cited local prejudice against out-of-state plaintiff as reason for choosing federal court, and 52.1% of plaintiffs' counsel who chose state court cited prejudice against out-
the extent that protecting out-of-state citizens from local bias continues to be one of the purposes served by diversity jurisdiction, access to federal courts under the diversity statute should be available in situations where such bias is a concern. Domestic relations cases often present such concerns.

The promulgation of the Uniform Child Custody Jurisdiction Act\textsuperscript{434} and its subsequent enactment by every state\textsuperscript{435} were direct responses to the problems caused by the tendency of states to disregard custody decrees issued in other states and to issue their own custody decrees in favor of the residents of their own state.\textsuperscript{436} Yet the Act failed to check what has been described by one commentator as the problem of “parochial [state] courts” and their penchant for “hometowning.”\textsuperscript{437} State courts continued to exhibit their “propensity for hometown decisions.”\textsuperscript{438}

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\textsuperscript{434} Unif. Child Custody Jurisdiction Act §§ 1-27, 9 U.L.A. 116 (1968) [hereinafter cited as UCCJA]. The UCCJA represents an attempt to avoid jurisdictional conflict and to promote cooperation among the courts of the several states. Id. § 1. For an explanation of the basic provisions of the UCCJA, see supra note 276.

\textsuperscript{435} See UCCJA, 9 U.L.A. 22, 22-23 (Supp. 1985) (table of jurisdictions wherein act has been adopted).

\textsuperscript{436} The Commissioners’ Prefatory Note to the UCCJA described the problems sought to be remedied through promulgation of the Act as follows:

There is growing public concern over the fact that thousands of children are shifted from state to state and from one family to another every year while their parents or other persons battle over their custody in the courts of the several states. . . . [The party who has lost custody] will remove the child in an unguarded moment or fail to return him after a visit and will seek their luck in the court of a distant state where they hope to find—and often do find—a sympathetic ear for their plea for custody.


\textsuperscript{437} Sampson, What’s Wrong With the UCCJA? Punitive Decrees and Hometown Decisions Are Making a Mockery of This Uniform Act, 3 Fam. Advoc., Spring 1981, at 28, 29.

\textsuperscript{438} Id. at 30. The author points out the “intrinsic naivete” of the UCCJA in that the act depends for its success upon state courts communicating and cooperating with one another. Id. Such a requirement is seen as beyond hope “in a system heretofore characterized, in an unfortunate number of cases, by judicial intemperance, recalcitrance, chauvinism and xenophobia.” Id.
through their interpretation of the malleable language of the Uniform Act.439

The recent interest of Congress in the prevention of parental kidnapping440 was motivated in part by a recognition that state courts, even in states that had adopted the Uniform Child Custody Jurisdiction Act, often responded to appeals by child-snatchers who sought haven in their states by "switch[ing] custody to the parent within [their] jurisdiction . . . ."441 As did the Uniform Child Custody Jurisdiction Act, the Parental Kidnapping Prevention Act attempted to deal with the problem through rules designed to restrict the ability of states to modify child custody decrees entered by other states.442

Yet the Parental Kidnapping Prevention Act itself has shortcomings. Some state courts fail to comply with the mandate of the Act and modify child custody decrees issued by other states by awarding custody to the litigant within their borders.443 When such noncompliance occurs, federal courts are now becoming involved through suits to mandate compliance.444 This circuitous

439. For a discussion of the ways in which the language of the UCCJA can be utilized by state courts to accept jurisdiction and rule in favor of their own residences, see Note, Family Law: Courts' Adoption of Uniform Child Custody Jurisdiction Act Offers Little Hope of Resolving Child Custody Conflicts, 60 MINN. L. REV. 820 (1976). See also W. WEYRAUCH & S. KATZ, supra note 284, at 548-51 (noting that the open-ended language of the UCCJA invites judicial discretion which may be used to foster parochial interests); Krauskopf, supra note 430, at 434 (bemoaning the differing versions of the UCCJA enacted in the several states and the resulting uneven interpretation of the Act's requirements); Sampson, supra note 443, at 28-29 (citing the hometown bias in state court decisionmaking as the cause of the interstate child custody dilemma).


441. Letter from Assistant Attorney General Patricia M. Wald to Congressman Peter W. Rodino, reprinted in Joint Hearings, supra note 278, at 101-02.


443. See, e.g., Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984). In Flood, the mother of four children brought suit in federal court because the states of residence of both the mother and father exercised jurisdiction over the question of the custody of the children. Each state court had awarded custody to the parent residing within its borders. Id. at 306. See also Heartfield v. Heartfield, 749 F.2d 1138 (5th Cir. 1985); McDougald v. Jenson, 596 F. Supp. 680 (N.D. Fla. 1984) (inconsistent custody decrees entered by Florida and Washington state courts).

444. See Flood v. Braaten, 727 F.2d 303 (3d Cir. 1984). In Flood, the court asserted:
route to preventing the unjustified preference of state courts for ruling in favor of their residents often involves three judicial proceedings: the original custody proceeding, the modification of the custody decree by the second state court, and the federal court action to mandate compliance with the federal act. 445

Allowing a federal court to hear a custody dispute in the first instance where there is the possibility of bias against one of the parties because of diversity of citizenship could lead to decisions truly in the best interest of the child. 446 It would remove the threat of a state court’s possible predisposition to rule in favor of its resident. As a result, a parent losing custody following trial in a federal court might be less likely to feel dissatisfied with a decision granting custody to the other parent since the decision would not be perceived as swayed by local bias. Additionally, child-snatching might be a less attractive course of conduct to the parent losing custody if custody determinations were cognizable in federal court. For even if the child-snatcher appealed to a state court in another state, the case would be removable to federal court by the spouse with legal custody. 447 Finally, the defending spouse in a federal court might be able to invoke the federal transfer statute to move the place of trial back to the state of her residence, 448 thus nullifying any advantage gained by the child-

445. Flood, 727 F.2d at 313. The necessity for federal appellate review in this instance actually created a fourth proceeding, since the case had to be remanded to the district court. Id.


447. See 28 U.S.C. § 1441(a)(1982). Section 1441(a) provides that: any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

448. Id. § 1404(a). Section 1404(a) allows a district court, “[f]or the convenience of parties and witnesses, in the interest of justice” to transfer any civil
snatcher by forcing the defending spouse to defend in an inconvenient location.

One could argue that whatever the perceived advantages of allowing federal courts to adjudicate custody disputes where diversity of citizenship exists, such an exercise of jurisdiction would involve the federal courts in determinations best left to the states.\textsuperscript{449} However, the tendency of courts to favor their own residents in child custody determinations casts some doubts on the basic premise that in cases involving litigants of diverse citizenship, the custody determination is best left to the states. Child custody determinations are to be made according to what would be in the best interest of the child. To the extent that a state court bases its decision on the residence of the parents, rather than on an evaluation of what truly would be in the child's best interest, the preference for a state forum is highly questionable.

Since the enactment of the Parental Kidnapping Prevention Act, federal courts have already become involved in determining issues very similar to those they would be forced to make in child custody determinations. In lawsuits brought in federal court to challenge assertions of jurisdiction allegedly improper under the federal act, federal courts may be called upon to determine whether a child "has been subjected to or threatened with mistreatment or abuse;"\textsuperscript{450} whether a child "has been abandoned"\textsuperscript{451} whether it was "in the best interest of the child that [a state] court assume jurisdiction;"\textsuperscript{452} and whether there is available in a particular state "substantial evidence concerning the child's present or future care, protection, training, and personal relationships."\textsuperscript{453} None of these terms are defined in the Act, thus leaving federal courts to fashion definitions.\textsuperscript{454}

action to any other district or division where the case might originally have been brought. \textit{Id.} Thus, where a parent has snatched a child and instituted a custody proceeding in a distant state, the parent with legal custody could remove the action to a federal court in the distant state and then seek transfer to the federal district in which she or he resides. It is likely that a federal court would find transfer both convenient and just in situations in which the child, prior to being snatched, had resided in the transferee state.

\textsuperscript{449} For arguments that child custody determinations are best left to the states, see Atwood, \textit{supra} note 7, at 620-21; Comment, \textit{supra} note 5, at 851-53.


\textsuperscript{451} \textit{Id.} § 1738A(c)(2)(C)(i).

\textsuperscript{452} \textit{Id.} § 1738A(c)(2)(D)(ii).

\textsuperscript{453} \textit{Id.} § 1738A(c)(2)(B)(ii)(II).

\textsuperscript{454} See \textit{id.} § 1738A. One may attempt to differentiate the actual determination of custody from the determination that a federal court must make when deciding whether a state court custody decree was entitled to the protection of
The propensity of state courts to favor their own residents in domestic relations cases is not necessarily peculiar to child custody determinations. The same local bias that may taint the decision of the state court in a child custody dispute may threaten also the integrity of judgments in other disputes, such as those regarding spousal support, child support, or the disposition of property. The domestic relations exception to federal jurisdiction restricts access to federal courts in the very cases where a neutral forum is most needed.

The need for an available federal forum is even more compelling where a domestic relations case presents a substantial federal question. Domestic relations cases can involve rights of fundamental importance to United States citizens. Developments in constitutional law have made clear that states are limited in the extent to which they can infringe upon those rights and in the mechanisms through which they seek to affect those rights. Certainly, state courts can claim no greater expertise in the area of constitutional law than the federal judiciary. Of course, as with any other case brought in federal court, existing abstention doctrines may call for a federal court to postpone its consideration of the federal question or even to dismiss the Parental Kidnapping Prevention Act. Yet, the similarities in the types of issues is striking. In both situations, the court is asked to look at the child's past relationships with his parents and to make a determination that will affect the child's future.

455. See, e.g., Carey v. Population Serv. Int'l, 431 U.S. 678 (1977). In Carey, the Supreme Court declared:

While the outer limits of [the right to personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decision "relating to marriage, Loving v. Virginia, 338 U.S. 1, 12 (1967); procreation, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541-42 (1942); contraception, Eisenstadt v. Baird, 405 U.S., at 453-54; id., at 460, 463-65 (White, J., concurring in result); family relationships, Prince v. Massachusetts, 321 U.S. 158, 166 (1944); and child rearing and education, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, [262 U.S. 390, 399 (1923)]."


456. See supra notes 287 & 362-65 and accompanying text.

457. See, e.g., Santosky v. Kramer, 455 U.S. 745, 764-70 (1982) (mere "fair preponderance of the evidence" standard prescribed by New York Family Court Act for the termination of fundamental parental rights denied parents due process); Zablocki v. Redhail, 434 U.S. 374, 388 (1978)(statutory classification of individuals which significantly interferes with the exercise of a fundamental right cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate those interests; support payment collection device was not supported by such interests).
Absent such considerations, however, the federal courts should not be precluded from considering important federal issues by the domestic relations exception.

In domestic relations cases where federal jurisdiction is based on diversity of citizenship, a federal forum may be in some cases the most effective and efficient forum. Where diversity of citizenship is present prior to the filing of an original suit for divorce, the very fact of this diverse citizenship portends potential problems, both for the effective trial of the action in state court and for the enforcement of any state court decree for support, custody or property division. The party who has left the marital domicile may file for divorce in his new domicile. Yet the facts that one of the parties is a domiciliary and personal jurisdiction can be obtained over the other spouse do not necessarily mean that the new domicile is the most effective forum for the action. It is possible that important evidence and witnesses are in the state where the other spouse is domiciled. Where the action is brought in state court, there is no mechanism whereby one state can transfer the action to courts of another state. In contrast, if suits were cognizable in federal court, federal transfer provisions could be employed to transfer the case to a federal court in the state where the action can be tried most effectively. The availability of transfer may also be important in minimizing disruption to any children of the marriage that might result from an extended trial in a distant forum.

Where an original decree has been obtained in state court, a federal forum for enforcement could be more effective, less time-consuming, and cheaper than enforcement in the state court of another state. While the full faith and credit clause mandates that certain domestic relations decrees be recognized in states other than the state rendering the decree, ordinarily enforcement of

458. For a discussion of the application of abstention doctrines to domestic relations cases, see infra notes 481-84 and accompanying text.
459. See H. CLARK, supra note 18, § 11.2.
460. A state court may decline jurisdiction and dismiss the case under the doctrine of forum non conveniens. See 20 AM. JUR. 2d Courts §§ 172-182 (1965); Annot., 9 A.L.R. 3d 547 (1966). A great deal of deference is usually given to plaintiff's choice of forum, however, and unless the balancing of factors is strongly in favor of the defendant, the plaintiff's choice of forum will rarely be disturbed. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947).
462. See Sistare v. Sistare, 218 U.S. 1 (1910). In Sistare, the United States Supreme Court held that alimony decrees were entitled to full faith and credit as to accrued nonmodifiable installments. Id. at 26. The actual award in the Sistare
the out-of-state decrees still requires the filing of an independent
lawsuit in the state where enforcement is sought. The Uniform
Reciprocal Enforcement of Support Act, some version of which
has been accepted by all states, does provide a mechanism for
allowing the obligee of a support decree to file an enforcement
action in her own state. The process, however, is cumbersome
and relies on the availability and efforts of law enforce-
ment officials in the state where the obligor resides.

While the matter is not free from controversy, a federal stat-

463. For a summary of the process of obtaining enforcement of a foreign
judgment in the courts of another state, see J. Landers & J. Martin, Civil Pro-
cedure 958-59 (1981). The process may be simpler in states that have adopted
the Uniform Enforcement of Foreign Judgments Act, which provides an enforce-
ment mechanism similar to the registration available in the federal district
courts. Id. (citing Unif. Enforcement of Foreign Judgments Act, 13 U.L.A.
173 (1964)).

(1968). The purpose of this act is "to improve and extend by reciprocal legisla-
tion the enforcement of duties of support." Id. § 1, at 648.


466. For a complete description of the procedure through which enforce-
ment is accomplished, see id.

467. The procedure established under the Act contemplates two contem-
poraneous proceedings, one in the state of the obligor and the other in the state
of the obligee. Id. Documents, findings, depositions, and evidence must all be
transmitted between the two particular courts. Id. For a summary of the proce-
dure, see id. at 930-31.

468. In a newsletter of the National Reciprocal and Family Support En-
facement Association, Gina Dipola, the Family Support Coordinator of the
Thurston County, Washington, Prosecution Attorney's Office, notes some of the
problems in the enforcement of support obligations through the Uniform Recip-
rocatal Enforcement of Support Act:

The incidents where the URESA petition in itself is inadequate to pro-
cess the matter in a responding jurisdiction are becoming overwhelm-
ing . . . .

What effect does this have on efficiency and cost effectiveness? It depends on
the size, staff and present processing practices of the responding juris-
dictions. Some take three months just to acknowledge a receipt—
others may attain resolution with 90-120 days. The delay caused by
the requirement of documentation—waiting to receive it and then pro-
ceeding—will most assuredly double the time lag. Meanwhile, the sta-
tus of the respondent may have changed financially, physically or
residentially. Again, more delay or worse yet—no respondent. Back to
Square Number One—locate, file new pleadings, etc. This happens too
often without such delays!

8 NRFSEA News (National Reciprocal and Family Support Enforcement Associ-
ute allowing judgments of one district to be registered in any other district\textsuperscript{469} may make it possible to enforce federal domestic relations judgments for the recovery of money or property more efficiently.\textsuperscript{470} Such registration, accomplished through the simple procedure of filing a certified copy of the judgment, results in the judgment having the same effect and enforceability as if the district court where it is registered had rendered the judgment in the first place.\textsuperscript{471}

\textsuperscript{469} 28 U.S.C. § 1963 (1982). Section 1963 provides:

A judgment in an action for the recovery of money or property now or hereafter entered in any district court which has become final by appeal or expiration of time for appeal may be registered in any other district by filing therein a certified copy of such judgment. A judgment so registered shall have the same effect as a judgment of the district court of the district where registered and may be enforced in like manner.

A certified copy of the satisfaction of any judgment in whole or in part may be registered in like manner in any district in which the judgment is a lien.

\textit{Id.}

\textsuperscript{470} Compare Gitlin v. Gitlin, 15 F.R.D. 458, 459 (E.D.N.Y. 1954)\{legislative intent to exclude divorce decree from registration bars application of § 1963\} with Gullet v. Gullet, 188 F.2d 719, 720 (5th Cir. 1951)\{action to enforce support agreement did not constitute divorce decree, but one "for the recovery of money" as contemplated by § 1963\}. The uncertainty as to the applicability of the registration statute to domestic relations cases derives from a comment in the Historical and Revision Notes to the statute. The Notes state that the language limiting registration to judgments "for the recovery of money or property" was included "to exclude judgments in divorce actions and any other actions, the registration of which would serve no useful purpose." 28 U.S.C. § 1963 historical and revision notes (1982). The \textit{Gullet} court, however, allowed registration of a divorce decree providing for separate maintenance, characterizing it not as a divorce decree but as one for the recovery of money. 188 F.2d at 720.

The cases might be distinguished on the grounds that in \textit{Gitlin}, the alimony decree sought to be enforced through registration was included as part of a divorce judgment, a type of judgment specifically referred to in the Historical and Revision Notes, while the separate maintenance decree in \textit{Gullet} was issued during the marriage, and it therefore was not a part of a divorce decree. To interpret the language of the Notes to exclude from the registration statute any judgment rendered in conjunction with a divorce decree, however, is not warranted by the purpose of the statute. The Notes explain the language of the registration statute as a means of restricting registration to those judgments the enforcement of which can be aided through registration. \textit{See} 28 U.S.C. § 1963 historical and revision notes (1982). Divorce judgments are given as an example of a type of judgment the registration of which would serve no purpose. The portion of a divorce decree that dissolves the marriage of the parties accomplishes that task by the very rendering of the decree; thus there is no need to allow registration. That is not the case, however, with judgments for alimony, child support or division of property. Registration of these judgments does serve a purpose: the simplification of the procedure through which a party can enforce his federal judgment.

Where domestic relations decrees have been issued by state courts, a federal court may sometimes serve as a more effective forum than a state court for enforcing that judgment. Enforcement of a domestic relations decree may be relatively simple where both parties remain in the jurisdiction that issued the original decree. In such a case, the issuing court retains jurisdiction over the parties and may enforce its judgment through contempt procedures or otherwise.472 A more difficult problem, however, is presented where a person seeks to enforce a judgment against a party who has left the state.

For example, if the state court that handed down the original domestic relations decree issues an injunction or contempt order against the offending party, that injunction or contempt order would not be per se enforceable against the offending party in another state.473 By leaving the state, the offending party can insulate himself somewhat from that state's enforcement efforts. The party seeking enforcement is then put to the time, inconvenience and expense of attempting to convince officials of the state in which the offender is now located to enforce the decree. By contrast, if the party seeking enforcement were able to resort to a federal court for enforcement, the mandate of any injunction issued by that federal court would run throughout the United States.474 The offending party would be in contempt of court for violating the injunction wherever in the United States he sought to flee. Moreover, enforcement efforts by the unified federal court system would be less cumbersome than attempts to convince a state court to enforce an injunction issued by an entirely independent court.

Thus, the repudiation of the domestic relations exception can be supported on affirmative policy grounds. First, domestic relations cases involving parties of diverse citizenship present significant problems of bias against which diversity jurisdiction was meant to protect. In addition, in many domestic relations cases based on diversity of citizenship, federal courts may be the most effective and efficient forums. Finally, the superior ability of federal courts to enforce domestic relations judgments when one of the parties to the original judgment has left the state militates to-

472. H. CLARK, supra note 18, §§ 14.10, 15.3.
473. See Restatement (Second) of Conflict of Laws § 102 (1971). The Restatement provides: "A valid judgment that orders the doing of an act other than the payment of money, or that enjoins the doing of an act, may be enforced, or be the subject of remedies, in other states." Id.
ward making a federal forum available, especially at a time when both the states and the federal government recognize the special problems of interstate enforcement of domestic relations.\textsuperscript{475}

All piecemeal attempts at improving the unsatisfactory state of the domestic relations exception have been unsuccessful. A 1956 proposal by Professors Vestal and Foster suggested a status-property distinction, with the former category within the scope of the exception, and the latter category within the jurisdiction of federal courts.\textsuperscript{476} This proposal has been criticized as unworkable.\textsuperscript{477} Indeed, it does little to further the goal of consistent application of the exception. The proposal merely shifts the focus of the inquiry from the difficult question of whether a particular case involves domestic relations to the equally difficult question of whether a particular case involves status or property concepts.\textsuperscript{478} Despite the widespread citation to the Vestal and Foster article for its excellent discussion of the exception,\textsuperscript{479} its proposal for redefining the contours of the domestic relations exception has not received widespread support.\textsuperscript{480}

Other attempts at reformulating the exception are likely to be similarly unsuccessful. Recent attempts at reformulation purport to employ existing federal jurisdictional\textsuperscript{481} and abstention\textsuperscript{482}

\textsuperscript{475} See supra notes 276-78 and accompanying text.
\textsuperscript{476} See Vestal & Foster, supra note 6, at 31.
\textsuperscript{477} Brandtscheit v. Britton, 239 F. Supp. 652, 654 (N.D. Cal. 1965) (proposal overlooked “sound policy considerations” behind the exception and is unworkable because many cases involve both status and property disputes).
\textsuperscript{478} See Vestal & Foster, supra note 6, at 29-31.
\textsuperscript{480} For a discussion of cases using a property-status analysis, see supra notes 104-14 & 152-75 and accompanying text.
\textsuperscript{481} See generally COLUMBIA Note, supra note 5. This note suggests that the case and controversy requirement of article III of the Constitution and the impartiality component of article III justiciability should be utilized as a means of excluding some domestic relations cases from federal jurisdiction. Id. at 1851-53.
\textsuperscript{482} See Atwood, supra note 7, at 603-11, 627-28 (application of the various abstention doctrines only where state interests are sufficiently important is a more principled approach than wholesale abstention under the domestic relations exception); Note, supra note 7, at 1105-20 (federal courts should abstain under the Burford doctrine only if the case presents a state interest of substantial concern and either an issue of unsettled law or a comprehensive administrative and judicial mechanism with which federal review would interfere; federal courts should utilize the Younger doctrine of equitable restraint only where the case involves enjoining of state domestic relations proceedings or modifying a domestic relations decree involving important local factors). See generally C. WRIGHT,
doctrines to delineate the scope of the exception. These proposals, however, invariably involve special extensions of the existing concepts in order to encompass domestic relations cases. These special extensions are as difficult to apply as the current domestic relations exception.\textsuperscript{483} In addition, these proposals do not further any of the recognized policies behind the exception.\textsuperscript{484} Given the dynamic nature of the field of family law, a workable redefinition of the term domestic relations for purposes of the exception may be an insurmountable task.

Any attempt to render the domestic relations exception more easily and uniformly applied presupposes that the exception deserves to survive. It has been argued in this article, however, that there are affirmative reasons why federal courts should be available to litigants in domestic relations cases, where established federal jurisdictional requirements are otherwise met. Moreover, it has been demonstrated that judicial repudiation of the exception is clearly within the power of lower federal courts.

Repudiation of the domestic relations exception will not necessarily result in a flood of domestic relations cases into federal court. As discussed above,\textsuperscript{485} repudiation of the exception will not mean that all domestic relations cases will be cognizable in federal court. Rather, it will mean only that those domestic relations suits that otherwise meet established requirements for federal jurisdiction may be filed in, or removed to, federal court.

Inability to satisfy the diversity of citizenship\textsuperscript{486} and amount in controversy requirements\textsuperscript{487} will limit the number of domestic

\textsuperscript{483} For example, while recognizing that family and juvenile courts cannot be equated with the complex administrative schemes which have in the past justified abstention, one commentator counsels extension of the abstention doctrine to include cases involving "analogous comprehensive state administrative and judicial mechanisms employed in domestic relations actions." Note, \textit{supra} note 7, at 1111. No guidance is given, however, in determining whether a particular state has such analogous comprehensive mechanisms. Such an individualized approach is necessary because of the varied structure of domestic relations courts and the differences in local judicial practices with respect to domestic relations cases. For a discussion of local practices, see \textit{supra} note 307 and accompanying text.

\textsuperscript{484} For example, the proposal advocated in a recent student note would result in contested cases, involving utilization of judicial expertise and temporal resources, being within federal court jurisdiction, while uncontested cases, involving little imposition in terms of time or expertise, falling outside federal court jurisdiction. \textit{See Columbia Note}, \textit{supra} note 5, at 1851-61.

\textsuperscript{485} \textit{See supra} notes 323-29 and accompanying text.

\textsuperscript{486} \textit{See supra} notes 326-27 and accompanying text.

\textsuperscript{487} \textit{See supra} notes 328-29 and accompanying text.
relations cases that are within the bounds of federal jurisdiction. In fact, it is primarily those cases which some consider to be at the "core" of the domestic relations exception that are least likely to satisfy federal jurisdictional requirements. Suits to adjudicate marital and custodial status will not by themselves be cognizable in federal court without the presence of a federal question because of the inability of these suits to satisfy the amount in controversy requirement. 488

Original divorce suits are probably the least likely to satisfy diversity of citizenship requirements. Until the court can sever the bonds of the marital relationship, divide the property of the parties, and award custody of the parties' children, the divorcing spouses may be unable or unwilling to leave the marital domicile to establish domicile elsewhere for fear of the effect of that move on the already stressed family or on the impending divorce suit. 489 These very real concerns about the effect of a move on

488. A question not addressed by this article is the propriety of those decisions which have held that neither marital status nor entitlement to child custody is capable of monetary valuation, and that therefore suits involving such matters do not satisfy the amount in controversy requirement. See supra notes 328-29 and accompanying text. It may be argued that, while the relief sought in these cases is not capable of monetary valuation, the issues to be determined are of sufficient importance to the parties involved and to society as to satisfy the function which the amount in controversy serves—to set an amount that is "not so high as to convert the Federal courts into courts of big business nor so low as to fritter away their time in the trial of petty controversies." C. WRIGHT, supra note 6, § 32, at 176 (quoting S. REP. No. 1830, 85th Cong., 2d Sess. 4, reprinted in 1958 U.S. CODE CONG. & AD. NEWS 3099, 3101). 489. A parent may be unwilling to disrupt the lives of any children of the marriage by requiring the children, who may already be under stress because of the breakdown of the family unit, to move to another state. A decision to leave the children in the state of the married domicile with the other parent carries with it the risk of having that action be taken into account when custody of children is decided upon by the court.

The parties may also be unwilling to leave the state for fear of losing control over assets of the marriage. Once a divorce petition is filed, one party may obtain a restraining order preventing the other party from disposing of the assets of the marriage during the pendency of the lawsuit. See, e.g., Ind. Code Ann. § 31-1-11.5-7(f)(b)(1)(West Supp. 1984). Until a suit has been filed, however, and unless the parties live in a community property state, each party has the ability to dispose of any property he or she owns regardless of the fact that that property may be subject to division by the court in a divorce suit. While a spouse, even if he or she remains in the state of the marital domicile, may have no recourse to the disposition of property by the other spouse until a lawsuit is filed, a spouse who chooses to leave the state to establish diversity of citizenship will of necessity be delaying the filing of the suit through which an order restraining alienation of property can be obtained until sufficient evidence of change of domicile can be established. In addition, knowledge of attempts at disposition of property would be more difficult to obtain where the spouses are living in different states.
the family and on the disposition of the issues to be determined in
the divorce suit strongly suggest that there is little possibility of a
move merely to create diversity of citizenship. Thus, it is quite
likely that the majority of domestic relations suits will continue to
be outside the boundaries of federal court jurisdiction.

The number of domestic relations cases actually brought to
federal court may be further restricted by the fact that notwith-
standing the availability of a federal forum, many litigants will
choose state forums instead. Studies have shown that attorneys
consider a variety of factors when making the decision as to
choice of forum. In one study, attorneys who had chosen a
state forum for their cases despite the availability of a federal fo-
rum cited factors such as lower litigation costs, familiarity with
judges, the degree of participation of the judge in trial, and the
accessibility of the court as reasons for their choice. In domes-
tic relations cases, other factors, such as the perceived greater ex-
pertise of state courts in domestic relations matters or the
availability of support services in state courts—the very factors
cited by those who would maintain the domestic relations excep-
tion—may lead litigants to prefer state courts, even where the
federal forum is available to them. Therefore, the number of do-
mestic relations cases brought or removed to federal court may
be far smaller than the number of cases in which federal jurisdic-
tional requirements can be met. A final factor that will restrict the
burden on federal dockets caused by repudiation of the domestic
relations exception is the availability of settled abstention doc-
trines to remand to state court those domestic relations cases
more properly adjudicated there. Use of these doctrines,
rather than the amorphous domestic relations exception, will re-
sult in more finely-tuned decisions as to the wisdom of federal
court adjudication of cases containing domestic relations issues.

VIII. CONCLUSION

Although both the Constitution and the federal jurisdictional
statutes appear to provide otherwise, federal courts today refuse

490. See Goldman & Marks, supra note 439, at 98 (quality of judges, court
calendar, rules of discovery, availability of practical procedures); Summers, supra
note 439, at 937-38 (geographical convenience, jury awards, discovery, judicial
temperment, etc.).

491. See Note, supra note 439, at 179.

492. For a discussion of the abstention doctrines, see supra notes 7, 308 &
481-84 and accompanying text. See generally Atwood, supra note 7; and Note,
supra note 7.
to hear a large number of cases on the basis of an implied domestic relations exception to federal jurisdiction.

Because of its murky origins, federal courts have received no guidance as to the boundaries of the domestic relations exception. As a result, they disagree on the nature of the exception and on its applicability to various types of domestic relations cases. The inconsistency in application of the exception is unacceptable, since access to federal court should be regulated by a standard that is uniformly applied throughout the country, regardless of the location of the court.

Contemporary courts justify their continued adherence to the domestic relations exception on both policy and precedential grounds. However, as demonstrated above, neither justification should stand as a bar to judicial repudiation of the exception. Nor should the distaste with which federal courts appear to view domestic relations cases play any part in a court's decision whether to hear such cases. In contrast to the lack of merit to arguments for retention of the domestic relations exception, several important policies would be furthered by repudiation of the exception.

This article calls for judicial repudiation of the exception. Past attempts at redefinition of the exception to rectify perceived problems in its application fail to present a workable solution. Further, given the changing nature of domestic relations law and the shift in the extent and nature of state and federal interests in domestic relations matters, judicial repudiation of the exception, rather than any makeshift revision, is the appropriate course of action.