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Comment

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FEDERAL JURISDICTION AND THE DOMESTIC RELATIONS EXCEPTION: A SEARCH FOR PARAMETERS

INTRODUCTION

Title 28 of the United States Code grants original jurisdiction to the federal district courts in all civil actions which arise under the Constitution, laws, or treaties of the United States (federal question jurisdiction) [1] or are between diverse citizens where the matter in controversy exceeds $10,000 (diversity jurisdiction). [2] There are, however, two well-established, judicially-created exceptions to the grant of diversity jurisdiction. [3] Federal courts ***844** view themselves as without subject matter jurisdiction to entertain diversity cases involving probate [4] or domestic relations matters. [5]

This Comment deals exclusively with the domestic relations exception which, simply stated, mandates that federal courts lack jurisdiction to grant divorces, determine alimony or support obligations, or resolve conflicting claims of divorced parents to custody of their children. [6] Even though such a case may satisfy all the requirements of the diversity statute, [7] it must be dismissed—not as a discretionary matter of abstention [8] but because the court has no power to act. [9]

The domestic relations exception arose in Supreme Court ***845** dictum in 1858. [10] Since that time the federal courts have observed a "hands-off" [11] policy in cases requiring an inquiry into a marital or parent-child relationship. [12] Although the

exception first arose in the context of divorce and alimony,[13] federal courts have since applied it to suits involving almost every marital or parental conflict.[14]

Today, while all federal courts agree that they lack jurisdiction to grant divorces, determine alimony or support obligations, ***846** or resolve the conflicting claims of divorced parents to custody of their children,[15] there is confusion as to how far this jurisdictional exception reaches.[16] This confusion has arisen because no circuit has clearly defined the boundaries of the exception[17] and, therefore, the federal courts have difficulty determining when to dismiss cases which involve domestic matters but which are not the traditionally excluded domestic relations disputes.[18] This lack of clarity is no longer limited, as it traditionally has been, to the diversity area.[19] Federal courts now question whether the domestic relations exception should be extended into the federal question area as well.[20]

Sound policy reasons such as the strong state interest in domestic relations matters,[21] the superior competence and resources of the state family courts[22] in settling family disputes and monitoring continuing domestic problem situations,[23] and the possibility of incompatible state and federal decrees in cases of continuing judicial supervision by the state[24] support the continued application of the domestic relations exception in the diversity area.[25] However, these policy reasons generally do not apply to the type of domestic actions brought under the federal question statute.[26] ***847** Also, they are counterbalanced by the strong federal interest in resolving important constitutional questions which may arise in domestic settings, especially with the growth of constitutionally protected relationships within the family.[27] Applying the exception so as to preclude all federal inspection of constitutional questions arising in domestic situations would be an unwise and incorrect extension of the exception.[28] The federal courts should be left free to act in this area and to determine whether to dismiss such actions as they do in all other cases which come before them under the federal question statute.[29]

This Comment, in a search for the parameters of the domestic relations exception, first considers the historical beginnings of the exception[30] and the policy reasons underlying its present application.[31] Next, this Comment surveys the current application of the exception in the federal courts in both the diversity and the federal question areas.[32] A particular concern of this Comment is the current

trend in some of the circuits to apply the exception to civil rights actions [33] arising in domestic settings, a trend which may preclude examination of important constitutional questions. [34] Finally, this Comment seeks to fix the boundaries of the exception [35] by proposing a practical approach for federal courts faced with domestic relations disputes. [36]

I. THE DICTUM OF BEGINNINGS

The domestic relations exception had its beginnings in 1858 in Barber v. Barber [37] when the Supreme Court, while holding that a federal district court had diversity jurisdiction to enforce an out-of-state divorce decree, stated by way of dictum:

> 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 ***848** an incident to divorce a vinculo, or to one from bed and board. [38]

This dictum has since been cited as authority for the domestic relations exception in most of the cases dealing with the exception. [39]

The dissenting justice supplied the rationale for this dictum. [40] He stated that since the chancery jurisdiction in England had not extended to actions of divorce or alimony, which were within the exclusive jurisdiction of the ecclesiastical court, the courts of the United States, as courts of chancery, were also without jurisdiction over such actions. [41] Such proceedings, therefore, did not come within the language "all suits of a civil nature at common law or in equity"' of the original diversity statute. [42] Several circuits adopted this rationale for the domestic relations exception. [43]

In cases following Barber the Supreme Court confirmed and enlarged the developing domestic relations exception. [44] The Court in In re Burrus [45] stated that " t he whole subject of the domestic ***849** relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States."' [46] Lower federal courts have interpreted this language as prohibiting

federal jurisdiction in domestic relations cases in general[47] and in child custody cases in particular.[48]

The Supreme Court directly recognized the domestic relations exception in 1930 in Ohio ex rel. Popovici v. Agler.[49] This case represents the only direct holding of the Court on the lack of federal jurisdiction over actions for divorce and alimony.[50] In Popovici a vice consul of a foreign country who was stationed and residing in Ohio was sued by his wife for a divorce and alimony in an Ohio state court.[51] The vice consul asserted that the state court lacked jurisdiction because of Article III, Section 2 of the United States Constitution[52] and related statutes giving federal courts original jurisdiction over all actions against foreign consuls and vice consuls.[53] The Supreme Court found that despite the statute granting this jurisdiction, the federal courts had no jurisdiction ***850** over divorce actions,[54] and that the vice consul's application for a writ of prohibition to halt the state court action had been properly denied.[55] In reaching this decision the Court relied on the Barber dictum and adopted the historical view propounded in the Barber dissent.[56]

The Supreme Court thus held that federal courts have no jurisdiction over divorce and alimony in a case where federal jurisdiction was alleged under a statute granting federal court jurisdiction over all actions against foreign consuls and vice consuls, rather than under the diversity statute. The statute at issue in Popovici, which was enacted in 1911,[57] had not been in existence when the exception arose in Barber in 1858. The Supreme Court did not view this as any barrier to applying the exception since

> [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 and not much in dealing with the statutes. 'Suits against consuls and vice-consuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.[58]

The Court therefore concluded that the statute did not affect the present case since the notion that federal courts had no jurisdiction over divorce had remained unquestioned for three-quarters of a century.[59]

More than a century has elapsed since Barber, and while the domestic relations exception has become well established,[60] it has not become well defined.[61] Some courts question the validity of the exception[62] but, as one court stated, " i t is beyond the realm ***851** 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 sic wasunjustified."'[63]

II. THE UNDERLYING POLICY

Although many courts doubt the validity of the historical rationale advanced for the exception,[64] they recognize the sound policy reasons that warrant its continuance.[65] Because state courts have handled domestic relations matters exclusively for more than one hundred years,[66] they have developed an expertise in handling such cases which is lacking in federal courts.[67] Some states have established specialized courts with social work functions and facilities which adjudicate only matrimonial and family matters.[68] These courts are better able than the federal courts to process the ***852** large volume of such cases[69] and to give the continued judicial supervision which such cases require.[70] Federal courts lack the expertise[71] and resources which enable the state family courts to make the extensive inquiries required to determine what is in the best long-term interests of the family.[72] There is no reason to establish a federal system of family courts with social work facilities to monitor family situations already under the supervision of the state family courts and agencies.[73]

The exercise of federal jurisdiction in domestic actions such as those for divorce, alimony, or custody would create the possibility of piecemeal, duplicative, or inexpert handling of what are generally single controversies[74] in a very sensitive area. This would not be in the best interests of a troubled family. Furthermore, the exercise of federal jurisdiction in this area could also result in incompatible federal and state decrees in cases subject to the continuing jurisdiction of the state.[75] These reasons, as well as the strong state interest in domestic relations matters within its borders[76] and the superior competence of the state courts in adjudicating and monitoring family disputes,[77] warrant the continued ***853** application of the domestic relations exception to diversity cases by the federal courts.[78]

Finally, federal judges do not want to open the federal forum to divorce litigation and the host of continuing problems such litigation brings with it.[79] They are unwilling to increase the number of cases on their already congested dockets by ignoring a rule that has existed for over a hundred years without any sign of congressional disapproval.[80]

III. THE SPECTRUM OF APPROACHES

All circuits agree that federal courts do not have diversity jurisdiction to grant divorces, determine alimony and support obligations, or resolve the conflicting claims of divorced parents to custody of their children.[81] These matters are seen as forming a well defined core of the domestic relations exception,[82] and will not be heard by any federal court.[83] However, many cases, though not actually actions for divorce, alimony, or a resolution of child custody, present issues which arise out of these core actions.[84] Circuits disagree about jurisdiction over these cases which lie on the periphery[85] of the exception.[86]

***854** While the domestic relations exception is firmly established in all the circuits,[87] each circuit has developed its own approach to the exception. Some have chosen to interpret the exception broadly,[88] others more narrowly.[89] No circuit has developed a bright line test for determining when an action falls within the scope of the domestic relations exception.[90] Some have tried to ***855** impose a standard inquiry[91] while others approach the exception on an ad hoc basis.[92] There is tension in the circuits as courts weigh the desirability of keeping all domestic disputes within the well-developed system of the state family courts against the ability of the federal courts to hear tort,[93] contract,[94] or constitutional questions[95] which arise in domestic settings.[96] There is also confusion as to how far the Supreme Court intended the domestic relations exception to extend.[97]

A. The Diversity Area

Federal courts are presented with a host of cases today which involve domestic issues unheard of at the time of Barber.[98] Parties bringing actions ranging from tort claims for child enticement[99] ***856** to contract and palimony suits[100] are clamoring to be let into the federal courts. The federal courts have generally

been reluctant to open their doors to this domestic relations "imbroglio,"[101] but some parties have successfully gained entrance into some circuits.[102] These actions, however, are usually tort or contract claims[103] which do not involve the traditional remedies fashioned by family courts.[104] The dismissal of these cases would therefore not be supported by the policy underlying the domestic relations exception.[105]

Recognizing that family law is peculiarly local[106] and that determinations of domestic matters often require continuous judicial supervision and adjustment,[107] several circuits have construed the exception broadly so as to avoid any federal involvement in the domestic area.[108] These circuits have refused to hear paternity,[109] ***857** palimony,[110] tort,[111] and contract[112] claims arising in domestic settings. Other circuits, looking to the policy underlying the exception, have construed the exception more narrowly[113] and have heard palimony suits[114] and certain tort[115] and contract[116] claims.

Beginning with Cole v. Cole[117] in 1980, the Fourth Circuit opened the federal courts to various tort claims between former spouses. In Cole a man brought a diversity action against his former wife and police officers for malicious prosecution, abuse of process, arson, conversion, and conspiracy. The district court dismissed the action for lack of subject matter jurisdiction under the domestic relations exception. The Fourth Circuit reversed, finding that this case did not present any true domestic relations claims[118] which would require the court to adjust family status or to establish duties under family relations law.[119] The court, while recognizing that some circuits were expanding the exception, warned that a district court could not simply dismiss all diversity cases having intra-family aspects, but must instead consider the exact nature of the rights asserted or of the breaches alleged to see if the domestic relations exception was truly applicable.[120]

After Cole, courts in the Fourth Circuit exercised jurisdiction over tort claims arising in domestic settings which did not require the court to adjust family status, establish familial duties, or apply any rule particularly marital in nature.[121] In 1982 the Fourth Circuit held that tort claims arising out of child abduction by the noncustodial parent are not within the domestic relations exception ***858** and therefore are within the jurisdiction of the federal courts.[122] The court concluded that such claims do not require any determination of entitlement to custody or

any other adjustment of family status but only the determination of the damages suffered due to the tortious conduct of one parent against the other in violation of a state custody decree.[123] The Seventh and District of Columbia Circuits immediately allowed similar tort actions in their courts.[124] These circuits, however, were faced not only with the question of retrospective damages but also with the question of whether to grant injunctive relief[125] or to award escalating punitive damages.[126] Both circuits concluded that such remedies were not within the jurisdiction of the federal courts since they would require an inquiry into the child's present interests and be tantamount to a declaration of which parent should have custody.[127]

***859** The Sixth Circuit, which construes the exception broadly,[128] has considered tort actions similar to those in Cole[129] and the child abduction cases[130] and found both actions within the domestic relations exception.[131] The Southern District of New York has held the same for the child abduction tort claim actions.[132] These decisions, however, were rendered before Cole and the other tort cases and lacked the careful consideration given these matters by the Fourth, Seventh, and District of Columbia Circuits.[133]

Tort claims between former spouses have found little sympathy in the Ninth Circuit,[134] which maintains that litigants will not be allowed to invoke diversity jurisdiction over domestic relations cases by pleading an independent tort.[135] The Ninth Circuit views ***860** the domestic relations exception as maintaining a time-honored boundary between the domains of federal and state jurisdiction[136] which, because of strong policy reasons,[137] should not be violated. This view of the exception has led to the circuit's "primary issue"' test[138] for subject matter jurisdiction in a domestic relations dispute. Under this test courts "must decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife."'[139] The courts of the Ninth Circuit give a broad scope to this test,[140] resulting in the dismissal of almost any case involving married couples or their children.[141]

Leaving the resolution of domestic disputes to the state courts, which have a superior expertise and interest in disposing of them,[142] the Third Circuit, like the Ninth Circuit, construes the exception broadly.[143] In determining whether an action falls within the domestic relations exception, the courts of the Third Circuit

consider whether questions of custody or parental rights ***861** are involved,[144] whether there is a pending state court action or an agreement to litigate in state court,[145] and whether there is a threat that former spouses will seek to play one court system off against the other.[146] Only if none of these factors are present and if an adjudication of the claim would not significantly alter the marital rights and duties decreed by the state[147] will the circuit exercise jurisdiction over the claim. The circuit has warned that federal courts do not have jurisdiction in domestic relations suits except where it is necessary to effectuate prior state court judgments.[148]

Using this inquiry, the district courts, as well as the court of appeals in the Third Circuit, have dismissed diversity actions based in contract upon breach of separation agreements[149] and tort claims alleging fraud, deceit, and intentional infliction of emotional distress.[150] The Third Circuit, however, has not held that a separation agreement can never be litigated in federal courts,[151] but only that a federal court could not exercise jurisdiction in such a case if any one of the factors in its standard inquiry were present.[152] The Third Circuit has also dismissed paternity suits[153] as within the domestic relations exception.

The Fifth Circuit uses both the inquiry developed by the Third Circuit[154] and a test similar to that used in the Ninth Circuit.[155] Although both these circuits broadly interpret the domestic relations exception, the Fifth Circuit gives it a narrow interpretation.[156] Thus, contrary to Ninth Circuit results, the ***862** Fifth Circuit's test has led to the holding that a diversity action against an executor of an estate for declaration of status as the putative wife of a decedent is within the jurisdiction of the federal court.[157] The court concluded that the issue of whether the woman was a putative wife of the decedent did not involve a question of marital status[158] but only an inquiry into property rights.[159] In contrast, the Central District of California, using the Ninth Circuit test, held a determination of spousal status to be a primary issue in the case and therefore dismissed the action for lack of subject matter jurisdiction under the domestic relations exception.[160]

Unlike the Third Circuit,[161] the Fifth Circuit has exercised jurisdiction over actions seeking alimony and child support in arrears[162] and damages for breach of separation agreements.[163] The court used the Third Circuit inquiry to make these determinations but found that no questions of custody or parental rights were

present, there was no pending state court action or agreement to litigate in state court, and there was no threat that the former ***863** spouses would seek to play one court system off against the other.[164] The court also found that, when no question of altering or modifying the state decree was present, the state had neither a strong interest in the adjudication of such suits nor any special competence to determine such matters.[165] The court found that none of the rationales for the domestic relations exception—except that of overcrowded federal dockets—barred the federal court from exercising jurisdiction over these claims for fixed sums.[166]

The First and Sixth Circuits have both refused to exercise diversity jurisdiction in actions involving the breach of a separation agreement.[167] The First Circuit remanded a diversity suit brought to compel a former husband to fulfill his support obligations under a state decree to the state court because the resolution of the dispute required a determination of the former husband's continuing family support obligations.[168] According to the First Circuit, the federal court could not determine the support obligations of the former husband, as it lacked the ability of the state family court to determine what was in the best interests of the family.[169] The First Circuit has declared that it sees "no reason to proliferate the number of available forums for litigation rooted in the duties of former spouses to one another and to their family."[170]

The Sixth Circuit dismissed a diversity action involving a breach of a separation and divorce decree under the domestic relations exception because the plaintiff was actually seeking a determination of the past, present, and future support obligations of her former husband.[171] This dismissal was based on the Sixth Circuit's refusal to consider diversity cases which require the court to hear extensive evidence on the parties' personal needs and finances, interpret and apply the provisions of a state divorce decree, monitor a former spouse's continued compliance with such a decree, or in any way assume the broad equitable powers of a state divorce court.[172]

***864** Recently two federal district courts have considered whether the domestic relations exception applies to actions brought by cohabitating unmarried couples and arrived at differentconclusions.[173] The Southern District of New York found that an agreement to live together as husband and wife does not create a matrimonial status within the domestic relations exception.[174] The court found that it had subject matter jurisdiction over what it termed a "common garden

variety"' [175] breach of contract action which did not require the special competence of the state courts and in which there is no especially strong state interest. [176]

Conversely, in the District of New Jersey the court held that a diversity palimony action did come within the domestic relations exception to federal jurisdiction and therefore could not be heard in federal courts. [177] The court reached this conclusion because it found that the state exhibited a significant interest in the consensual live-in relationship, akin to the state's interest in marriage, and that in order to protect this interest a court would be required to make the same kinds of inquiries that have traditionally brought into play the domestic relations exception. [178]

B. The Federal Question Area

The domestic relations exception arose in the context of divorce and alimony and traditionally has been viewed as an exception to federal diversity jurisdiction only, since such actions involve no federal questions. [179] Today, however, especially with ***865** the proliferation of civil rights actions [180] arising in domestic contexts, [181] federal courts are faced with the problem of whether to apply the exception in the federal question area. [182] Some courts have given careful consideration to this problem and refrained from applying the exception outside of the diversity context, [183] while others have indicated that they would apply the exception to federal question actions without commenting on the significant extension such application would entail. [184] Those circuits giving a broad construction to the exception in the diversity area [185] tend to carry this across into the federal question area as well. [186] Those circuits which construe the exception more narrowly [187] tend not to apply the exception in the federal question area, [188] or at least to ***866** question its applicability. [189]

The Sixth Circuit, which broadly construes the exception in the diversity area, [190] has indicated that it is willing not only to extend the exception into the federal question area [191] but even to apply it to civil rights actions between a parent and a state agency. [192] The Sixth Circuit dismissed a civil rights action brought by a married couple alleging that an adoption agency and certain of its officials arbitrarily and unreasonably withheld approval of the couple's application to adopt a child. Although the court concluded that the couple had failed to assert a cause of action under 42 U.S.C. Section 1983, [193] it stated that even if the

couple had asserted a cause of action the court would have dismissed the case for lack of subject matter jurisdiction due to the domestic relations exception. [194] In another civil rights action the Sixth Circuit dismissed the case finding the substance of the claim to be an intrafamily custody battle over which the court had no jurisdiction. [195] The Sixth Circuit has also invoked the policy underlying the domestic relations exception to support application of ***867** res judicata to the constitutional claims of natural parents against a juvenile judge and foster parents following the termination of their parental rights. [196] In general, the Sixth Circuit refuses to entertain a federal question suit which involves domestic matters. [197]

The First Circuit also consistently refuses to hear civil rights actions involving domestic matters. [198] In one case, [199] the circuit found that although the wife had framed her complaint as a civil rights action, it really was a demand for custody of her child and as such was not within the jurisdiction of the federal courts. A civil rights action brought by a father and his minor daughter against the mother, probation officer and others for violation of the plaintiffs' rights under the eighth and fourteenth amendments [200] was also dismissed as within the domestic relations exception, despite its constitutional characteristics.

Reasoning that issues affecting the proper care of juveniles held in the state's custody traditionally have been left exclusively to the states, [201] the Ninth Circuit generally dismisses federal question cases involving inquiry into domestic relations custodial matters. [202] The Ninth Circuit, however, uses the rationale underlying the exception as a basis for abstention [203] when dismissing such ***868** actions rather than dismissing them for lack of subject matter jurisdiction. [204] This circuit has dismissed on abstention grounds a civil rights action brought under 42 U.S.C. section 1983 [205] by a state prisoner denied visitation rights with his minor children who were in state custody. [206] The court indicated that it considered the action a custodial domestic relations case even though the disputing parties were the father and state authorities rather than husband and wife. [207] A class action brought under the federal question statute [208] on behalf of dependent, neglected, or delinquent juveniles seeking additional funding to private agencies that cared for children in state custody was also dismissed on abstention grounds. [209]

The Fourth Circuit, which gives a narrow construction to the exception in the diversity area, [210] has held that a civil rights action in an intrafamilial context is

outside the domestic relations exception.[211] In so concluding the Fourth Circuit applied the same set of inquiries it applies to a domestic relations diversity case.[212] The federal question case was a civil rights action brought by a mother against the county department of social services and various county officials, alleging that their tortious conspiratorial conduct had deprived her of the exclusive right to the custody and society of her three children.[213] The court considered whether a decision by the district court would require adjusting family status, establishing familial duties, or determining the existence of ***869** the breach of such duties.[214] Concluding that it would not, and that the doctrine of comity underlying the domestic relations exception would not be violated by hearing her claim, the court found the section 1983 suit to be within the jurisdiction of the district court.[215]

The Seventh Circuit has taken a somewhat different approach to civil rights actions involving domestic relations issues.[216] Reasoning that it is reluctant to involve federal judges in custody disputes "in the name of the Constitution and section 1983,"'[217] this circuit has approved dismissal of two civil rights complaints against welfare and law enforcement officers, alleging constitutional violations by their removal of children from the plaintiffs' custody on summary judgment for the defendants.[218] The circuit made clear that it viewed a grant of such judgment for the defendants as a refusal by the court to intervene in custodial situations.[219] These Seventh Circuit cases demonstrate, however, that the court is basing dismissal on reasons, such as the limited capability of the federal courts to deal with custodial matters,[220] which are normally associated with the domestic relations exception.[221]

***870** The Eighth Circuit has not decided whether the domestic relations exception applies to cases brought under the federal question statute.[222] Although it has never directly decided the issue, it has indicated that the exception would not apply to such cases.[223]

The Tenth Circuit, when faced with a civil rights action brought by a divorced husband against the city, police department, and a police officer for damages allegedly arising from interference with his child visitation rights, held that civil rights actions "should not be viewed as a vehicle to resolve a dispute involving visitation rights-privileges"'[224] since that is a matter uniquely reserved to the state court system.[225] The court dismissed the action, finding that no federal constitutional claim had been alleged.[226] However, the Tenth Circuit did leave

an opening for federal jurisdiction in this area by finding the relationship between parent and child constitutionally protected. [227]

***871** The most effective and considered treatment of the domestic relations exception in the federal question area appears in a recent Fifth Circuit case, Franks v. Smith. [228] In Franks, a married couple filed a civil rights suit under 42 U.S.C. section 1983 alleging that their fourth amendment rights had been violated by a county welfare worker and county deputy sheriff when they entered the couple's home without a warrant to reclaim a child who had been entrusted to the couple's care three years earlier by the natural mother. [229] The district court had dismissed the complaint for lack of subject matter jurisdiction under the domestic relations exception. The court of appeals reversed with respect to the alleged fourth amendment violation, [230] holding that the mere fact that a claimed violation of constitutional rights arises in a domestic relations context does not bar review of those issues by the federal courts. [231] The court decided that federal question actions arising in domestic relations disputes should be treated by the district courts in the same manner as all other federal question actions—that is, dismissal for lack of subject matter jurisdiction is inappropriate unless it is determined that an asserted constitutional violation is wholly insubstantial or frivolous or is clearly immaterial to the case and was asserted solely for the purpose of obtaining federal jurisdiction. [232] The court found that the claimed violation here was material to the case and was not patently insubstantial or frivolous and remanded the case to the district court for determination of whether there was a violation of the couple's fourth amendment rights and, if so, whether they were entitled to any damages. [233]

***872 IV. IN SEARCH OF PARAMETERS**

The domestic relations exception, while recognized in all circuits, [234] has no clearly defined boundaries. [235] There is a general tendency among many of the federal courts to apply the exception to any action in which the parties are domestically related or in which custody or visitation rights are involved. [236] While the application of the exception to true domestic relationscases—primarily those seeking divorce or a determination of alimony, child custody and support [237] —is supported by strong policy reasons, [238] a federal court should not simply dismiss all cases having intrafamily aspects. [239] Instead, the court, when faced with a case having domestic relations aspects, should consider the exact nature of the rights asserted or the breaches alleged [240] and if none of the underlying rationales [241] of

the exception obtain in that case dismissal for lack of subject matter jurisdiction would be inappropriate. [242]

***873** Today, the question of how far the exception reaches in the diversity area centers around tort actions involving custody or post-marital disputes, [243] palimony suits, [244] and actions alleging breaches of separation agreements. [245] This uncertainty about how far the exception reaches is no longer confined to the diversity area, but extends into the federal question area as well. [246] To establish the boundaries of the exception, and thereby resolve the existing confusion, courts must consider domestic-relations-type cases in the light of the underlying policy which the exception is thought to serve. [247]

A. The Diversity Area

Federal courts are not local institutions with staffs of social workers having an expertise in state family law. [248] Federal courts should decline jurisdiction in cases requiring either continuing judicial supervision of a volatile family situation [249] or detailed reporting to the court in order to facilitate adjustments to custody rights, visitation rights, and support obligations. [250] Federal courts should also be wary of exercising jurisdiction where the exercise of such jurisdiction would create the possibility of incompatible state and federal decrees in cases subject to continuing state judicial supervision [251] or the possibility of "piecemeal, duplicative, or inexpert handling of what is substantially a single controversy." [252] Whether a feuding couple is attempting to play one court system ***874** off against the other should also be evaluated before a federal court hears a domestic relations case. [253]

As the above considerations indicate, federal courts should continue to preclude what are genuinely divorce, alimony, or child custody and support cases from entering federal courts. [254] However, diversity cases such as simple contract [255] or tort [256] actions for damages which do not fall within the core of the exception, [257] or require the alteration of state divorce or custody decrees, [258] generally do not involve the traditional remedies of the state family courts [259] nor require continual judicial supervision. Such actions are within the competence of the federal courts. [260]

When determining whether a diversity case falls within the domestic relations exception a federal court should first consider whether the case falls within the core of the exception—that is, whether the parties seek a divorce decree, a determination of alimony or child support, or a determination of which of the two parents should be awarded custody of the children. If the case does not fall within the core of the exception, the court should still consider whether the exercise of jurisdiction would violate the policy behind the exception;[261] that is, whether the relief sought requires the court to alter or modify a state decree,[262] determine future support duties of former spouses,[263] or assume the broad ***875** equitable powers of the state family courts.[264] If the case does not fall within the core of the exception[265] and does not implicate any of the rationales underlying the exception,[266] the federal courts should not dismiss the case as within the domestic relations exception.

Using this inquiry, federal courts should not apply the domestic relations exception to such diversity actions as those seeking to recover fixed sums or property owed under separation or other contractual agreements,[267] to enforce or determine the validity of out-of-state or foreign divorce decrees,[268] or to determine marital status in order to establish rights in a decedent's estate.[269] Such cases neither fall within the core of the exception nor implicate any of its underlying rationales.[270] Nor should federal courts generally apply the exception to actions seeking damages for torts committed by former spouses against one another[271]—especially those arising out of child abduction by the noncustodial parent.[272] These cases do not require a fresh determination of who should ***876** have custody over the abducted child[273] but only a determination of whether a state custody decree was violated and, if so, what damages were suffered.[274] Federal courts are entirely competent to resolve such traditional tort issues as the existence of a legal duty, the breach of that duty, and the damages flowing from the breach,[275] and do so every day. Moreover, such tort suits do not create the risk of inconsistent state and federal decrees since they would be litigated as independent civil actions and not as part of the strictly equitable custody proceedings.[276]

Looking at the rationale underlying the exception, federal courts should find they have jurisdiction to issue injunctions directing an absconding parent to return a child in accordance with a valid state custody decree.[277] However, the District of Columbia Circuit[278] has held, and the Seventh Circuit[279] has agreed, that the

granting of an injunction directing the return of an abducted child to the custodial parent is barred by the domestic relations exception because it would require an inquiry into the present interests of the child and implicitly answer the question of who should have custody of the child.[280] This reasoning is incorrect. Such an injunction would merely confirm an existing state court decree and would not in any way conflict with it or require any further inquiry into the child's interests.[281] In addition, damages are rarely an adequate remedy for the custodial parent in such cases.[282]

B. The Federal Question Area

When the domestic relations exception first arose in 1858[283] circuit courts had jurisdiction of diversity actions but no jurisdiction of federal question actions.[284] Congress did not confer a general ***877** grant of federal question jurisdiction upon the lower federal courts until 1875.[285] Even after this general grant the exception continued to be viewed as an exception to diversity jurisdiction only, since the traditional domestic relations cases involved no questions arising under the constitution, laws or treaties of the United States.[286] This continues to be true of most of the domestic relations disputes brought in federal court today.[287] However, the growth of constitutionally protected relationships within the family[288] and the proliferation of civil rights actions[289] have caused cases arising in domestic settings, usually involving visitation rights or custody,[290] to be brought under the federal question ***878** statute as well.[291] These actions are not the traditional types of domestic relations cases,[292] since they generally involve alleged constitutional violations by state agencies or officers.[293]

When faced with cases brought under the federal question statute involving domestically related parties or alleged constitutional violations arising in domestic settings, federal courts question whether the domestic relations exception applies to such actions.[294] This is the wrong question. The question federal courts should ask instead is whether the parties claiming federal jurisdiction are truly alleging a nonfrivolous constitutional claim[295] or are merely involved in a domestic relations dispute which has no reason for being in the federal courts under the federal question statute.[296] Most true domestic relations cases—that is, those seeking the granting of a divorce decree, the determination ***879** of the amount of alimony to be paid or how it is to be paid and subsequent modifications of

the amount, or the decision as to which parent should have custody of a minor child and subsequent alterations in the custody decree[297]—involve no federal questions[298] and therefore the courts would have no need to use the domestic relations exception to dismiss them.[299] It is possible, however, that due process or equal protection violations could occur in the proceedings surrounding these determinations. Federal courts would be entirely competent to decide claims alleging such violations and their correction by the federal courts would bring none of the underlying rationales of the exception into play.[300]

When former spouses, by alleging the violation of their constitutional rights, seek to involve federal courts in domestic relations matters which would be dismissed if brought as diversity actions,[301] their cases should be dismissed as involving constitutional claims which are wholly insubstantial and obviously frivolous[302] rather than under the domestic relations exception.[303] An extension of the exception would not only be unnecessary but also unwise, since some federal courts have shown a tendency to apply the exception to dismiss cases brought under the federal question statute merely because the alleged constitutional violation occurred in a domestic setting or arose out of a family relationship.[304] ***880** Such a construction of the exception would be incorrect.[305] The court should instead carefully consider the exact nature of the claim presented by the parties.[306] While the federal court cannot determine who should have custody of a child nor assume the function of a juvenile court by making the child a ward of the court,[307] it can determine if a due process violation has taken place in such situations.[308] Actions arising in domestic situations involving due process or equal protection claims, which can be determined and corrected without requiring continued supervision of a family situation,[309] or actions involving violations of unrelated constitutional rights, such as those arising under the fourth amendment,[310] can be heard in federal courts without implicating the rationales underlying the domestic relations exception.[311] Generally, when a true constitutional violation occurs in a domestic setting its resolution will not require the typical inquiries of the state divorce court[312] nor impose the social work functions ***881** of the family courts[313] upon the federal system. If there were a possibility that it would do so the rationale underlying the exception could still be applied as a basis for federal court abstention.[314]

***882** There is therefore good reason not to allow the extension of the domestic relations exception into the federal question area. Such an extension could preclude the federal courts from addressing important constitutional issues should they arise in cases characterized as domestic or in which the parties are domestically related.[315] The mere fact that a claimed violation of constitutional rights took place in a domestic relations context should not bar a federal court from reviewing such constitutional issues.[316] This is especially true with the growth of constitutionally protected relationships within the family itself[317] and the concomitant possibility of constitutional violations[318] occurring in domestic settings. These cases often do not require an evaluation of the underlying domestic dispute.[319]

When faced with domestic related federal question actions, federal courts should follow the approach recently adopted by the Fifth Circuit[320] and treat such cases as they would any federal question action by taking one of three routes. First, if the case involves feuding spouses and is obviously only a domestic relations case clothed in a "constitutional cloak,"'[321] the court should dismiss the case based on the fact that the constitutional question presented is "wholly insubstantial"'[322] and "obviously frivolous."[323] ***883** Second, if the case involves a constitutional claim that is not "obviously without merit,"'[324] but determination of the claim would involve the court in a detailed inquiry into and continued surveillance of a domestic situation which has been or is being determined in state court, then the court should decline jurisdiction on abstention grounds.[325] Third, if the case involves a constitutional claim that is substantial and its determination would not require the inquiries typical of the traditional remedies of the family court,[326] then the court should hear the case.[327] By following this approach the federal courts would be furthering the underlying policy of the domestic relations exception yet would not be closing the door to federal jurisdiction should an important constitutional question arise in a domestic relations setting.

*884 C. Fixing the Bounderies

Under the approaches set forth above,[328] the federal courts will make different inquiries when faced with cases arising in domestic settings depending on whether they are brought under the diversity[329] or federal question[330] statute, but the basic underlying policy of the exception[331] will still generally fix the boundaries as to

whether such a case will be heard or not. If the exercise of federal jurisdiction would involve the court in a detailed inquiry into and a continued surveillance of a family situation which has been or is being determined in state court, the federal court would not exercise jurisdiction over such a case under either inquiry. [332] In the diversity area this would fix the boundaries of the exception close to its well-defined core. [333] In the federal question area courts would not be precluded from resolving important constitutional issues if they arose in domestic settings but would be free when warranted, as they generally are in any federal question case, to dismiss such actions due to lack of a federal question or on abstention grounds. [334]

CONCLUSION

Beginning with Supreme Court dictum in 1858, [335] the domestic relations exception has become well established in all federal circuits. [336] Over the years the federal courts expanded the exception [337] in an effort to keep their "federal hands off"' [338] the "vexatious"' [339] domestic relations imbroglio."' [340] Some circuits are still seeking to expand the exception both within [341] and outside of [342] the diversity area.

***885** The application of the domestic relations exception to true domestic relations cases is supported by strong policy reasons which warrant its continuance. [343] Federal courts, however, should not simply dismiss all cases having intrafamilial aspects [344] but should instead consider the exact nature of the rights asserted or the breaches alleged. [345] If the case does not implicate any of the rationales underlying the exception, and is otherwise properly in the federal court, [346] dismissal would be inappropriate.

This approach would fix the boundaries of the exception close to its well-defined core. [347] In the diversity area tort and contract actions between former spouses could be heard as not within the domestic relations exception [348] and, when warranted, injunctions could be issued to compel compliance with state separation agreements or custody decrees. [349] In the federal question area the determination of important constitutional questions arising in domestic settings would not be precluded but the policy reasons underlying the exception would be furthered. [350] This approach narrowly confines the exception yet leaves the court room to decline domestic cases on abstention grounds. [351] Under this approach federal courts will

not avoid all domestic relations cases but will sometimes trade in "wares from the foul rag-and-bone shop of the heart."' [352]

Footnotes

a I would like to express my gratitude to Professor Kenneth L. Karst of UCLA Law School for his suggestions, encouragement, and support.

1 The federal question statute, 28 U.S.C. § 1331 (Supp. V 1981), states that: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."DD'

2 The diversity statute, 28 U.S.C. § 1332 (1976), provides in pertinent part:
(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 interest 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.

3 Federal courts have no subject matter jurisdiction over cases involving probate or domestic relations matters. 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3609 (1975). For a discussion of these exceptions, see Dragan v. Miller, 679 F.2d 712, 713-14 (7th Cir. 1982) (probate exception); Csibi v. Fustos, 670 F.2d 134, 136 (9th Cir. 1982) (domestic relations exception). The probate and domestic relations exceptions are two of the "most mysterious and esoteric branches of the law of federal jurisdiction."' Dragan, 679 F.2d at 713 (discussing the historical account advanced for the probate exception which is the same as that advanced for the domestic relations exception). The usual historical account advanced for these exceptions maintains that since the first judiciary act gave federal courts diversity jurisdiction only over "all suits of a civil nature at common law or in equity,"' Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78, the probate of wills and the administration of estates as well as actions for divorce, custody, and related matters, all of which were historically within the exclusive jurisdiction of the English ecclesiastical courts, were excluded from this jurisdictional grant. Barber v. Barber, 62 U.S. (21 How.) 582, 604-05 (1858) (Daniel, J., dissenting); Lloyd v. Loeffler, 694 F.2d 489, 491 (7th Cir. 1982); Dragan, 679 F.2d at 713. The language "all suits of a civil nature at common law or in equity"' was maintained until 1948 when Congress substituted the phrase "all civil actions"' in its place. Act of June 25, 1948, ch. 646, 62 Stat. 930. Although this new phrase seems broader, it was intended to be synonymous with the original language from the Judiciary Act of 1789. Revisers' Note to 28 U.S.C. § 1332 (1976); Csibi v. Fustos, 670 F.2d at 136; Solomon v. Solomon, 516 F.2d 1018, 1021 n.9 (3d Cir. 1975); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosentiel, 490 F.2d 509, 513 (2d Cir. 1973). Some courts have questioned the validity of this historical account, see, e.g., Lloyd v. Loeffler, 694 F.2d at 491; Dragan v. Miller, 679 F.2d at 713; Spindel v. Spindel, 283 F.Supp. 797, 806 (E.D.N.Y. 1968), but others have accepted it. See, e.g., Csibi v. Fustos, 670 F.2d at 136; Bossom v. Bossom, 551 F.2d 474, 475 (2d Cir. 1976).

4 In Markham v. Allen, 326 U.S. 490, 494 (1946), the Supreme Court stated that "a federal court has no jurisdiction to probate a will or administer an estate."' See Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982).

5 See, e.g., Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930) (federal courts have no jurisdiction over divorce); Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981) ("Although a domestic relations case may meet the technical requirements for diversity jurisdiction, federal courts traditionally have refrained from exercising jurisdiction over cases which in essence are domestic relations disputes."'); Solomon v. Solomon, 516 F.2d 1018, 1024 (3d Cir. 1975) ("[F]ederal courts do not have jurisdiction in domestic relations suits . . . ."'); Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968) ("[I]t is well recognized that the 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."'). See generally 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3609 (1975).

6 See infra note 87.

7 That is, 28 U.S.C. § 1332 (1976). See supra note 2.

8 Abstention is a judicially created doctrine under which a federal court will decline to exercise jurisdiction over a case so that a state court or state agency will have the opportunity to decide the matters at issue. See generally C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION §§ 4241-4247. The doctrine as we know it today began in 1941 in Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941), out of respect for the rightful independence of state governments and to insure the smooth working of the federal system by avoiding unnecessary conflicts between the federal judiciary and state governments. See infra note 314.

9 The maxim that a judgment rendered by a court lacking subject matter jurisdiction is void and a nullity is one of the oldest jurisdictional dogmas. J. COUND, J. FRIEDENTHAL & A. MILLER, CIVIL PROCEDURE CASES AND MATERIALS 199 (3d ed. 1980). See Elliott v. Peirsol, 26 U.S. (1 Pet.) 328, 340 (1828); Capron v. Van Noorden, 6 U.S. (2 Cranch) 125 (1804).

10 Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858). See infra text accompanying notes 37-43.

11 In Kamhi v. Cohen, 512 F.2d 1051, 1056 (2d Cir. 1975), the court stated that the Second Circuit would keep its "federal hands off actions which verge on the matrimonial, or impinge upon the matrimonial jurisdiction of the state courts."DD'

12 "The general inquiry is whether hearing the claim will necessitate the court's involvement in domestic issues, i.e., whether it will require inquiry into the marital or parent-child relationship."' Jagiella v. Jagiella, 647 F.2d 561, 565 (5th Cir. 1981).

13 See infra note 38 and accompanying text.

14 Originally confined to suits for divorce and alimony, see, e.g., Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930); Barber v. Barber, 62 U.S. (21 How.) 582 (1858), the exception has since been extended to child custody actions, see, e.g., Bergstrom v. Bergstrom, 623 F.2d 517 (8th Cir. 1980); Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.) (per curiam), appeal dismissed, 414 U.S. 805 (1973), disputes over visitation rights, see, e.g., Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967), suits to establish paternity and to obtain child support, see, e.g., Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968); Albanese v. Richter, 161 F.2d 688 (3d Cir.), cert. denied, 332 U.S. 782 (1947), actions to enforce separation or divorce decrees still subject to state court modification, see, e.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981); Morris v. Morris, 273 F.2d 678 (7th Cir. 1960); Lewis v. Lewis, 543 F.Supp. 35 (M.D. Pa. 1981), palimony actions, see, e.g., Anastasi v. Anastasi, 544 F.Supp. 866 (D.N.J. 1982); but see Korby v. Erickson, 550 F.Supp. 136 (S.D.N.Y. 1982) (agreement to live together as husband and wife does not create matrimonial status so as to come within the domestic relations exception), tort actions against former spouses, see, e.g., Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973) (per curiam); Kilduff v. Kilduff, 473 F.Supp. 873 (S.D.N.Y. 1979), but see Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982) (domestic relations exception inapplicable to diversity tort action arising from mother's abduction of child from father in violation of state custody decree); Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980) (domestic relations exception did not bar former husband's tort claims against former wife since no adjustment of family status or duties required), civil rights actions arising from domestic disputes, see, e.g., Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982) (per curiam); Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981); Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973) (per curiam); but see Franks v. Smith, 717 F.2d 183 (5th Cir. 1983) (mere fact that constitutional violation arises in domestic relations context does not bar federal court review); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092 (4th Cir. 1982) (domestic relations exception no bar to federal jurisdiction in a 42 U.S.C. § 1983 suit for damages involving interference with custody by county department and officials), and a tions to establish status as a putative spouse, see, e.g., Welker v. Metropolitan

Life Ins. Co., 502 F.Supp. 268 (C.D. Cal. 1980); but see Lee v. Hunt, 431 F.Supp. 371 (W.D. La. 1977) (domestic relations exception inapplicable to diversity action to establish status as a putative spouse of a decedent). In Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980), the court noted that federal courts seek to expand the exception since domestic relations cases involve distasteful proof, overload the already crowded dockets of federal courts, consume a great amount of time, and require specialized attention on vexatious issues. Id. at 1088.

15 See infra notes 81-83 and accompanying text.

16 Llyod v. Loeffler, 694 F.2d 489, 492 (4th Cir. 1982); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974); Allen v. Allen, 518 F.Supp. 1234, 1236 (E.D. Pa. 1981). See infra notes 243-47 and accompanying text.

17 See, e.g., Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982) ("The boundaries of the exception are uncertain, however . . . ."); Allen v. Allen, 518 F.Supp. 1234, 1236 (E.D. Pa. 1981) ("The critical question, of course, is what a domestic relations case is . . . . [There is] a large 'gray area' for future caselaw development.'").

18 Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

19 See generally C. WRIGHT, THE LAW OF FEDERAL COURTS § 25, 143-45 (4th ed. 1983); 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3609 (1975); Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 MINN. L. REV. 1, 23-36 (1956); Comment, Federal Jurisdiction in Domestic Relations Cases, 28 MD. L. REV. 376 (1968).

20 See, e.g., Peterson v. Babbitt, 708 F.2d 465 (9th Cir. 1983) (per curiam); Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717-18 (8th Cir. 1983); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092 (4th Cir. 1982); Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981); Hernstadt v. Hernstadt, 373 F.2d 316, 317-18 (2d Cir. 1967). See infra notes 179-233 and accompanying text.

21 See infra note 76.

22 See infra notes 67, 77.

23 See infra note 73.

24 See infra notes 65, 75.

25 See infra notes 64-80 and accompanying text.

26 Usually the determination of the constitutional violations alleged in these actions does not involve the federal courts in the inquiries typical of the state family courts. See, e.g., Franks v. Smith, 717 F.2d 183 (5th Cir. 1983) (fourth amendment violation arising in a domestic relations context); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092 (4th Cir. 1982) (civil rights claim solely for damages for past actions in violation of a state court custody order). See infra notes 309-13 and accompanying text.

27 See infra notes 227, 288.

28 See infra notes 283-327 and accompanying text.

29 Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983). See infra notes 228-33, 320-27 and accompanying text.

30 See infra notes 37-63 and accompanying text.

31 See infra notes 64-80 and accompanying text.

32 See infra notes 81-233 and accompanying text.

33 See, e.g., Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982) (per curiam); Schleiffer v. Meyers, 644 F.2d 656, 663-64 (7th Cir.), cert. denied, 454 U.S. 823 (1981); Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973) (per curiam); LaMontagne v. LaMontagne, 394 F.Supp. 1159, 1160-61 (D.Mass. 1975).

34 See infra notes 283-327 and accompanying text.

35 See infra notes 234-334 and accompanying text.

36 See infra notes 261-82, 320-27 and accompanying text.

37 62 U.S. (21 How.) 582 (1858). See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1189 (2d ed. 1973).

38 62 U.S. (21 How.) at 584.

39 See, e.g., Doe v. Doe, 660 F.2d 101, 105 (4th Cir. 1981); Solomon v. Solomon, 516 F.2d 1018, 1022 (3d Cir. 1975); Armstrong v. Armstrong, 508 F.2d 348, 349 (1st Cir. 1974); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 513 (2d Cir. 1973); Lutsky v. Lutsky, 310 F.Supp. 517, 519 (S.D. Fla. 1970), aff'd, 433 F.2d 346 (5th Cir. 1970); Williamson v. Williamson, 306 F.Supp. 516, 517 n.5 (W.D. Okla. 1969); Garberson v. Garberson, 82 F.Supp. 706, 709 (N.D. Iowa 1949). See also Sosna v. Iowa, 419 U.S. 393, 404 (1975) (citing Barber in dictum); Comment, Domestic Relations-Federal Courts Held to Have Jurisdiction to Declare Divorce Invalid, 44 N.Y.U. L. REV. 631 (1969).

40 Barber v. Barber, 62 U.S. (21 How.) 582, 604-05 (1858) (Daniel, J., dissenting); Phillips, Nizer, Benjamin, Krim, & Ballon v. Rosenstiel, 490 F.2d 509, 513 (2d Cir. 1973); Spindel v. Spindel, 283 F.Supp. 797, 802 (E.D.N.Y. 1968).

41 Barber v. Barber, 62 U.S. (21 How.) 582, 604-05 (1858) (Daniel, J., dissenting). The dissenting justices also found that there could be no diversity of citizenship between husband and wife since the two became one in law by marriage, id. at 600-01, and that federal tribunals had no power to control the duties or habits of private family members in their domestic intercourse since such power belonged exclusively to the particular communities to which those families belonged. Id. at 602.

42 Act of Sept. 24, 1789, ch. 20. § 11, 1 Stat. 73, 78. See discussion of this in Phillips, Nizer, Benjamin, Krim, & Rosenstiel, 490 F.2d 509, 513 & n.3 (2d Cir. 1973).

43 See, e.g., Csibi v. Fustos, 670 F.2d 134, 136 (9th Cir. 1982); Bossom v. Bossom, 551 F.2d 474, 476 (2d Cir. 1976); Solomon v. Solomon, 516 F.2d 1018, 1021 n.9 (3d Cir. 1975). But cf. Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983) "([T]he historical interpretation of the origin of the domestic-relations exception is probably incorrect . . . ."'); Llyod v. Loeffler, 694 F.2d 489, 491 (7th Cir. 1982) ("The historical account is unconvincing."'); Spindel v. Spindel, 283 F.Supp. 797, 806 (E.D.N.Y. 1968) ("The historical reasons relied upon to explain the federal court's complete lack of matrimonial jurisdiction are not convincing."').

44 The developing exception was addressed in three cases: De La Rama v. De La Rama, 201 U.S. 303 (1906); Simms v. Simms, 175 U.S. 162 (1899); and In re Burrus, 136 U.S. 586 (1890).

45 136 U.S. 586 (1890). Of the three cases cited supra note 44, the dictum in Burrus is the most often quoted as the strongest indication that the subject of domestic relations will be left to the states. Burrus, however, involved a dispute between a father and grandfather for the custody of a child under the habeas corpus statutes and diversity jurisdiction was not in question. In fact, the district court, whose ruling was in question, had no diversity jurisdiction at all because at that time only federal circuit courts, not district courts, had diversity jurisdiction. 136 U.S. at 597.

46 136 U.S. at 593-94.

47 See, e.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981); Buechold v. Ortiz, 401 F.2d, 371, 372 (9th Cir. 1968) (quoting Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930) and In re Burrus, 136 U.S. 586, 593-94 (1890)); Cherry v. Cherry, 438 F.Supp. 88, 89 (D. Md. 1977); Bercovitch v. Tanburn, 103 F.Supp. 62 (S.D.N.Y. 1952); Garberson v. Garberson, 82 F.Supp. 706, 710 (N.D. Iowa 1949). But see Note, Federal Jurisdiction: Federal Courts Have Jurisdiction to Determine the Validity of a Mexican Divorce, 35 BROOKLYN L. REV. 313 (1969), where the author, discussing the Burrus dictum, states:

The Court was referring here to the substantive law to be applied, and not to the jurisdiction of the federal courts . . . . In restricting the federal government's power to create substantive law in the area, Burrus did no more than establish that the federal courts must rely on the state law in determining a case in this area. It did not expressly state that federal courts lack diversity jurisdiction over domestic relations.
Id. at 315.

48 See, e.g., Solomon v. Solomon, 516 F.2d 1018, 1022 (3d Cir. 1975); Gargallo v. Gargallo, 472 F.2d 1219, 1220 (6th Cir.) (per curiam), appeal dismissed, 414 U.S. 805 (1973); Hernstadt v. Hernstadt, 373 F.2d 316, 317 (2d Cir. 1967); LaMontagne v. LaMontagne, 394 F.Supp. 1159, 1160 (D.Mass. 1975).

49 280 U.S. 379 (1930).

50 "[T]he jurisdiction of the Courts of the United States over divorces and alimony always has been denied."' 280 U.S. at 383.

51 She originally sued her husband in federal court but the action had been dismissed under the domestic relations exception. Popovici v. Popovici, 30 F.2d 185, 185-86 (N.D. Ohio 1927).

52 "The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . . ."' U.S. CONST. art. III, § 2, cl. 1.

53 Federal Judicial Code, Act of March 3, 1911, ch. 231, §§ 24, 233, 256, 36 Stat. 1093, 1156, 1160. 280 U.S. at 382-83. Today these sections have been revised and codified in 28 U.S.C. § 1351 (Supp. V 1981) which provides:
The district courts shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against
(1) consuls or vice consuls of foreign states; or
(2) members of a mission or members of their families (as such terms are defined in section 2 of the Diplomatic Relations Act).

54 See supra note 50.

55 280 U.S. at 384.

56 It has been understood that, "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,"' Ex parte Burrus, 136 U.S. 586, 593, 594, and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied. Barber v. Barber, 21 How. 582. . . .
280 U.S. at 383.

57 Act of March 3, 1911, ch. 231, 36 Stat. 1093. See supra note 53.

58 280 U.S. at 383-84.

59 Id. at 383.

60 See supra note 5.

61 See infra notes 234-47 and accompanying text.

62 See, e.g., Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983); Lloyd v. Loeffler, 694 F.2d 489, 491-92 (7th Cir. 1982); Solomon v. Solomon, 516 F.2d 1018, 1030-33 (3d Cir. 1975) (Gibbons, J., dissenting); Armstrong v. Armstrong, 508 F.2d 348, 349-50 (1st Cir. 1974); Spindel v. Spindel, 283 F.Supp. 797, 802-03, 806-09 (E.D.N.Y. 1968).

63 Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973).

64 See cases cited supra note 62.

65 See, e.g., Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983); Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978). See infra notes 66-80 and accompanying text. See also Note, Federal Jurisdiction—Diversity of Citizenship—Validity of a Foreign Divorce Decree, 54 IOWA L. REV. 390, 394-95 (1968) (considerations such as the continuing supervision by the court necessary in divorce and alimony situations, the already overcrowded dockets of the federal courts, the local nature of lower state courts and their ability to react quickly to the changing needs of the parties in domestic cases, greater expertise of state courts in domestic relations law, and the possibility of conflicting state and federal decrees in cases subject to continuing state supervision support the domestic relations exception).

66 Barber was decided in 1858. See supra notes 37-39 and accompanying text.

67 Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981); Cherry v. Cherry, 438 F.Supp. 88, 90 (D. Md. 1977).
In Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968), for example, the court stated:
There are many criteria to be considered in child support cases, such as the standard of living, employment and wages of the father, most of which are intimate to the parties and dependent upon the particular conditions existing in the area where the parties reside. State courts deal with these problems daily and have developed an expertise that should discourage the intervention of federal courts.
Id. at 373.

68 See, e.g., ALA. CODE § 12-17-70 (Supp. 1983); CAL. CIV. PROC. CODE §§ 1740-1749 (West 1982); N.Y. FAM. CT. ACT §§ 411, 511, 652 (McKinney 1983); OHIO REV. CODE ANN. § 2301.03 (Baldwin 1983); R.I. GEN. LAWS § 8-10-1-8-10-45 (1970 & Supp. 1983).
In Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C. 1976) the court commented:
The field of domestic relations is so vexatious, time-consuming and specialized that virtually every state in the Union has established a separate system of family courts to prevent their own trial courts from being overburdened. As it has done consistently in the past, the federal court system should allow them that dubious honor exclusively.

69 Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981). As an indication of the large volume of such cases a look at the number of filings for dissolution of marriage, nullity, and legal separation in the Superior Court of Los Angeles County, California is informative. During November 1983 there were 3,388 such filings with an average over the eleven preceding months of 3,545 a month. Superior Court of Los Angeles County, Monthly Conspectus, for the Month of November 1983 (Jan. 11, 1984) (on file at UCLA Law Review).

70 H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 17.3, at 577 (1968). See infra note 73.

71 See supra note 67 and accompanying text.

72 Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

73 In Thrower v. Cox, 425 F.Supp. 570 (D.S.C. 1976), for example, the court stated:
In granting alimony and deciding matters of child custody, the court must retain jurisdiction and frequently reconsider the case to determine if changed circumstances warrant a change in the original decree. This requires constant supervision of the court . . . . [I]n order to perform the job adequately, state family courts out of necessity frequently work in close conjunction with social welfare agencies which assist them in carrying out their functions. Such assistance is not presently available in the federal system, nor do we need to create an additional bureaucracy to needlessly duplicate these state services.
425 F.Supp. at 573.

74 Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982).

75 Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978).

76 Csibi v. Fustos, 670 F.2d 134, 136-37 (9th Cir. 1982); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978).

77 Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983); Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974); Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968).

78 Csibi v. Fustos, 670 F.2d 134, 136-37 (9th Cir. 1982).

79 See supra note 73.

80 Cherry v. Cherry, 438 F.Supp. 88, 90 (D. Md. 1977). See also Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973); Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C. 1976).

81 See infra note 87.

82 Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982); Csibi v. Fustos, 670 F.2d 134, 137 (9th Cir. 1982).

83 Solomon v. Solomon, 516 F.2d 1018, 1024 (3d Cir. 1975). See also supra note 82.

84 The Ninth Circuit views the domestic relations exception as creating two classes of cases—those at the core of the exception over which the federal courts lack subject matter jurisdiction and those on the periphery of the exception over which the court would have jurisdiction but should abstain from adjudicating. The "second class of cases consists of those where domestic relations problems are involved tangentially to other issues determinative of the case."' Csibi v. Fustos, 670 F.2d at 137. Some examples of such cases are
those requesting a federal court to enforce a defaulting spouse's obligations under a state support decree, to enforce a final state divorce decree under the Full Faith and Credit clause, to invalidate a state divorce decree obtained without personal jurisdiction, to award damages in a suit between two spouses for breach of contract, and to determine the rights of spouses under federal statutes.
Id. (footnote omitted).

85 In Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982), the court stated:
But there is also a periphery to be considered. When a case must begin in state court, as a divorce or custody case must, retention of any ancillary litigation in the same court is supported by considerations of judicial economy, and also by consideration of relative expertness since the issues in an ancillary proceeding may be the same as those in cases that are within the core of the domestic relations exception and hence within the exclusive jurisdiction of the state courts.
See also Bossom v. Bossom, 551 F.2d 474, 475 (2d Cir. 1976) (federal courts may decline to exercise jurisdiction over matters "on the verge"' of the domestic relations exception if there is no obstacle to a full and fair determination in the state courts).

86 Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974) ("Lower federal courts have had difficulty determining when to decline cases which, though not strictly speaking actions for divorce or for alimony, are related to those subjects."').

87 See, e.g., Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383-84 (1930); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858); Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir. 1983); Lloyd v. Loeffler, 694 F.2d 489, 491-92 (7th Cir. 1982); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982); Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982); Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981); Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1980); Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978); Solomon v. Solomon, 516 F.2d 1018, 1021-25 (3d Cir. 1975); Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968); Hernstadt v. Hernstadt, 373 F.2d 316, 317-18 (2d Cir. 1967); McCarty v. Hollis, 120 F.2d 540, 542 (10th Cir. 1941); Robinson v. Robinson, 523 F.Supp. 96, 97-98 (E.D. Pa. 1981); Lutsky v. Lutsky, 310 F.Supp. 517, 518-19 (S.D. Fla. 1970), aff'd, 433 F.2d 346 (5th Cir. 1970); Thrower v. Cox, 425 F.Supp. 570, 571-72 (D.S.C. 1976).

88 See, e.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981); Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975); Kamhi v. Cohen, 512 F.2d 1051 (2d Cir. 1975); Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973)

(per curiam); Welker v. Metropolitan Life Ins. Co., 502 F.Supp. 268 (C.D. Cal. 1980); Linscott v. Linscott, 98 F.Supp. 802 (S.D. Iowa 1951). See also Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982) (per curiam) (concluding civil rights suit against an adoption agency and other officials would come within the domestic relations exception); Anastasi v. Anastasi, 544 F.Supp. 866 (D.N.J. 1982) (palimony action within the domestic relations exception). See infra notes 128-60, 167-68 and accompanying text.

89 See, e.g., Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982) (domestic suits whose essence is in tort or contract that do not exceed the federal court's competence should be heard); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092, 1095 (4th Cir. 1982) (federal court has jurisdiction to hear civil rights action with domestic relations background); Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982) (federal court has jurisdiction over an action to recover damages for child enticement, civil conspiracy, and intentional affliction of emotional distress arising from the alleged removal of children from custodial parent by other parent); Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978) (domestic relations exception held inapplicable to a diversity suit between former spouses for damages caused by breach of a voluntary separation agreement); Van Gaalen v. Sparks, 555 F.Supp. 325, 328 (E.D. Va. 1983) ("The Fourth Circuit's most recent pronouncements on the domestic relations exception suggest that it is to be viewed more narrowly . . . . Other Circuits, following the Fourth Circuit's case law, have also evidenced a narrower view of the exception."'). See also infra notes 117-21, 161-66 and accompanying text.

90 Fusaro v. Fusaro, 550 F.Supp. 1260, 1262 (E.D. Pa. 1982) ("Noticeably absent from Solomon, however, was a bright line test as to circumstances under which a case should be considered a domestic relations matter."'). See Allen v. Allen, 518 F.Supp. 1234, 1236-37 (E.D. Pa. 1981) ("While the Solomon court made some helpful comments as to the result in extreme cases, it left a large 'gray area' for future caselaw development. . . . [A] clear standard has yet to emerge to guide our weighing of those factors which are present."'); see also Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982) (historical rationale is not helpful in determining whether an action falls within the domestic relations exception since tort of wrongful interference with a child's custody did not exist when the first judiciary act was passed).

91 See, e.g., Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975), and Robinson v. Robinson, 523 F.Supp. 96 (E.D. Pa. 1981); Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980), and Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982); Jagiella v. Jagiella, 647 F.2d 561, 564-65 (5th Cir. 1981); Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1216 (6th Cir. 1982); Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982); Csibi v. Fustos 670 F.2d 134, 137-38 (9th Cir. 1982), and Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968).

92 See, for example, Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974); Bossom v. Bossom, 551 F.2d 474, 475 (2d Cir. 1976); Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 718 (8th Cir. 1983).

93 Lloyd v. Loeffler, 694 F.2d 489, 492-93 (7th Cir. 1982); Wasserman v. Wasserman, 671 F.2d 832, 834-35 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982); Gargallo v. Gargallo, 472 F.2d 1219, 1220 (6th Cir.) (per curiam), appeal dismissed, 414 U.S. 805 (1973); Van Gaalen v. Sparks, 555 F.Supp. 325, 328 (E.D. Va. 1983); Acord v. Parsons, 551 F.Supp. 115, 118 (W.D. Va. 1982); Kilduff v. Kilduff, 473 F.Supp. 873, 874 (S.D.N.Y. 1979).

94 Jagiella v. Jagiella, 647 F.2d 561, 564-65 (5th Cir. 1981); Crouch v. Crouch, 566 F.2d 486, 487-88 (5th Cir. 1978); Solomon v. Solomon, 516 F.2d 1018, 1024-26 (3d Cir. 1975); Fusaro v. Fusaro, 550 F.Supp. 1260, 1263 (E.D. Pa. 1982); Korby v. Erickson, 550 F.Supp. 136, 138 (S.D.N.Y. 1982); Anastasi v. Anastasi, 544 F.Supp. 866, 868 (D.N.J. 1982); Robinson v. Robinson, 523 F.Supp. 96, 98 (E.D. Pa. 1981); Turpin v. Turpin, 415 F.Supp. 12, 13-14 (W.D. Okla. 1975).

95 Franks v. Smith, 717 F.2d 183, 185-86 (5th Cir. 1983); Peterson v. Babbitt, 708 F.2d 465, 466 (9th Cir. 1983); Zak v. Pilla, 698 F.2d 800, 801 (6th Cir. 1982); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092, 1094-95 (4th Cir. 1982); Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981).

96 See Cole v. Cole, 633 F.2d 1083, 1087-88 (4th Cir. 1980).

97 See Lloyd v. Loeffler, 694 F.2d 489, 491-92 (7th Cir. 1982). For a good discussion of the confusion in this area, see Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 MINN. L. REV. 1, 23-36 (1956).

98 In Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982), the court stated:
The tort of wrongful interference with a child's custody did not exist at the time the first judiciary act was passed, and it would strain our historical imagination to the breaking point to try to determine whether, had there been such a tort then in England, it would have been within the exclusive jurisdiction of the ecclesiastical courts.

99 See, e.g., Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982); Acord v. Parsons, 551 F.Supp. 115 (W.D. Va. 1982).

100 See, e.g., Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981); Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975); Korby v. Erickson, 550 F.Supp. 136 (S.D.N.Y. 1982); Anastasi v. Anastasi, 544 F.Supp. 866 (D.N.J. 1982).

101 Overman v. United States, 563 F.2d 1287, 1292 (8th Cir. 1977).

102 See, e.g., Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982) (diversity action for tortious interference with custody of a child); Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982) (diversity suit in tort seeking damages resulting from former wife's alleged kidnapping of parties' child); Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982) (diversity suit to recover damages resulting from abduction of child by noncustodial parent); Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) (diversity action between former spouses to recover alimony and child support in arrears); Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978) (diversity suit for damages caused by breach of separation agreement); Van Gaalen v. Sparks, 555 F.Supp. 325 (E.D. Va. 1983) (diversity action between former spouses for breach of contract, fraudulent inducement, and intentional infliction of emotional distress); Turpin v. Turpin, 415 F.Supp. 12 (W.D. Okla. 1975) (diversity action between former spouses involving an alleged contractual wrong and an alleged tortious wrong).

103 See infra notes 117-24, 162-66, 174-76 and accompanying text.

104 Such remedies include alimony, custody, visitation, and child support.
In Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982) the court stated:
These remedies—alimony, custody, visitation, and child support—often entail continuing judicial supervision of a volatile family situation. The federal courts are not well suited to this task. They are not local institutions, they do not have staffs of social workers, and there is too little commonality between family law adjudication and the normal responsibilities of federal judges to give them the experience they would need to be able to resolve domestic disputes with skill and sensitivity.
Id. at 492.

105 See supra notes 64-80 and accompanying text.

106 Ellis v. Hamilton, 669 F.2d 510, 515-16 (7th Cir.), cert. denied, 103 S.Ct. 488 (1982) ("Yet recognizing that family law is peculiarly local, the federal courts continue to adhere tenaciously to the judge-made rule that excepts most domestic relations cases from the diversity jurisdiction."').

107 Id. at 516.

108 See infra notes 128-53, 160, 167-72, 177-78 and accompanying text.

109 See, e.g., Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968); Albanese v. Richter, 161 F.2d 688 (3d Cir.), cert. denied, 332 U.S. 782 (1947); Bates v. Bushey, 407 F.Supp. 163 (D. Me. 1976).

110 See Anastasi v. Anastasi, 544 F.Supp. 866 (D.N.J. 1982). See infra notes 177-78 and accompanying text.

111 See, e.g., Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973) (per curiam); Kilduff v. Kilduff, 473 F.Supp. 873 (S.D.N.Y. 1979).

112 See, e.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981); Robinson v. Robinson, 523 F.Supp. 96 (E.D. Pa. 1981).

113 See supra note 89. See infra notes 117-27, 156-66 and accompanying text.

114 See Korby v. Erickson, 550 F.Supp. 136 (S.D.N.Y. 1982). See infra notes 174-76 and accompanying text.

115 See supra note 102 and infra notes 117-24 and accompanying text.

116 See supra note 102 and infra notes 163-66 and accompanying text.

117 633 F.2d 1083 (4th Cir. 1980).

118 Id. at 1088.

119 Id. at 1089.

120 Id. at 1088.

121 Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982) (torts of child enticement and intentional infliction of emotional distress arising from a child abduction by the noncustodial parent); Van Gaalen v. Sparks, 555 F.Supp. 325, 328 (E.D. Va. 1983) (claims against former husband for breach of contract, fraudulent inducement, and intentional infliction of emotional distress); Acord v. Parsons, 551 F.Supp. 115, 117 (W.D. Va. 1982) (ction similar to Wasserman).

122 Wasserman v. Wasserman, 671 F.2d 832, 834-35 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982).

123 Id.

124 The Seventh Circuit in Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982), concluded that such tort actions were not within the domestic relations exception because their resolution did not require any special experience in domestic relations matters, since the tort issues involved were not entangled with issues only state courts would be competent to resolve. Id. at 493. The court was only required to determine if the state custody decree had been violated and, if so, what damages were suffered. Id. There was no question raised as to the validity of the custody decree. The court also found there was no risk of inconsistent state and federal decrees since such a tort suit would be litigated as an independent civil action and not as part of the strictly equitable custody proceeding. Id. The District of Columbia Circuit in Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982), fully agreed with the reasoning of Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982), concluding that the resolution of such tort issues did not require the federal court to exceed its competence. 682 F.2d at 1042. The Fifth Circuit has also allowed such a tort suit but without mentioning whether the domestic relations exception applied. Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir. 1980).

125 Bennett v. Bennett, 682 F.2d 1039, 1042-43 (D.C. Cir. 1982).

126 Lloyd v. Loeffler, 694 F.2d 489, 493-94 (7th Cir. 1982).

127 In Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982), the court questioned whether it was within the district courts' jurisdiction under the domestic relations exception to issue a decree awarding an escalating punitive damages award against the parent absconding with the child over whom the plaintiff had legal custody. An escalating award, increasing each month the child was not returned, was found to have answered implicitly the question of who should have custody of the child and therefore was considered to be the equivalent of an injunction ordering the absconding parent to return the child. 694 F.2d at 493-94. Such an injunction has been denied in both the District of Columbia Circuit, Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982), and the Sixth Circuit, Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.) (per curiam), appeal dismissed, 414 U.S. 805 (1973).
The court in Bennett v. Bennett, 682 F.2d 1039 (D.C. Cir. 1982), concluded that injunctive relief would require an inquiry into the present interests of the abducted child, and such an inquiry was exclusively within the province, experience, and competence of the state courts. But cf. Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th

Cir. 1983) (stating in dictum that the domestic relations exception is no bar to granting an injunction to compel return of a child by noncustodial parent to custodial parent in accordance with state custody decree).

128 The Sixth Circuit consistently refuses to hear cases arising in domestic settings—even those brought as civil rights actions. See, e.g., Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982); Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981); Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973) (per curiam); Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973); Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.) (per curiam), appeal dismissed, 414 U.S. 805 (1973).

129 See, e.g., Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973) (per curiam) (diversity action in which former husband alleged that his former wife instituted malicious prosecution and committed perjury against him, and converted certain of his personal property).

130 See, e.g., Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.) (per curiam), appeal dismissed, 414 U.S. 805 (1973) (diversity action brought by father seeking damages and injunctive relief for illegal removal of his three minor children by his former wife).

131 Both cases cited supra in notes 129 and 130 were summarily dismissed in brief per curiam opinions as being within the domestic relations exception.

132 See Kilduff v. Kilduff, 473 F.Supp. 873 (S.D.N.Y. 1979) (diversity action arising out of the abduction of two children by the noncustodial parent held clearly within the domestic relations exception as an ongoing custody dispute, even though characterized as an action for damages caused by the tortious conduct of a spouse). See also Casaburro v. Daher, 569 F.Supp. 835 (S.D.N.Y. 1983) (motion to dismiss for lack of subject matter jurisdiction granted in a diversity action brought by former husband against former wife alleging false imprisonment, deprivation of society, association, and companionship of his daughter as well as intentional infliction of emotional suffering, all due to conspiracy of former wife and her current husband to deprive him of visitation rights).

133 See supra notes 117-27 and accompanying text.

134 In Bacon v. Bacon, 365 F.Supp. 1019 (D. Or. 1973), Mrs. Bacon brought a diversity action against Mr. Bacon, her former husband, seeking to recover general and punitive damages for intentional infliction of mental anguish resulting from his disobedience of prior state court decrees and orders. The court, on its own motion, dismissed the case for lack of subject matter jurisdiction under the domestic relations exception, concluding that the plaintiff would "have to try to cook her Bacon in State Court if she has the facts to fuel the fire of her purpose."' 365 F.Supp. at 1021.

135 [I]f litigants were allowed to invoke diversity jurisdiction over domestic relations cases by pleading an independent tort, the longstanding domestic relations exception to federal subject-matter jurisdiction would be completely swallowed up. . . . In sum tort allegations shall not provide a means for circumventing this important exception to federal court jurisdiction.
Csibi v. Fustos, 670 F.2d 134, 138 (9th Cir. 1982).

136 Id. at 138 ("In holding that the district court lacked jurisdiction over the instant dispute, we are reaffirming a time-honored boundary between the domains of federal and state governments."'); see also Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968) ("Domestic relations is a field peculiarly suited to state regulation and control, and peculiarly unsuited to control by federal courts."').

137 See supra notes 65-80 and accompanying text.

138 The term "primary issue test"' was coined in Csibi v. Fustos, 670 F.2d 134, 137 (9th Cir. 1982), but the test was formulated in Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968).

139 Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968).

140 See Csibi v. Fustos, 670 F.2d 134, 137-38 (9th Cir. 1982).

141 See, e.g., Peterson v. Babbitt, 708 F.2d 465 (9th Cir. 1983) (per curiam) (holding abstention appropriate in a 42 U.S.C. § 1983 action brought by a father in state prison being denied visitation rights with his minor children by state authorities); Csibi v. Fustos, 670 F.2d 134 (9th Cir. 1982) (diversity action brought by decedent's alleged first wife and her children to establish their rights in decedent's estate found within the domestic relations exception); L.H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981) (holding abstention appropriate in a class action brought on behalf of dependent, neglected, or delinquent children); Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (diversity action to establish paternity and obtain child support dismissed as within the domestic relations exception); Welker v. Metropolitan Life Ins. Co., 502 F.Supp. 268 (C.D. Cal. 1980) (diversity action brought by a woman seeking to be declared the putative wife of the decedent dismissed as within the domestic relations exception); Bacon v. Bacon, 365 F.Supp. 1019 (D. Or. 1973) (diversity action seeking damages from former husband for intentional infliction of emotional anguish dismissed as within the domestic relations exception).

142 Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975).

143 See, e.g., Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975); Albanese v. Richter, 161 F.2d 688 (3d Cir.), cert. denied, 332 U.S. 782 (1947); Fusaro v. Fusaro, 550 F.Supp. 1260 (E.D. Pa. 1982); Lewis v. Lewis, 543 F.Supp. 35 (M.D. Pa. 1981); Robinson v. Robinson, 523 F.Supp. 96 (E.D. Pa. 1981); Allen v. Allen, 518 F.Supp. 1234 (E.D. Pa. 1981); Johanning v. Johanning, 509 F.Supp. 770 (D.N.J. 1981).

144 Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975).

145 Id.

146 Id. These factors, first mentioned in Solomon, were later applied in Fusaro v. Fusaro, 550 F.Supp. 1260, 1263 (E.D. Pa. 1982); Lewis v. Lewis, 543 F.Supp. 35, 37 (M.D. Pa. 1981), and Allen v. Allen, 518 F.Supp. 1234, 1236-37 (E.D. Pa. 1981), as well as in Crouch v. Crouch, 566 F.2d 486, 487-88 (5th Cir. 1978) in the Fifth Circuit. See infra notes 162-66.

147 See Robinson v. Robinson, 523 F.Supp. 96, 98 (E.D. Pa. 1981).

148 See Solomon v. Solomon, 516 F.2d 1018, 1024 (3d cir. 1975) ("federal courts do not have jurisdiction in domestic relations suits except where necessary to the effectuation of prior state court judgments involving the same matters"') (footnote omitted) (emphasis in the original).

149 See, e.g., Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975); Fusaro v. Fusaro, 550 F.Supp. 1260 (E.D. Pa. 1982); Lewis v. Lewis, 543 F.Supp. 35 (M.D. Pa. 1981); Allen v. Allen, 518 F.Supp. 1234 (E.D. Pa. 1981).

150 See, e.g., Robinson v. Robinson, 523 F.Supp. 96 (E.D. Pa. 1981).

151 Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975).

152 Id.

153 See Albanese v. Richter, 161 F.2d 688 (3d Cir.), cert. denied, 332 U.S. 782 (1947).

154 See Crouch v. Crouch, 566 F.2d 486, 487-88 (5th Cir. 1978).

155 In the Fifth Circuit the general test is whether hearing the claim will require an inquiry into the marital or parent-child relationship. Jagiella v. Jagiella, 647 F.2d 561, 565 (5th Cir. 1981).

156 See, e.g., Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) (domestic relations exception held not to apply to a diversity action for past due alimony and child support pursuant to a state decree); Erspan v. Badgett, 647 F.2d 550 (5th Cir. 1981), cert. denied, 455 U.S. 945 (1982) (domestic relations exception held not to apply to a diversity action to enforce terms of a divorce decree); Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978) (domestic relations exception held not to apply to a diversity action for damages caused by breach of a voluntary separation agreement); Wilson v. Wilson, 532 F.Supp. 152 (M.D. La. 1980), aff'd, 667 F.2d 497 (5th Cir. 1982) (domestic relations exception held not to apply to a diversity action to enforce an out-of-state divorce decree); Lee v.

Hunt, 431 F.Supp. 371 (W.D. La. 1977) (domestic relations exception held not to apply to a diversity action for declaration of status as a putative wife of a decedent to acquire rights in his estate).

157 See Lee v. Hunt, 431 F.Supp. 371 (W.D. La. 1977).

158 Id. at 377.

159 "Where the basic issue is an inquiry into property rights, the domestic relations exception is not applicable."' Id.

160 In Welker v. Metropolitan Life Ins. Co., 502 F.Supp. 268 (C.D. Cal. 1980), the court, using the Buechold "primary issue"' test, dismissed a diversity action by a woman seeking to be declared the putative wife of the decedent as within the domestic relations exception in direct contradiction to the result in Lee v. Hunt, 431 F.Supp. 371 (W.D. La. 1977). The Welker court stated that the Hunt court construed the domestic relations exception too narrowly, 502 F.Supp. at 270, since the relief the plaintiff sought was subsidiary to and dependent upon an express determination of status.

161 See supra note 149 and accompanying text. See also supra text accompanying notes 144-52.

162 See, e.g., Jagiella v. Jagiella, 647 F.2d 561, 564 (5th Cir. 1981) ("Since the arrearages here in question were calculable solely from the records of the Clerk of the Florida Circuit Court and involved no litigation of questions regarding the parties' marital relationship, we conclude that the district court properly exercised jurisdiction."').

163 See, e.g., Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978) ("While we approvingly acknowledge the so-called domestic relations exception to diversity jurisdiction, we find it inapplicable to the instant case, which involves little more than a private contract to pay money between persons long since divorced, whose children are well into adulthood."' (footnotes omitted)).

164 566 F.2d at 487-88.

165 Id. at 488.

166 Id.

167 See Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974); Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir. 1981).

168 Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

169 Id.

170 Id.

171 Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1216-17 (6th Cir. 1981) (when sums claimed under a separation agreement had not been reduced to judgment by a state court, the former spouse is in reality seeking a determination of past, present and future duties of the other spouse and such a determination falls within, or at least is on the verge of, the domestic relations exception).

172 Id. at 1217.

173 Korby v. Erickson, 550 F.Supp. 136 (S.D.N.Y. 1982); Anastasi v. Anastasi, 544 F.Supp. 866 (D.N.J. 1982).

174 In so concluding, the court stated:
Generally, the exception is based upon a true marital relationship and encompasses the incidental rights that flow therefrom such as support of a spouse or children, custody of children, property interests and probate administration—rights legally enforceable by virtue of the legal status. It is clear that the instant situation does not fit into any of these categories. The 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. It did not give rise to any legally enforceable

right to support or maintenance or the other property rights or interests that arise from a legal marital status and are incidental thereto.
Korby v. Erickson, 550 F.Supp. 136, 138 (S.D.N.Y. 1982) (footnote omitted).

175 Id.

176 Id.

177 Anastasi v. Anastasi, 544 F.Supp. 866, 867 (D.N.J. 1982).

178 The court came to this conclusion because the New Jersey Supreme Court in Crowe v. De Gioia, 90 N.J. 126, 447 A.2d 173 (1982), had made the same kind of extensive inquiries into the parties' financial needs and interests to shape a remedy in a palimony case that have traditionally brought the domestic relations exception to federal jurisdiction into play. 544 F.Supp. at 868.

179 Barber v. Barber, 62 U.S. (21 How.) 582 (1858), where the exception began, was a diversity action. Except for a grant in 1801 that lasted little more than a year, there was no general grant of federal question jurisdiction to the lower federal courts until 1875. C. WRIGHT, THE LAW OF THE FEDERAL COURTS 4 (4th ed. 1983); see supra note 19 and infra notes 283-87 and accompanying text.

180 DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1982 ANNUAL REPORT 108, 111. Under "An Analysis of the Workload of the Federal Courts for the Twelve Month Period Ended June 30, 1982,"' the report states:
Civil rights litigation (excluding prisoner civil rights petitions) regularly comprises a significant portion of all civil litigation filed in the [United States] district courts. During the twelve month period ended June 30, 1982, there were 17,038 civil rights cases filed, an increase of 10.5 percent over the 15,419 cases filed in 1981. [There were 10,392 civil rights cases filed in 1975.]
Id. at 108, 111 (Table 24). As for prisoner civil rights petitions, they rose 7.0 percent from 1981 to 1982, id. at 102, and the percent change of civil rights petitions filed by federal prisoners in 1982 over 1977 was 72.7 percent and by state prisoners 115.6 percent. Id. at 103 (Table 20).

181 See infra notes 190-233 and accompanying text.

182 See supra note 20.

183 See, e.g., Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983); Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717-18 (8th Cir. 1983); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092, 1094-95 (4th Cir. 1982).

184 See, e.g., Zak v. Pilla, 698 F.2d 800, 801 (6th Cir. 1982); Schleiffer v. Meyers, 644 F.2d 656, 663-64 (7th Cir.), cert. denied, 454 U.S. 823 (1981); Sutter v. Pitts, 639 F.2d 842, 843-44 (1st Cir. 1981); Denman v. Leedy, 479 F.2d 1097, 1098 (6th Cir. 1973) (per curiam); LaMontagne v. LaMontagne, 394 F.Supp. 1159, 1160-61 (D.Mass. 1975).

185 That is, the First, Second, Third, Sixth, and Ninth Circuits. See supra notes 88, 128-53, 167-78 and accompanying text.

186 See infra notes 191-209 and accompanying text.

187 That is, the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits. See supra notes 89, 117-27, 155-66 and accompanying text.

188 See cases cited supra note 183 and infra notes 210-33; see also Rowell v. Oesterle, 626 F.2d 437, 438 (5th Cir. 1980) (per curiam) ("This general rule [i.e., the domestic relations exception], however, has not operated to bar federal review of constitutional issues, simply because those issues arise in 'domestic' contexts."'); Overman v. United States, 563 F.2d 1287, 1292 (8th Cir. 1977) ("There is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional dimension."') (emphasis added); Spencer v. Spencer, 430 F.Supp. 683, 689 n.3 (M.D.N.C. 1977)

("Although . . . [the domestic relations exception] does not control the disposition of suits involving substantial federal questions . . . .'").

189 See infra notes 222-23 and accompanying text.

190 See supra notes 128-31, 171-72 and accompanying text.

191 See, e.g., Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982) (per curiam); Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973) (per curiam); Castorr v. Brundage, 674 F.2d 531, 536-37 (6th Cir.), cert. denied, 103 S.Ct. 240 (1982); see also Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981) ("Even when brought under the guise of a federal question action, a suit whose substance is domestic relations generally will not be entertained in a federal court.'").

192 See Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982) (per curiam).

193 42 U.S.C. § 1983 (Supp. V 1981) provides that:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

194 698 F.2d at 801. ("Federal courts traditionally decline to accept jurisdiction in parent-child, domestic relations or custody disputes and in adoption matters which are subject to state law and state court disposition.'").

195 Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973). In Denman the Sixth Circuit actually gave three reasons for dismissing an action brought on behalf of a father and his seven children under 42 U.S.C. sections 1983 and 1985(3) and the diversity statute. The father alleged that certain public officials and members of his estranged wife's family had conspired to deprive him and his children of "their mutual care, companionship, love and affection.'" Id. at 1098. The three reasons given by the court were: a lack of jurisdiction due to the domestic relations exception, a failure to allege a valid cause of action under section 1983, and a failure to set forth a cognizable cause of action under section 1985(3). Id. Although the court did not make this clear, the dismissal under the domestic relations exception may have only applied to the diversity nature of the action.

196 Castorr v. Brundage, 674 F.2d 531, 536-37 (6th Cir.), cert. denied, 103 S.Ct. 240 (1982). In Castorr the court found that a 42 U.S.C. section 1983 action instituted by natural parents for damages against a juvenile judge and foster parents following termination of their parental rights was merely an effort to confer domestic relations jurisdiction upon a federal court. The substantive federal policy to defer to the expertise of the state courts in such matters therefore supported the application of res judicata to the section 1983 constitutional claims of the natural parents. Id. at 533, 536-37.

197 Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981) ("Even when brought under the guise of a federal question action, a suit whose substance is domestic relations generally will not be entertained in federal court.'").

198 See, e.g., Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981); LaMontagne v. LaMontagne, 394 F.Supp. 1159 (D.Mass. 1975).

199 Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981). Although Sutter was a diversity action, the plaintiff claimed that her former husband maliciously frustrated the exercise of her civil rights in violation of the Massachusetts civil rights statute, MASS. ANN. LAWS ch. 12, § 11I (Michie/Law Co-op. 1980), by disobeying the visitation and custody orders of a Massachusetts court. The court found that her civil rights claim boiled down to a demand for custody of the child which, "[w]ith its constitutional cloak removed, [was] . . . nothing more than an 'attempt to embroil the federal courts in matrimonial matters best left to the states."DDD" 639 F.2d at 844 (citation omitted). The court therefore affirmed the dismissal of her complaint.

200 LaMontagne v. LaMontagne, 394 F.Supp. 1159 (D.Mass. 1975). The court did not find the fact that the parents of the child were unmarried as any obstacle to applying the exception.

201 L.H. v. Jamieson, 643 F.2d 1351, 1355 (9th Cir. 1981).

202 See, e.g., id.; Peterson v. Babbitt, 708 F.2d 465 (9th Cir. 1983) (per curiam).

203 See, e.g., Peterson v. Babbitt, 708 F.2d at 466 ("Ever since In re Burrus . . . the federal courts have uniformly held that they should not adjudicate cases involving domestic relations, including 'the custody of minors and a fortiori, rights of visitation."DDD"); L.H. v. Jamieson, 643 F.2d at 1355 ("The appellants propose interjecting the federal courts into issues affecting the proper care of juveniles held in the state's custody. These issues have traditionally been left exclusively to the states."').

204 See, e.g., Peterson v. Babbitt, 708 F.2d 465 (9th Cir. 1983) (per curiam) (holding abstention appropriate in a 42 U.S.C. section 1983 action brought by a father being denied visitation rights with his minor children by state authorities); L.H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981) (holding abstention under Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941), appropriate in a class action brought on behalf of dependent, neglected, or delinquent children).

205 See supra note 193.

206 Peterson v. Babbitt, 708 F.2d 465 (9th Cir. 1983) (per curiam). Peterson alleged that by denying him visitation rights the state authorities deprived him of a fundamental liberty interest without due process of law. The court, first discussing the domestic relations exception, found abstention appropriate since the issue of Peterson's visitation rights would be resolved in a pending state court proceeding. Id. at 466.

207 708 F.2d at 466.

208 See supra note 1.

209 L.H. v. Jamieson, 643 F.2d 1351 (9th Cir. 1981).

210 See supra notes 117-23 and accompanying text.

211 Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092 (4th Cir. 1982).

212 See supra notes 118-21 and accompanying text.

213 679 F.2d at 1093.

214 Id. at 1095.

215 679 F.2d at 1094-95. The appellate court remanded the case to the district court, holding that the district court had jurisdiction to hear the case but that it could stay proceedings and retain it on its docket until a final custody ruling was made in the state court. It expressed no opinion on the merits of the 42 U.S.C. section 1983 claim.

216 See Lossman v. Pekarske, 707 F.2d 288 (7th Cir. 1983); Ellis v. Hamilton, 669 F.2d 510 (7th Cir.), cert. denied, 103 S.Ct. 488 (1982).
In Lossman, a father and his three children sought damages under 42 U.S.C. section 1983, alleging that county welfare and law enforcement officers deprived the plaintiffs of liberty without due process of law by removing the children from the father's custody. The district court granted summary judgment for the defendants and the court of appeals affirmed.
In Ellis, the plaintiffs sought damages and injunctive relief under 42 U.S.C. section 1983, claiming that several welfare and judicial officers had violated their rights under the due process clause of the fourteenth amendment by causing the plaintiffs' grandchildren to be removed from their homes and adopted by strangers. The district court dismissed the complaint on summary judgment for the defendants and the court of appeals affirmed.

217 Lossman, 707 F.2d at 292.

218 See supra note 216.

219 Lossman, 707 F.2d at 292; Ellis, 669 F.2d at 511, 515-17.

220 In Lossman, 707 F.2d at 292, the court stated:
But the limited capability of the federal courts to deal effectively with such matters, evidenced by their long-standing refusal to award custody in diversity cases . . . places narrow limits on the appropriate federal judicial role even when the issue is damages, as in this case, rather than who shall have custody . . . . We agree with the district judge that intervention here would have exceeded those limits.

221 In Ellis, 669 F.2d at 515-16, the court stated:
[R]ecognizing that family law is peculiarly local, the federal courts continue to adhere tenaciously to the judge-made rule that excepts most domestic relations cases from the diversity jurisdiction. . . . The relief sought in this case illustrates, if the point is not sufficiently obvious, why the federal courts are not the right tribunals to decide custody cases. The plaintiffs want a decree giving them the right to visit with the children periodically. The decree would require continuous judicial supervision and adjustment until the last child was grown up—feasible and familiar tasks for a local domestic relations judge but not for a remote, and in these matters totally inexperienced, federal district judge. The plaintiffs' damage claim does not present this problem, but damages are rarely an adequate remedy in a custody case; if we thought these plaintiffs were just after money we would doubt the good faith of their suit.

222 Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717-18 (8th Cir. 1983).
In Ruffalo a former wife brought an action under the federal question statute, 28 U.S.C. § 1331 (Supp. V 1981), on behalf of herself and her son for injunctive relief and damages against her former husband and the federal officials responsible for concealing him and her son through the Witness Protection Program. The district court below held that the domestic relations exception barred the issuance of an injunction for the return of the plaintiff's son. The Eighth Circuit, while expressing doubt as to whether the domestic relations exception applies to actions brought under the federal question statute, found that, even if the exception did apply to such cases, it did not bar jurisdiction in the case before it because the state court could not grant effective relief to the plaintiff (it was unlikely that the state court could compel the federal officials to divulge the son's whereabouts) and "'[u]nderlying the various reasons advanced to justify the domestic-relations exception is one basic premise: There is a state forum in which the plaintiff may obtain relief.'" 702 F.2d at 718.

223 See Overman v. United States, 563 F.2d 1287, 1292 (8th Cir. 1977) ("There is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional dimension.'") (emphasis added); Alsager v. District Court, 518 F.2d 1160, 1165 (8th Cir. 1975) (federal court could not review propriety of termination of parental rights under state standard, but could "adjudicate those facts necessary to resolve the claim that that state standard is unconstitutional as written and as applied.'").

224 Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981).

225 Id.

226 Id. at 1332-33.

227 Id. at 1331. See also Santosky v. Kramer, 455 U.S. 745, 753 (1982) (parents have a "fundamental liberty interest'" in the care, custody, and management of their children); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (relationship between parent and child is constitutionally protected); Stanley v. Illinois, 405 U.S. 645, 651-52 (1972) (integrity of the family unit has found protection in the due process and equal protection clauses of the fourteenth amendment and the ninth amendment and the parents' interest in companionship, care, custody, and management of their children is "cognizable and substantial'").

228 717 F.2d 183 (5th Cir. 1983).

229 717 F.2d at 184.

230 The married couple had also sought an injunction for the return of the child to their custody and damages for mental distress caused by the taking of the child. The court affirmed the district court's dismissal for lack of subject matter jurisdiction over the question of custody of the child. There was no state decree awarding custody to the plaintiffs at the time the action was filed, and while the appeal to the Fifth Circuit was pending, the state court found that the natural mother was fit to take care of the child and that the child's best interest was to be in her natural mother's custody and not that of the married couple. Id. at 185.

231 Id. at 185-86.

232 Id.

233 Id.

234 See supra note 87.

235 See supra note 17.

236 In Spindel v. Spindel, 283 F.Supp. 797 (E.D.N.Y. 1968), the court stated:
Some lower courts have sweepingly applied the Supreme Court's dicta [i.e., in Barber] disowning power to grant relief in matrimonial disputes. Thus, it has been asserted that the federal courts are barred from entertaining not only actions involving matrimonial status, but also any case concerned with "'domestic relations,"' in the broad sense of the term.
283 F.Supp. at 806.
The court in Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980) stated:
[I]n seeking to expand the exception to federal jurisdiction, district courts have occasionally looked beyond the nature of the rights which the proposed litigation seeks to establish. Such courts have referred more globally to exceptions grounded on "the domestic relations nature"' of a case . . . or to "a judicial exception to federal jurisdiction . . . with respect to intra-family feuds."DD'
(citations omitted) (emphasis in original). See also supra note 14.

237 See Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980). See also supra notes 81-86 and accompanying text.

238 See supra notes 65-80 and accompanying text.

239 See Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980) ("A district court may not simply avoid all diversity cases having intrafamily aspects."'); Spindel v. Spindel, 283 F.Supp. 797, 812 (E.D.N.Y. 1968) ("A federal court is not deprived of competence merely because the parties involved are husband and wife or the controversy might be termed a 'marital dispute." DDD"). See also Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 MINN. L. REV. 1, 31 (1956) ("It appears that some very serious questions may be raised about the position adopted by the federal courts where they refused to exercise jurisdiction simply because of the individuals involved."').

240 Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980). See also Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983); Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1216 (6th Cir. 1981); Crouch v. Crouch, 566 F.2d 486, 487-88 (5th Cir. 1978).

241 See supra notes 65-80 and accompanying text and infra notes 248-53 and accompanying text.

242 Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092, 1094-95 (4th Cir. 1982); Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980).

243 See supra notes 117-37 and accompanying text.

244 See supra notes 173-78 and accompanying text.

245 The following cases held that diversity actions for breach of a separation agreement were within the domestic relations exception: Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975); Armstrong v. Armstrong, 508 F.2d 348 (1st Cir. 1974); Fusaro v. Fusaro, 550 F.Supp. 1260 (E.D. Pa. 1982); Lewis v. Lewis, 543 F.Supp. 35 (M.D. Pa. 1981); Cherry v. Cherry, 438 F.Supp. 88 (D. Md. 1977). The following cases, however, held such actions were not: Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981); Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978); Wilson v. Wilson, 532 F.Supp. 152 (M.D. La. 1980), aff'd, 667 F.2d 497 (5th Cir. 1982); Turpin v. Turpin, 415 F.Supp. 12 (W.D. Okla. 1975).

246 See supra notes 179-233 and accompanying text.

247 Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982). See also supra notes 65-80 and infra notes 248-53 and accompanying text.

248 Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974); Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968); Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C. 1976). See also supra note 68 and accompanying text.

249 See cases cited supra note 248.

250 Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1217 (6th Cir. 1981); Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C. 1976). See also supra notes 70-72 and accompanying text.

251 Lloyd v. Loeffler, 694 F.2d 489, 492-93 (7th Cir. 1982); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978).

252 Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982).

253 Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975); Allen v. Allen, 518 F.Supp. 1234, 1237 (E.D. Pa. 1981).

254 Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980).

255 See, e.g., Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978); Korby v. Erickson, 550 F.Supp. 136 (S.D.N.Y. 1982).

256 In Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982), the court stated that "[a] federal court is entirely competent, in this case as much as any other, to determine traditional tort issues such as the existence of a legal duty, the breach of that duty, and the damages flowing from that breach."' See, e.g., Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982); Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982).

257 See supra notes 81-83 and accompanying text.

258 Any case requiring alteration or reformation of the state decree should be dismissed as within the exception. In reforming or altering a decree the federal court would, in effect, be issuing such a decree itself. See Davis v. Davis, 558 F.Supp. 485 (N.D. Miss. 1983); Fusaro v. Fusaro, 550 F.Supp. 1260 (E.D. Pa. 1982); Robinson v. Robinson, 523 F.Supp. 96 (E.D. Pa. 1981).

259 See supra note 104.

260 See, e.g., Cole v. Cole, 633 F.2d 1083, 1089 (4th Cir. 1980); Crouch v. Crouch, 566 F.2d 486, 487-88 (5th Cir. 1978).

261 See supra notes 65-80, 248-53 and accompanying text.

262 See, e.g., Bossom v. Bossom, 551 F.2d 474 (2d Cir. 1976). In Bossom a divorced husband brought a diversity action seeking a declaration of invalidity of a stipulation incorporated into a New York divorce decree. The court found that invalidating such a stipulation would in effect modify the state divorce decree and therefore "would seem to involve a sufficient meddling with the judgment of divorce to bring the case within the matrimonial exception itself."' 551 F.2d at 475.

263 See Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1217 (6th Cir. 1981); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974). See supra notes 168-70 and accompanying text.

264 Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1217 (6th Cir. 1981). See supra notes 171-72 and accompanying text.

265 See supra notes 81-83 and accompanying text.

266 The strong state interest in domestic relations matters, the superior competence and resources of the state courts in settling family disputes and monitoring continuing domestic problem situations, and the possibility of incompatible state and federal court decrees in cases of continuing judicial supervision by the state all weigh heavily in keeping domestic relations core matters out of federal courts. Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978); Buechold v. Ortiz, 401 F.2d 371, 372-73 (9th Cir. 1968).

267 See, e.g., Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981); Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978). See supra notes 162-66 and accompanying text.

268 In Rosenstiel v. Rosenstiel, 278 F.Supp. 794, 799 (S.D.N.Y. 1967), the court stated:
An action to determine the validity of a divorce decree is not technically a divorce action although, in effect, it determines the marital relationship of the parties involved. . . . However, in order for the federal district courts to assume jurisdiction of such a domestic relations dispute, there must be present the requisite diversity of citizenship and satisfaction of the monetary requirement imposed by 28 U.S.C. § 1332(a), and a constitutional claim which is not frivolous.
See also Southard v. Southard, 305 F.2d 730, 731 (2d Cir. 1962) ("[T]he appellant sought simply a declaration that the Connecticut decree was invalid under the Constitution of the United States, and there is no reason why a declaratory action should not prima facie lie to determine the controverted status of the parties. . . . Thus the district court had jurisdiction over the action."'); Spindel v. Spindel, 283 F.Supp. 797 (E.D.N.Y. 1968)(holding that a federal court had jurisdiction to determine validity of a Mexican divorce decree).

269 See supra notes 157-60 and accompanying text. But see Csibi v. Fustos, 670 F.2d 134, 137 (9th Cir. 1982).

270 See supra notes 265-66.

271 See supra notes 117-24 and accompanying text.

272 See supra notes 122-24 and accompanying text.

273 Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982). See supra note 124. See also Wasserman v. Wasserman, 671 F.2d 832, 835 (4th Cir.), cert. denied, 103 S.Ct. 372 (1982).

274 Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982).

275 Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982).

276 Lloyd v. Loeffler, 694 F.2d at 493.

277 See infra note 281-82 and accompanying text.

278 Bennett v. Bennett, 682 F.2d 1039, 1042-43 (D.C. Cir. 1982).

279 Lloyd v. Loeffler, 694 F.2d 489, 493-94 (7th Cir. 1982).

280 See supra notes 125-27 and accompanying text.

281 Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 718 (8th Cir. 1983).

282 Ellis v. Hamilton, 669 F.2d 510, 516 (7th Cir.), cert. denied, 103 S.Ct. 488 (1982) ("[D]amages are rarely an adequate remedy in a custody case; if we thought these plaintiffs were just after money we would doubt the good faith of their suit."').

283 That is, in Barber v. Barber, 62 U.S. (21 How.) 582 (1858). See supra notes 37-39 and accompanying text.

284 Since the Judiciary Article (Art. III) of the Constitution is not self-executing, the first Congress passed the Judiciary Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78, to establish the judicial courts of the United States. While the Act made prompt use of the constitutional grant of judicial power in cases of diverse citizenship it did not make use of the grant of judicial power over cases arising under the constitution or laws of the United States. U.S. CONST. art. III, § 2, cl. 1. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 32-34 (2d ed. 1973).

285 Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. This Act gave the circuit courts jurisdiction of "all suits of a civil nature at common law or in equity . . . arising under the Constitution or laws of the United states, or treaties made, or which shall be made, under their authority."' The wording "all suits of a civil nature at common law or in equity"' is identical to that in the first judiciary act, which has been interpreted to exclude those matters within the exclusive jurisdiction of the English ecclesiastical courts. See supra note 3, 40-43 and accompanying text. The similar language does not necessarily indicate that the domestic relations exception should be extended into the federal question area. In fact, the actions which were excluded by this interpretation were actions for divorce and alimony, actions which were historically heard in the ecclesiastical courts of England. These actions could never be brought in federal court under the federal question statute since they do not arise under the constitution or laws of the United States. The only way they could have possibly entered federal court was under the diversity statute and their entrance under that statute was precluded beginning in 1858. Furthermore, the validity of this historical account of the exception has been seriously questioned. See supra notes 3, 62.

286 See supra note 1 and infra note 287.

287 Most of the domestic relations disputes which parties seek to bring into federal courts today involve breach of separation agreements, see, e.g., Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978); Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975), torts committed by former spouses, see, e.g., Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982); Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980), or determinations of marital status, see, e.g., Csibi v. Fustos, 670 F.2d 134 (9th Cir. 1982); Lee v. Hunt, 431 F.Supp. 371 (W.D. La. 1977). These cases involve no constitutional questions.

288 See, e.g., Santosky v. Kramer, 455 U.S. 745 (1982); Quilloin v. Walcott, 434 U.S. 246 (1978); Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816 (1977); Moore v. East Cleveland, 431 U.S. 494 (1977) (plurality opinion); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Stanley v. Illinois, 405 U.S. 645 (1972); Prince v. Massachusetts, 321 U.S. 158 (1944); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923). See supra note 227.

289 See supra note 180.

290 The cases arising in domestic settings brought under the federal question statute, 28 U.S.C. § 1331 (Supp. V 1981), are usually brought as civil rights actions alleging violations of the parties' constitutional rights by state officers or agencies in the context of an alleged violation of a parent's right to custody or visitation of a minor child. See, e.g., Peterson v. Babbitt, 708 F.2d 465 (9th Cir. 1983); Castorr v. Brundage, 674 F.2d 531 (6th Cir.), cert. denied, 103 S.Ct. 240 (1982); LaMontagne v. LaMontagne, 394 F.Supp. 1159 (D.Mass. 1975). This will be especially true now that the Supreme Court has found that parents have a fundamental liberty interest in the care, custody, and management of their children which is protected by the fourteenth amendment. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

291 See supra notes 179-233 and accompanying text.

292 See supra note 237 and accompanying text.

293 See supra notes 190-233 and accompanying text.

294 See, e.g., Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717-18 (8th Cir. 1983) ("It is unclear whether thedomestic-relations exception applies to cases brought under the federal-question statute."').
The domestic relations exception could conceivably apply to cases brought under the federal question statute. In Ohio ex. rel. Popovici v. Agler, 280 U.S. 379 (1930), the Supreme Court concluded that since the Constitution

was adopted with the understanding that domestic relations were matters reserved to the states, the courts would have no difficulty in construing any congressional grants of jurisdiction accordingly. See supra notes 57-59 and accompanying text. Thus, it follows that federal courts have no jurisdiction over actions for divorce or alimony no matter under what federal jurisdiction statute such actions are brought. Actions for divorce and alimony, however, should never be brought under the federal question statute, see supra note 286 and accompanying text, so application of the exception in this area would be unnecessary and possibly dangerous. An overly broad and incorrect application of the exception in this area could possibly preclude federal examination of important constitutional issues in which there is a superior federal interest.

295 See infra notes 322-23. See also Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983) ("Unless it is determined that an asserted constitutional violation has been forwarded solely for the purpose of obtaining federal jurisdiction or is wholly insubstantial and frivolous, or unless it is determined that such an asserted violation is clearly immaterial to the case, then dismissal for lack of subject matter jurisdiction is inappropriate.'").

296 See, e.g., Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981) ("Although Sutter has clothed her complaint in the garb of a civil rights action, . . . her claim boils down to a demand for custody of the child. We perceive no grounds to justify transforming Sutter's difficulty in securing enforcement of the probate court's custody order into a problem of constitutional dimension."'); Hernstadt v. Hernstadt, 373 F.2d 316, 318 (2d Cir. 1967) ("Where the constitutional claim is frivolous . . . the suit should be dismissed as an impermissible attempt to embroil the federal courts in matrimonial matters best left to the states."').

297 See supra notes 81-83 and accompanying text.

298 See supra note 287 and accompanying text.

299 That is, they could be dismissed for presenting a constitutional claim that is wholly unsubstantial and obviously frivolous. See infra notes 320-27 and accompanying text.

300 In other words, determination of such claims would not require federal courts to determine which party should actually have custody of a child or what amount of support one party should pay to the other. Rather, the courts would determine only whether the proceeding violated the due process rights of the parties involved and, if so, whether a new state hearing should be held in accord with the court's directives.
A good example of this separation between the constitutional violation and the underlying domestic dispute can be seen in Wiesenfeld v. New York, 474 F.Supp. 1141 (S.D.N.Y. 1979). In Wiesenfeld, a man's second wife and their infant daughter sued the state, city, and state court judges, alleging that the state family court proceedings in which a support order against the man was increased in favor of a child of his former marriage was unconstitutional. The court refused to adjudicate whether the support award was factually excessive (such an adjudication would bring the underlying rationale of the exception into play) but instead concerned itself solely with the constitutional issues presented by the plaintiffs' charge that state family court support proceedings gave preference to dependents of first families, thereby depriving dependents of subsequent families of adequate levels of support. Id. at 1145-46.

301 See supra note 296 and accompanying text. For the determination of when to dismiss a domestic relations case in the diversity area, see supra notes 248-82 and accompanying text.

302 See infra notes 322-23 and accompanying text.

303 Such actions do not arise "under the Constitution, laws, or treaties of the United States,"' 28 U.S.C. § 1331 (Supp. V. 1981), and the court has no jurisdiction over them, whether or not it applies the domestic relations exception.

304 See supra notes 191-209 and accompanying text. This is also a problem in the diversity area. See supra notes 236, 128-160, 167-72 and accompanying text.

305 Such a construction is not necessary to further the rationale underlying the exception and moves the boundaries of the exception too far from the well-defined core to which the exception was originally limited. See supra notes 37-80 and accompanying text. See also Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983) ("The mere fact that

a claimed violation of constitutional rights arises in a domestic relations context does not bar review of those constitutional issues.'").

306 See Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092, 1095 (4th Cir. 1982); Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981).

307 These actions would involve the core subjects of the domestic relations exception and violate the rationale underlying the exception by causing the federal courts to assume the functions of a state family court. Federal courts would not need to reach those issues, however, to determine if constitutional violations had occurred. Directing with whom the child should live or visit (involving a determination of what is in the best interests of the child) is not in itself a constitutional question which the federal court should have to definitively determine to grant relief to a party in a federal question case. The constitutional question arises as to the procedures by which such determinations are made, and it is these issues which would concern the federal court. See supra note 300 and accompanying text.

308 See, e.g., Duchesne v. Sugarman, 566 F.2d 817, 828 (2d Cir. 1977) (failure of city bureau of child welfare to obtain judicial ratification of its decision to retain custody of mother's children amounted to a deprivation of her liberty interest in family privacy without due process of law); Alsager v. District Court, 545 F.2d 1137, 1138 (8th Cir. 1976) (parents were deprived of substantive and procedural due process in state proceedings in which their parental rights were terminated).

309 See supra notes 300, 308 and accompanying text. See also Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092, 1095 (4th Cir. 1982) ("Mrs. Kelser's fourteenth amendment claims would not require adjusting family status, establishing familial duties, or determining the existence of breach of such duties.'").

310 See Franks v. Smith, 717 F.2d 183, 186 (5th Cir. 1983) (fourth amendment violation arising in a domestic setting). See supra notes 228-33 and accompanying text.

311 See supra notes 65-80 and accompanying text and supra note 300.

312 See supra notes 67 and 104.

313 See supra note 73.

314 Under the abstention doctrine a court may decline to exercise jurisdiction over a case which it would have had the power to hear if it had so chosen. The abstention doctrine exists in several distinct forms which vary in rationale and application. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-17 (1976). The first of these is commonly referred to as the Pullman doctrine, which calls for the federal court to refrain from deciding a federal constitutional question where the case may be disposed of on questions of state law. Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500-02 (1941). When applying Pullman abstention to a case the federal court retains jurisdiction pending a determination of the state court that would resolve the state law question and perhaps make it unnecessary to decide the federal constitutional question.
According to the Ninth Circuit, three criteria must be met for Pullman abstention to be applicable:
(1) The Complaint "touches a sensitive area of social policy upon which the federal courts ought not to enter unless no alternative to its adjudication is open."DD'
(2) "Such constitutional adjudication plainly can be avoided if a definitive ruling on the state issue would terminate the controversy."DD'
(3) The possibly determinative issue of state law is doubtful.
Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d 838, 839-40 (9th Cir. 1979) (quoting Canton v. Spokane School Dist. No. 81, 498 F.2d 840, 845 (9th Cir. 1974)) (footnote omitted).
The second form of abstention, established in Burford v. Sun Oil Co., 319 U.S. 315 (1943), is used to avoid needless conflict with the administration by a state of its own affairs. Burford type abstention recognizes the need for federal courts to abstain from exercising jurisdiction where a state's interest in carrying out its domestic policy predominates, especially where federal court proceedings would generally add nothing to, or possibly even detract from, a state's well-established system of handling such proceedings. Arnav Industries, Inc. v. Dreskin, 551 F.Supp. 461, 463-64 (S.D.N.Y. 1982). "'Where such a predominant state interest is found, the district court

may invoke the abstention doctrine without finding, in addition, a state issue or unclarity in the pertinent state law."' Id. at 464. Burford type abstention calls for dismissal of the action. Dismissal of the action is thought appropriate in such cases because "federal review . . . would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."' Colorado River Water Conservation Dist. v. United States, 424 U.S. at 814. When a state has sought to concentrate the actions involved in a particular court or set of courts, as states have in family relations, this weighs in favor of such abstention. Santa Fe Land Improvement Co. v. City of Chula Vista, 596 F.2d at 841-42.

The other principal form of abstention arose in Younger v. Harris, 401 U.S. 37 (1971), and is often referred to as "Our Federalism."' Id. at 44-45. The concept of comity is at the heart of the decision in Younger. The Younger doctrine counsels federal abstention when there is a pending state proceeding. It was first articulated with reference to state criminal proceedings but has since been held "fully applicable to civil proceedings in which important state interests are involved."' Moore v. Sims, 442 U.S. 415, 423 (1979). See Trainor v. Hernandez, 431 U.S. 434 (1977); Juidice v. Vail, 430 U.S. 327 (1977); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975). In the recent case of Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432 (1981), the Supreme Court, citing to Moore v. Sims, 442 U.S. at 423, and Huffman v. Pursue, Ltd., 420 U.S. at 604-05, stated that the policies underlying Younger are fully applicable to noncriminal judicial proceedings when important state interests are involved. The Court determined that the importance of the state interest could be evidenced by the fact that the noncriminal proceedings bore a close relation to proceedings criminal in nature or that the proceedings were necessary for the vindication of important state policies or for the functioning of the state judicial system. 457 U.S. at 432. However, it must be remembered that the Supreme Court "has never applied the Younger doctrine to a case where the State was not a party to the pending state proceedings,"' and that "extensions of Younger in the civil context have occurred only when the State was directly involved in a pending stateproceeding."' Etlin v. Robb, 458 U.S. 1112, 1113-14 (1982) (White, J., dissenting from the denial of certiorari) (denial of certiorari to a Fourth Circuit case in which the court held that when there had been a custody determination and support order in state court where the parties to the proceeding were the child's parents the Younger doctrine of abstention applied to a 42 U.S.C. § 1983 action subsequently brought in federal court by the father against the state trial judge, state governor, and State Attorney General).

315 See supra note 304 and accompanying text.

316 See supra note 305.

317 See supra notes 227, 288.

318 See supra note 310 and accompanying text.

319 See supra note 300.

320 Franks v. Smith, 717 F.2d 183, 185 (5th Cir. 1983). See supra notes 228-33 and accompanying text.

321 That is, if one spouse of a feuding couple, although claiming a violation of his or her constitutional rights, is essentially asking a federal court to modify a state divorce decree or determine future support obligations of the other spouse. See Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981); LaMontagne v. LaMontagne, 394 F.Supp. 1159, 1160 (D.Mass. 1975).

322 In Hagans v. Lavine, 415 U.S. 528, 536-37 (1974), the Supreme Court stated:

Over the years this Court has repeatedly held that the federal courts are without power to entertain claims otherwise within their jurisdiction if they are "so attenuated and unsubstantial as to be absolutely devoid of merit,"' (citation omitted); "wholly insubstantial,"' (citation omitted); "obviously frivolous,"' (citation omitted); "plainly unsubstantial,"' (citation omitted); or "no longer open to discussion,"' (citation omitted) . . . . "[The] question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy.'

323 Hagans v. Lavine, 415 U.S. at 537; Wise v. Bravo, 666 F.2d 1328, 1333 (10th Cir. 1981); Hernstadt v. Hernstadt, 373 F.2d 316, 318 (2d Cir. 1967). See also Nouse v. Nouse, 450 F.Supp. 97, 99 (D. Md. 1978) (dismissing plaintiff's

42 U.S.C. section 1983 action against his former wife and her mother since it did not allege that they acted under color of state law and also since the wife's actions did not constitute state action for section 1983 purposes).

324 Hagans v. Lavine, 415 U.S. at 537. See also Miller v. Barry, 545 F.Supp. 105, 106 (D.D.C. 1982).

325 See supra note 314. See, e.g., Moore v. Sims, 442 U.S. 415 (1979) (holding abstention appropriate under the Younger doctrine in a child dependency case where there was a pending state court proceeding brought by the state for temporary custody of the children who were believed to have been abused); Peterson v. Babbitt, 708 F.2d 465 (9th Cir. 1983) (per curiam) (holding abstention appropriate in a 42 U.S.C. section 1983 action brought by a father being denied visitation rights with his minor children by state authorities where there was a pending state court dependency proceeding); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092 (4th Cir. 1982) (approving abstention of district court in domestic relations type civil rights action but holding instead of dismissing the action the district court should have stayed proceedings and retained it on its docket); Williams v. Williams, 532 F.2d 120 (8th Cir. 1976) (holding the application for declaratory and injunctive relief against the enforcement of a state court adoption decree in a 42 U.S.C. section 1983 action brought by a state prisoner was barred by the comity principles of Younger since the relief sought would nullify the decree of a state court); Merrick v. Merrick, 441 F.Supp. 143, 147 (S.D.N.Y. 1977) (stating in dictum that the state's interest in the area of domestic relations is of a sufficiently great import to justify abstention under the Younger doctrine as extended to civil cases).

326 See supra notes 67 and 104 and accompanying text.

327 See, e.g., Franks v. Smith, 717 F.2d 183 (5th Cir. 1983); Kelser v. Anne Arundel County Dep't of Social Servs., 679 F.2d 1092 (9th Cir. 1982). See supra notes 208-15, 228-33 and accompanying text.

328 See supra notes 237-327 and accompanying text.

329 See supra notes 248-82 and accompanying text.

330 See supra notes 283-327 and accompanying text.

331 See supra notes 65-80 and accompanying text.

332 It would be dismissed as within the domestic relations exception in the diversity area and dismissed either as presenting a constitutional claim which is wholly insubstantial and frivolous or as an abstention in the federal question area. See supra notes 237-327 and accompanying text.

333 See supra notes 81-83 and accompanying text.

334 See supra notes 283-327 and accompanying text.

335 See supra notes 37-39 and accompanying text.

336 See supra note 87.

337 See supra note 14.

338 Kamhi v. Cohen, 512 F.2d 1051, 1056 (2d Cir. 1975).

339 Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C. 1976).

340 Overman v. United States, 563 F.2d 1287, 1292 (8th Cir. 1977).

341 See supra notes 128-53, 167-68, 177-78 and accompanying text.

342 See, e.g., Zak v. Pilla, 698 F.2d 800 (6th Cir. 1982) (per curiam); Schleiffer v. Meyers, 644 F.2d 656 (7th Cir.), cert. denied, 454 U.S. 823 (1981); Denman v. Leedy, 479 F.2d 1097 (6th Cir. 1973) (per curiam); LaMontagne v. LaMontagne, 394 F.Supp. 1159 (D.Mass. 1975). See supra notes 186, 190-209 and accompanying text.

343 See supra notes 64-80 and accompanying text.

344 Cole v. Cole, 633 F.2d 1083, 1089 (4th Cir. 1980).

345 See supra notes 240-327 and accompanying text.

346 That is, all jurisdictional requirements are met and there are no pending state proceedings involving the same subject matter which would make abstention appropriate. See supra notes 1, 2, 314.

347 See supra notes 81-83 and accompanying text.

348 See supra notes 267-76 and accompanying text.

349 See supra notes 277-82 and accompanying text.

350 See supra notes 294-327 and accompanying text.

351 See supra note 314.

352 Cole v. Cole, 633 F.2d 1083, 1089 (4th Cir. 1980).

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