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Note
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THE DOMESTIC RELATIONS EXCEPTION TO DIVERSITY JURISDICTION

Federal courts currently refuse to exercise diversity jurisdiction over cases that they deem to involve "domestic relations." [1] In 1859, the Supreme Court wrote: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony...." [2] In subsequent cases, it disclaimed, in dictum, federal jurisdiction over "the whole subject of husband and wife, parent and child." [3] Federal courts have accepted these assertions as implied limitations on their jurisdiction, despite a statutory grant of diversity jurisdiction that nowhere mentions such an exception. [4] However, while all courts have adhered to the domestic relations exception, [5] the breadth of the exception, as well as justifications for it, [6] remain unclear. [7]

The courts vary greatly in their approaches to domestic relations cases. They rely on both historical jurisdictional limitations and the doctrine of abstention as grounds for not hearing such cases. Present application of these precepts has resulted in inconsistent, unpredictable, and, at times, unjustifiable characterization of actions as "domestic." Although recent cases have attempted to contain narrowly the domestic relations exception, [8] the law remains in a state of uncertainty.

***1825** This Note offers a principled method of deciding when it is proper for federal diversity courts to decide domestic cases. The approach suggested relies not so much on the domestic nature of a case, as on principles applicable to diversity suits in general. The Note first describes the current conflicting judicial treatment of domestic cases, and the two mechanisms federal courts use to decline to hear

"domestic" cases. It then examines the historical foundation for the domestic relations exception and concludes that such a foundation does not sufficiently justify the exception. The Note next weighs modern policy considerations for and against the exception, and similarly concludes that such considerations do not support the continued use of the exception in its current form. Finally, a new test is proposed for distinguishing domestic cases that are appropriate for resolution in federal diversity court from those that are not. The two elements of the proposed test reflect general principles of federal-state relations and federal jurisdiction—specifically, whether a particular case requires a federal court to assume a third-party role to represent the sovereign interest of a state, and whether the suit presents a constitutional case or controversy. The Note concludes that cases of divorce and child custody normally are not appropriate for federal adjudication, but that all other cases commonly termed "domestic" may properly be heard in federal court.

I. MODERN COURT TREATMENT

The domestic relations exception has been shaped largely by lower federal courts. A lack of guidance by the Supreme Court has resulted in disparate treatment of domestic cases in two respects. First, the courts have inconsistently defined the parameters of the exception, so that the availability of a federal forum for domestic disputes depends on the scope of the exception recognized by the particular jurisdiction in which the action is brought. Second, the courts proffer divergent rationales for refusing to hear domestic cases. Some courts maintain that they lack jurisdiction to adjudicate domestic cases, while others admit that they have the power to proceed but nonetheless abstain from exercising that power. The magnitude of these inconsistencies and the confusion they cause reveal that the law regarding the domestic relations exception is in need of reform.

A. Scope of the Exception

In the areas of child custody, divorce, and alimony, courts have implemented the domestic relations exception both broadly and narrowly. This dichotomy has resulted in, on the one hand, summary dismissal of all claims that emerge from a domestic background, and, on the other, a willingness to separate out and rule on traditional legal issues arising from domestic cases.

1. Child Custody. Federal courts will not themselves make determinations of child custody.[9] In addition, many courts are wary of lawsuits stemming ***1826** from or indirectly involving child custody arrangements, and construe the domestic

relations exception broadly to encompass such claims. For example, one court dismissed a suit sounding in contract, brought for damages for breach of child visitation provisions in a voluntary separation agreement. [10] The court noted that it had "no jurisdiction over this domestic relations case." [11] In another action, an exhusband sued his former wife for tortious "interference with his attempts to communicate" with their children. [12] The court invoked the domestic relations exception "because plaintiff's claims herein relate to child custody and visitation and communication rights in connection therewith." [13] In a third case, children sued under section 1983, [14] alleging that a state judge deprived them of their constitutional rights by disallowing appearance of counsel on their behalf. [15] Even though it was not a diversity action and no issue of child custody was at bar, the court abstained, writing that the suit was "a domestic relations case." [16]

In contrast, dividing traditional legal claims from the "domestic" background of the action, other courts have taken a less expansive view of the domestic relations exception. Two examples illustrate this approach. In Bennett v. Bennett, an exwife withheld her children from her former spouse's lawful custody. [17] The exhusband sued for both injunctive and compensatory relief. The Court of Appeals for the District of Columbia held that it did not have jurisdiction to order injunctive relief, which, it wrote, would involve the court in a determination of actual custody. [18] However, the court refused to dismiss, under the domestic relations exception, the claim for compensatory damages, explaining that "a federal court is entirely competent ... 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." [19]

***1827** Wasserman v. Wasserman [20] provides a second example of the tendency of some federal courts to decide legal issues even though they arise in cases in which the question of custody is tangentially present. The plaintiff had charged her former husband and his parents with child enticement, intentional infliction of emotional distress, and civil conspiracy for taking their children from her lawful custody and secluding them from her. The court ruled that the claims were "in no way dependent on a present or prior family relationship ... and prosecution of these torts will not require the existence of any rule particularly marital in nature." [21] As no determination of actual custody was sought, [22] the court held the domestic relations exception inapplicable. [23]

These few examples of child custody cases illustrate the unpredictable and inconsistent application of the domestic relations exception by the federal courts. Divorce and alimony cases fare no better.

2. Divorce and Alimony. Just as they are unwilling to make a direct determination of child custody, federal courts will not grant a divorce.[24] However, as in the child custody context, the exact reach of the domestic relations exception to issues incidental to divorce is unclear.

Many courts have demonstrated reluctance to pass on "domestic" issues that arise in the context of a divorce or an alimony decree. For example, where suit was brought for unpaid alimony already accrued,[25] the court invoked the domestic relations exception on the ground that "determining the amount of ***1828** the accrued alimony defendant owes ... would involve the district court in the administration of divorce in a very real way."[26] In another case, the plaintiff sought a declaratory judgment that the provisions for support under his postnuptial agreement were terminated by the common-law marriage of his exwife.[27] The court refused to hear the claim, because "this would obviously require a finding that such a common-law marriage relationship exists."[28]

In addition to declining to pass on questions related to alimony or separation agreements, many courts invoke the exception when issues involving a determination of marital status arises. Thus, federal courts have refused to determine a plaintiff's status as spouse for purposes of inheritance[29] or distribution of insurance proceeds.[30]

Many courts, however, draw a distinction between issues of property and issues of status, and limit the application of the domestic relations exception to the former.[31] Thus, some federal courts have exercised jurisdiction over cases involving breach of support decrees on the ground that the parties' status is not affected by the dispute.[32] For example, in one case, suit was ***1829** brought for default on payments for alimony and child support.[33] The court rejected the defendant's reliance on the domestic relations exception: "What is presented is simply a dispute between two persons, who for over nine years have been divorced and living apart and between whom there have been no domestic relations, as to whether there has been compliance with two contracts existing between them."[34]

In the areas of child custody, divorce and alimony, lower federal courts have been unable to adopt a uniform and principled approach to domestic relations cases. This conflict among the circuits, and its resultant inequities to "domestic" suitors seeking resolution of actions otherwise properly in federal court, should be resolved.

*1830 B. Mechanisms for Denying a Federal Forum to Domestic Relations Cases

When invoking the domestic relations exception courts rely on one of two mechanisms. Some courts, purportedly relying on Supreme Court precedent, simply assert lack of jurisdiction to hear the cases;[35] others use the abstention doctrine.[36]

1. Jurisdiction. Nothing in the wording of article III[37] or the diversity statute[38] suggests a domestic relations exception to federal jurisdiction. The exception, a judicial creation, originated in early Supreme Court dicta. The Court first alluded to the domestic relations exception in Barber v. Barber[39] in 1858. Suit had been brought in a district court to enforce an alimony decree.[40] The Court ordered the decree enforced, but noted in dictum: " T his is not a suit asking the court for the allowance of alimony.... We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce...."[41] The Court based this disclaimer on the belief that the chancery courts of England —whose practice defined and limited the equity jurisdiction of the courts of the United States—lacked jurisdiction over such suits.[42] In England such suits were entertained by the ecclesiastical courts alone. Since the English chancery courts were thus constrained, so too, it followed, were the federal courts of the United States.[43]

***1831** Subsequent decisions of the Supreme Court, while consistently refusing to hear domestic relations cases on jurisdictional grounds, are unclear about whether the domestic relations exception is a constitutional or statutory limitation. In Simms v. Simms,[44] in 1899, and in De La Rama v. De La Rama,[45] in 1906, the Court held the domestic relations exception inapplicable. In both cases, the Court exercised its appellate jurisdiction, explicitly granted by statute, over divorce cases arising in territorial courts.[46] The Court distinguished these cases from Barber on the ground that under article IV[47] Congress has sovereign power over

territories and may legislate "over all subjects upon which the legislature of a State might legislate within the State." [48] Thus Congress could vest the territorial courts with domestic relations jurisdiction. Because the Court apparently did not see any article III barriers to the exercise of its appellate jurisdiction in Simms and De La Rama, the cases imply that the domestic relations exception is not a constitutional limitation on the adjudicatory authority of article III courts. [49]

In 1930, however, in Ohio ex rel. Popovici v. Agler, [50] Justice Holmes, writing for the Court, held that federal courts lacked constitutional adjudicatory authority to hear a divorce case between an American wife and her husband, the vice-counsel of Romania. [51] Justice Holmes's majority opinion ***1832** reasoned that the provisions of article III extending the judicial power to cases involving consuls and vice-consuls [52] must be read in light of the Barber line of cases, and concluded that

> [I]f it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce.... [t]here is no difficulty construing the [Constitution] accordingly.... "Suits against consuls and vice-consuls" must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged in the ecclesiastical Courts. [53]

Holmes thus read the domestic relations exception into the Constitution.

Recognizing the inconsistency between Simms and De La Rama, on the one hand, and Popovici, on the other, modern courts generally have viewed the domestic relations exception as a gloss on the diversity statute rather than as a constitutional limitation. [54] Many courts, however, do not distinguish between constitutional and statutory adjudicatory authority, [55] and the distinction, while perhaps potentially important, [56] currently has little practical significance. In either case, these courts dismiss domestic relations cases for lack of jurisdiction.

2. Abstention. Courts invoke the doctrine of abstention as a second means of dismissing domestic relations cases. Federal courts are normally obligated to exercise their jurisdiction, once invoked. However, under the doctrine of abstention, a federal court can decline to exercise its jurisdiction, or postpone hearing a case, in a few "extraordinary and narrow" [57] circumstances.

One such circumstance, recognized by the Supreme Court in Burford v. Sun Oil Co.,[58] is when the exercise of federal jurisdiction would cause needless ***1833** disruption of state efforts to administer internal affairs.[59] Burford suggests that abstention is appropriate where federal resolution of an issue would interfere with state efforts to establish a coherent policy on matters of substantial concern.[60]

An increasing number of courts faced with domestic relations questions rely on Burford to invoke the doctrine of abstention. The majority of these courts still dismiss for lack of subject matter jurisdiction in cases that involve core domestic relations issues such as granting a divorce. However, courts also invoke the doctrine of abstention to justify dismissal[61] in cases that raise issues incidental to such core areas.

In Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel,[62] the court endorsed use of the abstention doctrine in cases that, though not raising a pure domestic relations question, would require the federal court to decide an issue involving complex interpretation and application of state family law. A law firm had sued to recover attorney's fees, earned in divorce litigation, from its client's former husband. Although the action did not fall within the core of the domestic relations exception, Judge Friendly, writing for the court, characterized the claim as linked to state divorce law. The court did not contend that it lacked jurisdiction to hear the suit. Rather, it urged abstention,[63] on the grounds that the case presented difficult problems of state law and raised "issues 'in which the states have an especially strong interest and a well-developed competence....' "[64] While recognizing that federal diversity courts have a duty to exercise their jurisdiction, the court nonetheless doubted ***1834** "that the Supreme Court today would demand that federal judges waste their time exploring a thicket of state decisional law in a case such as this."[65]

Subsequent to Phillips, Nizer, federal courts have abstained from exercising their diversity jurisdiction in cases ranging from a suit for breach of a separation agreement[66] to an action in tort for false imprisonment of the parties' children.[67]

In contrast to the majority position, which asserts that in core domestic cases, lack of subject matter jurisdiction is the proper basis for dismissal, a minority of courts that invoke the abstention doctrine conclude that they have jurisdiction even over core domestic issues; they simply abstain from exercising that jurisdiction.[68]

Thus, in refusing to hear a suit for the adoption of children, one court wrote that "federal courts will not act in the domestic relations area, though the power to act is present." [69] In practice, it matters little whether the court abstains or dismisses for lack of subject matter jurisdiction. The result is the same—the federal court is unavailable for the resolution of the dispute.

Thus far, this Note has examined the contours of the domestic relations exception and the approaches federal courts have used to decline to adjudicate domestic disputes. On the one hand, the divergent treatment of domestic cases has led to inconsistent results in actions based on similar facts. On the other, courts have reached similar results by invoking the exception through theoretically different approaches—lack of jurisdiction and abstention. A more appropriate approach to domestic relations cases should both lead to uniform practical results and rest on a cohesive theoretical basis.

II. HISTORICAL RATIONALES FOR THE DOMESTIC RELATIONS EXCEPTION

Given the federal courts' disparate views on both the scope of the domestic relations exception and the appropriate procedural device for invoking it—abstention or lack of subject matter jurisdiction—a fuller understanding of the exception's underlying rationale is essential. An evaluation of the domestic relations exception ultimately must focus on an analysis of competing contemporary policies relevant to the exception. Such analysis, however, can take place only in the context of a fuller understanding of the historical rationales traditionally invoked to defend the federal judiciary's refusal to adjudicate domestic relations cases.

A. The Weight of History

In Barber v. Barber, [70] the progenitor of the domestic relations exception, the Supreme Court disclaimed jurisdiction over cases of divorce and alimony ***1835** on the grounds that English courts lacked jurisdiction over such cases and the jurisdiction of the courts of equity of the United States "is the same in nature and extent as the jurisdiction of England, whence it is derived." [71] The opinion offered no support for this influential disclaimer. [72] Nonetheless, seventy-one years later, relying largely on this dictum, the Court concluded without reservation that in 1789 the "common understanding" must have been that domestic relations cases

belonged to the ecclesiastical courts in England and therefore were not within article III jurisdiction. [73]

In fact, the jurisdiction of courts in 1789 was much less limited than the Supreme Court claimed. Suits for divorce, alimony, child custody, and other domestic matters were in fact heard by English lay courts. [74] That certain of these cases were heard infrequently does not mean that hearing them was beyond the jurisdictional powers of the courts. The broad scope of the current domestic relations exception is inconsistent with actual practice in 1789.

Until 1857, British ecclesiastical courts were empowered to grant divorce a mensa et thoro. [75] However, the power of the ecclesiastical courts to grant divorces was a matter of privilege not of right. And, although their power to grant divorce was infrequently exercised, lay courts retained substantial jurisdiction over domestic matters.

In 1656, the case of The Protector v. Sir Thomas Ashfield [76] made clear that a matter traditionally within the jurisdiction of the ecclesiastical courts, in certain circumstances, could also be tried by a lay jury. The court announced the general principle that

> ***1836** [t]he common law [of England] is the most ancient, general, and fundamental law of the land. And the privileges of the church derive themselves only from the indulgence and favour of princes; and they had no foundation in the ancient common law.... And although the privileges of the church are confirmed by divers act of parliament, that hinders not but that there was an ancient common law, in which they had no bottom. [77]

Thus, since the church's jurisdiction was not of right, neither was it exclusive. Where appropriate, lay courts could hear cases typically heard only by ecclesiastical courts.

While this case did not itself involve a question of domestic relations, the principle stated by the court concerning the derivation of ecclesiastical and secular adjudicatory power is applicable to domestic relations suits. Indeed, in reaching its decision, the court specifically relied on jurisdictional practices in the areas of matrimony and divorce. The court noted that the plea of unques accouple en loyal

matrimony—a plea which admits a marriage but contends that it was in violation of church law—is normally triable only by bishop's certificate.[78] However, "where a bishoprick is taken away ... the issue shall be tried per pais by jury ; that there may be no failure of justice."[79] The court further observed that the ecclesiastical law in this area was itself limited, and that trial by jury was available in special cases. Ecclesiastic jurisdiction "took place only in a case of a general allegation of bastardy, ... loyalty de matrimony or divorce; and that only so long as the party was alive and a party to the suit. And that in all other cases the common law retained its jurisdiction...."[80] Thus, the English law courts had the inherent power to adjudicate domestic relations and even actual divorce cases with only a circumscribed area relegated to ecclesiastical courts through princely indulgence.

English lay courts not only had the power to hear domestic cases, but they often did so. While English chancery courts did not frequently exercise their inherent power to adjudicate matters directly relating to divorce—only two actual divorce decrees are reported[81]—the courts were active in the general area of domestic relations. For example, the English chancery courts often worked jointly with the ecclesiastical courts in "domestic" matters.[82] For ***1837** example, in Read v. Read,[83] the plaintiff had "gotten a Sentence for Alimony against Sir John Read in the Spiritual Court, who refused to obey it, and in Avoidance of it threatened to go beyond Sea."[84] Upon Lady Read's petition, the lay chancery issued a writ ne exeat regnum, to restrain him.[85]

In addition to acting in coordination with ecclesiastical courts in domestic relations matters, the lay courts would at times function independently as domestic relations tribunals over intrafamilial disputes.[86] This function was frequently evident in suits for support. For example, the English chancery would enforce a husband's duty to provide for his spouse. In one instance,[87] the court wrote that " t hough the wife be ever so lewd, yet while she cohabits with her husband he is bound to find her necessaries and pay for them, for he took her for better or worse."[88]

In Colmer v. Colmer,[89] the chancery court made explicit that it had jurisdiction to entertain suits for spousal support. Such a case, the court ***1838** stated, was "proper not only for the spiritual Court, but also for a court of common law, it is a breach of the peace in the husband not to maintain his wife."[90]

Judicial treatment of child custody and support questions also makes clear the English lay court's willingness to accept jurisdiction in domestic relations cases. In one instance,[91] for example, a certain Lord Hardwicke, acting on behalf of the chancery, "took care of an infant from her testamentary guardian, and ordered that she not marry without leave of the Court."[92] A 1718 statute provides further evidence that lay courts exercised jurisdiction over child support matters. Noting that numerous parents "run away from their places of abode ... leaving a child or children,"[93] Parliament provided that churchwardens, "upon application to ... any two justices of the peace," might seize the rents, goods, and chattel of the absent parents and dispose of them towards the children's relief "as such two justices of the peace ... shall order or direct."[94]

***1839** This brief review indicates that English equity courts were not reluctant to hear cases that, by modern standards, would be subject to the domestic relations exception to federal diversity jurisdiction. Indeed, where domestic relations issues were mixed with actions regularly cognizable in Chancery, the question of preemptive or even coordinate ecclesiastical jurisdiction often was not even raised.[95]

B. Significance of Historical Jurisdictional Policies

Although a number of modern courts have recognized that the domestic relations exception of Barber and subsequent cases is founded on an historical inaccuracy, they have generally refused to depart from what they perceive as an interpretation of history advanced by the Supreme Court. For example, in Lloyd v. Loeffler,[96] the Seventh Circuit wrote that although " t he historical account is unconvincing ... it is too well established to be questioned any ***1840** longer by a lower court."[97] This reluctance to depart from inaccurate historical interpretation is unwarranted for three reasons.

First, the Supreme Court implied that if the view of history it assumed were wrong —as it has proved to be—the question would have been decided differently. In Simms v. Simms,[98] the Court noted that there was "no dissent" from the Barber dictum, and therefore "assumed as indubitable" that federal diversity courts lack jurisdiction in cases involving divorce and alimony. In Ohio ex rel. Popovici v. Agler,[99] Justice Holmes specifically conditioned his holding that federal courts lack jurisdiction to grant divorce; this limitation on diversity jurisdiction is appropriate, he wrote, " 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." [100]

Modern courts should not be constrained by the Supreme Court's inaccurate view of history that underlies the domestic relations exception. Indeed, because the early Supreme Court cases felt bound by history, and because history has proved that courts of equity did have domestic jurisdiction, it would more closely follow the spirit of concern for historical accuracy found in these cases to abandon the exception.

Second, in the analogous area of probate—the only other exception to federal diversity jurisdiction—the Supreme Court already has exhibited an unwillingness to be rigidly constrained by its view of pre-1789 historical development. Historically, courts of common law and equity lacked jurisdiction over probate proceedings. Such matters were within the sole cognizance of ecclesiastical courts. [101] Although today no federal court will probate a will or administer an estate, they routinely entertain actions involving claims that historically would have been heard by ecclesiastical courts. [102] For example, in Ellis v. Davis, [103] suit was brought in federal court to set aside the probate of a will and recover possession of land that had passed under it. The court ruled that since the case could be heard in state court, pursuant to a state statute in a ***1841** proceeding at law, the plaintiff would also be allowed to bring a suit at law in federal court. [104]

In contrast, federal courts have consistently refused to entertain suits for divorce, even though state courts are authorized by statute to grant divorce, [105] and state courts hear "domestic relations" cases as a matter of course. Thus, even if the Barber Court's assessment of English jurisdictional practices is accurate, the example of probate suggests that historical development does not always control the Supreme Court's definition of the jurisdictional parameters of federal courts. [106]

Finally, for those lower federal courts that recognize the historical inaccuracy of the domestic relations exception, but nonetheless feel bound by what they perceive as authoritative Supreme Court precedent, a third reason counters strict adherence to the exception. The scope of the domestic relations exception was defined primarily by expansive lower court holdings, rather than by the Supreme Court. For example, the child custody aspect of the exception—so firmly established in modern courts—was fashioned exclusively by lower federal courts. In fact, in In re Burrus, [107] the Supreme Court specifically reserved the issue "whether the diverse citizenship of

parties contesting the right to custody of a child could, in the courts of the United States, give jurisdiction to those courts to determine that question" and noted that the issue "has never been decided by this court that we are aware of." [108] ***1842** Thus, much of what is now considered to fall within the exception was never passed on by the Supreme Court.

In sum, modern courts should not read history and Supreme Court precedent to compel the continued vitality of the domestic relations exception. A review of English practice reveals that the Court's original historical analysis was flawed. Moreover, because the Court conditioned the exception on the accuracy of its view of history, because in the analogous area of probate jurisdiction the Court has been less bound by history, and because the contours of the domestic relations exception have been largely shaped in the lower federal courts, Supreme Court precedent should provide no barrier to judicial reevaluation of the exception. History should no longer be used by federal courts to assert a lack of jurisdiction over domestic cases. If a justification for a domestic relations exception exists, it must be grounded in considerations of contemporary policy.

III. POLICY ARGUMENTS FOR AND AGAINST THE DOMESTIC RELATIONS EXCEPTION

Modern courts, whether they agree or disagree with the historical rationale for the domestic relations exception, [109] frequently offer a variety of policy considerations to justify their treatment of domestic cases. [110] Both those arguments that support the application of the domestic relations exception and those that support the exercise of federal diversity jurisdiction in domestic cases merit examination. An evaluation of these arguments compels the conclusion that retention of the exception in its present form is indefensible. Even though certain arguments in support of the exception have merit, a method for determining when it is appropriate to hear domestic cases, more narrowly tailored than the current domestic relations exception, can take these policy arguments into account. [111]

A. Considerations Against the Exception

1. Fear of Local Bias. Under the rule of diversity jurisdiction, a federal court may hear a claim when parties to a case or controversy are of diverse citizenship. [112] The diversity statute does not distinguish among types of claims brought under it. By its terms, it grants federal courts jurisdiction over domestic cases. [113] Indeed,

not only is the diversity statute silent on the domestic relations exception, but refusing to exercise jurisdiction in domestic cases ***1843** goes against the basic purpose that underlies the grant of federal diversity jurisdiction—assuring that nonresident litigants have their disputes adjudicated free from local bias. [114] Fear of local prejudice is certainly no less of a concern in domestic cases than in other civil matters. In fact, this fear may be particularly realistic in such cases, where, for instance, a nonresident wife finds the state court in the jurisdiction of her husband's residence unsympathetic or hostile. [115] At least one court has recognized the validity of fear of local bias in domestic cases by listing bias among the factors to be considered in determining whether to abstain. [116] Thus, the purpose underlying the grant of diversity jurisdiction is furthered by opening the federal courts to all litigants, including those involved in domestic disputes. [117]

2. The Erie Doctrine. Another argument for dispensing with the domestic relations exception is that one of the most important justifications for its existence is no longer relevant. Prior to the decision in Erie Railroad v. Tompkins, [118] a federal court exercising diversity jurisdiction over a domestic relations case applied federal common or equitable law. In Barber v. Barber [119] —the progenitor of the exception —at least one member of the Court expressed concern about the propriety of applying federal law in areas traditionally regulated by the states. [120] This same concern was implicit in the decision in De La Rama v. De La Rama, [121] where appeal was taken from a divorce denied by a territorial court. Faced with the contention that federal ***1844** courts lack jurisdiction in divorce cases, the De La Rama Court distinguished Barber on the ground that Barber has no application to the Supreme Court's appellate jurisdiction over territorial courts since Congress, in exercise of its article IV powers, [122] "has full legislative power over all subjects upon which the legislature of a State might legislate within the State." [123] Thus in cases involving territorial law, such as De La Rama, federal courts could hear domestic issues, because application of federal law would not intrude on state law.

Erie's holding that federal diversity courts must apply the substantive law of the state in which they sit eliminated the concern, evident in both Barber and De La Rama, that federal law should not apply to such quintessential state concerns as the regulation of the family. Following Erie, a federal court hearing a "domestic relations" case would no longer supplant state law with a federal rule, but rather would strive to apply the same substantive law as a state court. [124] The risk feared in Barber and De La Rama of the federal government's intruding upon state law in domestic cases dissolves.

3. Preclusion of Federal Adjudication of Federal Issues. The domestic relations exception operates in certain situations to bar lower federal courts from ruling on federal issues. Issues of federal concern—constitutional and statutory—increasingly appear in the context of domestic litigation. [125] Not only may the litigants prefer to have such issues resolved by a federal court, [126] but the federal courts themselves have an interest in adjudicating federal questions of national significance.

If a federal question is raised by a plaintiff in state court, the defendant always has the opportunity to remove the issue to federal court under federal question jurisdiction, regardless of the domestic nature of the case. [127] In contrast, if the federal question is raised only by the defendant, the issue can be removed to federal court only on the basis of diversity jurisdiction. [128] If the case is characterized as domestic, however, the domestic relations exception blocks a defendant from invoking diversity jurisdiction to assure that a federal ***1845** court will pass on his substantive federal question. Although the Supreme Court may ultimately hear such cases on appeal or through a grant of certiorari, the defendant who raises a federal question in the context of domestic relations litigation must first pursue his case to the highest state court and then seek review from the Supreme Court. [129] Therefore, the domestic relations exception, as a practical matter, serves as a significant obstacle to federal review of federal questions.

Precluding diversity jurisdiction in such cases is especially inappropriate given the indistinct nature of the line that often separates the federal and the domestic aspect of an issue. Not only do federal issues—both constitutional [130] and statutory [131] —frequently arise in the context of domestic relations cases, but occasionally domestic concerns actually shape the disposition of the federal question. In Kulko v. Superior Court, [132] for example, the Court ruled that the act of a divorced father in sending his child to live with the child's mother in California was insufficient to give the California courts jurisdiction over the nonresident father. In so holding, the Court announced a national policy of promoting harmonious interstate custody arrangements and so held that a finding of jurisdiction over the father "would impose an unreasonable burden on family relations." [133]

Absent some countervailing policy considerations, erecting procedural barriers to federal adjudication of federal issues is inappropriate. [134] The fact that the domestic relations exception operates as such a barrier weighs strongly

against continuing to deny diversity jurisdiction in cases that raise ***1846** family law questions. The recent trend [135] —evident at both the judicial [136] and congressional [137] levels—to develop federal policies on domestic matters makes the argument for rethinking the domestic relations exception even more compelling. Allowing litigants involved in a domestic dispute to present their case to a federal court gives further expression to an already articulated federal interest in domestic issues.

B. Policy Considerations in Support of the Domestic Relations Exception: An Evaluation

Courts have advanced four policy considerations in support of the domestic relations exception. First, they have argued that states have special interests in domestic matters, with which federal courts should not interfere. Second, they have posited that a flood of litigation would result from opening the federal courts to domestic suitors. Third, courts invoking the exception have urged that the need for continuing jurisdiction and judicial supervision in certain domestic litigation imposes undue burdens on federal courts. Fourth, they have noted that state courts have particular competence and expertise in domestic affairs. None of these considerations, by itself, or in combination with the others, can sustain a plausible argument for retaining the domestic relations exception in its present form.

1. State Interest in Domestic Cases. Many courts defend the domestic relations exception by suggesting that family-related matters represent an area of special state concern. [138] A corollary of this argument is that, given the degree of state interest present in this area, federal law should play no role in the adjudication of domestic issues.

This argument is unconvincing for three reasons. First, as noted above, [139] the state is not alone in its concern for the family—there is a significant federal interest in domestic relations as well. Second, the rule of Erie— ***1847** requiring that a federal diversity court strive to apply the same substantive law as would the highest court of the state in which it sits—assures that the impact of the federal litigation on matters regulated by the states is minimal. [140] Third, in other areas, such as the law of eminent domain, the state's interest is easily as substantial as it is in domestic relations matters. Yet the magnitude of the state interest does not preclude adjudication in federal diversity courts. [141] That states have great interest

in the resolution of domestic disputes, then, cannot serve to deprive the federal courts of jurisdiction. [142]

2. Flood of Litigation. Federal courts have also feared that opening their doors to domestic relations cases would result in a flood of litigation. [143] While it is true that abandoning the exception would increase the federal workload, it is unlikely that any great burden would be imposed. Domestic litigants in a dispute prior to divorce will only rarely be of diverse citizenship before divorce because spouses usually have common domiciles. [144] And, in cases arising after divorce, while diversity of citizenship is more likely to exist, the amount in controversy requirement [145] still serves as at least a modest barrier to any potential flood of litigation in federal courts. [146]

***1848** In child custody disputes, for example, "the right of a parent to have the custody of a minor child is priceless," [147] and so cannot be reduced to a numerical sum to satisfy the amount in controversy requirement. Similarly, suits for breach of a modifiable alimony agreement often do not involve an amount past due of more than $10,000. [148] A spouse dependent on monthly alimony payments is not likely to delay initiating suit until that sum accrues in order to gain access to a federal forum. [149] In contrast, parties to tort and contract cases that arise in a domestic context usually will be able to meet the amount in controversy requirement. However, since federal courts—even those that accept the domestic relations exception in some form—are currently often willing to hear such cases because they involve traditional claims, [150] the elimination of the domestic relations exception would not result in a dramatic increase in the federal caseload. [151] Thus, while a modest rise in the number of federal diversity cases in certain domestic areas might accompany the elimination or narrowing of the exception, the increased caseload would be unlikely to cause any significant hardship for the federal judicial system.

3. Continuing Litigation. Another argument advanced in defense of the exception is the need for courts entertaining domestic suits to retain jurisdiction and reevaluate the disposition of a case in light of changed circumstances. [152] Modifiable alimony decrees, for example, require such continuing evaluation. However, this argument ignores the federal practice, already common in other contexts, of retaining jurisdiction in cases that may require modification of earlier decrees. The Supreme Court acknowledged the appropriateness of this equitable practice in United States v. Swift & Co. "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions...." [153] Thus, federal courts

retaining jurisdiction in domestic cases would cause no departure from the normal rule of federal equity jurisdiction.

***1849** 4. State Competence and Expertise. Courts invoking the domestic relations exception often rely on the argument that state courts are more competent in domestic matters than are federal courts.[154] Pointing to the existing network of state social services and the specialized state tribunals, such as divorce courts, already in place to hear divorce, alimony, and child custody cases,[155] defenders of the exception maintain that the interests of the family are best served by the states.

a. Existing Federal Expertise. To a significant degree the competency argument is circular. State courts undoubtedly do have greater competence in certain domestic affairs, such as divorce and child custody; but federal courts lack expertise "only because federal courts following [the domestic relations exception] have traditionally declined jurisdiction over this subject matter."[156] There is no reason to believe that federal judges, who commonly decide difficult questions of state law, would be unable to master the subject of domestic relations.[157]

Indeed, some federal courts already hear and competently dispose of domestic relations matters.[158] For example, in Abdul-Rahman Omar Adra v. Clift,[159] suit was brought in federal court under the Alien's Action for Tort Act[160] by a foreign national to obtain custody of his daughter who was residing with her mother in the United States. The court proceeded to resolve the issue of custody by determining the best interests of the child in accordance with the applicable state law.[161] Similarly, the Third Circuit, which functions as a territorial court to hear appeals from the Virgin Islands,[162] ***1850** entertains domestic cases, including child custody and divorce proceedings, and has found no difficulty in doing so.[163]

Inferences drawn from the routine application of conflict-of-laws rules also undermine the competency argument. State courts frequently decide domestic relations cases in which the law of a sister state supplies the rule of decision. For instance, in Worthley v. Worthley,[164] a California state court adopted a modifiable New Jersey state alimony decree. The California court provided that the issues of whether and how the decree should be modified could be tried in California, noting that "the law of the state in which the support obligation originated can be judicially noticed ... and applied by the California courts."[165] In this endeavor, the California state court presumably had no greater competence in applying New Jersey law than a federal court would have had.[166]

b. Specialized State Tribunals and the Availability of Social Services Agencies. Certainly, the mere existence of specialized state tribunals should not be sufficient to deprive federal courts of diversity jurisdiction. Such an argument was rejected in the analogous area of probate, where states have also established specialized tribunals, such as surrogate courts. In Hyde v. Stone, [167] the Supreme Court wrote that "this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different States cannot be impaired by the laws of the States, which ... regulate the distribution of their judicial power." [168] Similarly, the existence of state courts specializing in domestic matters should not preclude federal jurisdiction.

Without doubt, in some domestic cases, particularly ones involving child custody, the competence of a state court is enhanced by its ability to call upon state social service agencies to provide support services. [169] In such situations, it would in fact be inappropriate for federal courts to hear the case. This argument rests, however, not on the domestic nature of the proceeding, but on the recognized principle that a federal court should decline to hear a case in which it cannot provide the relief necessary to produce an equitable result. [170] Regardless of the nature of the case, whenever state support services, unavailable to federal courts, are considered necessary, federal diversity courts ***1851** should abstain from hearing the case. Because the discretion to decline jurisdiction on this ground is exercised on a case-by-case basis, the need for assistance from state support services does not provide a justification for the domestic relations exception. [171]

On balance, the policy considerations in favor of eliminating or refining the domestic relations exception outweigh those in favor of maintaining it. Analysis has shown that the current practice of treating domestic relations cases as a class per se inappropriate for federal resolution is unjustifiable. [172]

IV. A PROPOSED TEST

Analysis of the policies for and against the domestic relations exception has demonstrated the absence of any significant justification for its continued use. This conclusion does not, however, imply that all cases currently subsumed under the domestic relations exception are appropriate for resolution in federal diversity court. Rather, it implies the need for a more justifiable test to determine which domestic cases should be heard in federal court. The test proposed in this part relies

on general principles of federal jurisdiction and federal-state relations applicable to all diversity cases, rather than on a determination that the case is or is not domestic.

A. The Test Outlined

The Supreme Court has made clear in other contexts that distinguishing cases suitable for resolution in federal diversity court from those that are not should focus not on the subject matter of the case but on the nature of the proceeding. [173] Courts should apply the same analysis to domestic relations cases. Rather than simply label the case domestic, and on that ground refuse to review it, the federal diversity court should look to the nature of the proceeding—specifically the particular state's function in the suit and whether it presents a justiciable case or controversy—to determine the appropriateness of review.

***1852** The proposed test has two elements. The first involves federal-state relations, and addresses the appropriateness of federal courts' entertaining diversity suits where state law compels state courts to act as third parties to the proceedings. The second element invokes the traditional case or controversy requirement of article III of the Constitution, [174] and excludes diversity cases that do not meet this standard. Such an application of this common jurisdictional requirement to the domestic relations area is new, and long overdue.

1. Court as a Third Party. In a federal judicial proceeding the judge sits impartially and decides disputes only on the basis of the arguments presented by the parties. Ordinarily he does not assume the role of an active third party. Indeed, impartiality may be an essential attribute of article III justiciability. [175] On certain occasions, however, state courts do act as third parties, and cease to function in a purely judicial capacity. They instead act as representatives of the state in the exercise of its sovereign prerogative.

If federal diversity courts were to hear cases that called for them to assume such a third-party role under applicable state law, they would be exercising the sovereign prerogative of the state. Federal courts, in such cases, would not merely be required impartially to apply state law—as are all federal diversity courts under the Erie doctrine—but would be required to represent the state's third-party interest as would a state court. A federal court's performance of the state's third-party sovereign function may well transcend the powers conferred on it by article III. [176] Alternatively, the exercise of this function by a federal court would cause unacceptable friction in federal-state relations. [177] To avoid such friction

and to assure that federal courts remain ***1853** within their constitutional powers abstention is appropriate where state law requires the court to assume a third-party role. [178]

2. Case or Controversy. Federal courts, unlike state courts, are limited by article III to hearing only actual "cases or controversies." [179] Two essential elements characterize a justiciable case or controversy: an actual controversy with adversary parties and the ability of the judge to decide in favor of either party on the basis of the arguments presented by the litigants. From the adjudicatory process there must emerge a question, "precisely framed ... from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests." [180] Proceedings in which both parties desire the same result do not present actual cases or controversies for article III purposes. [181] Similarly, proceedings in which, by their nature, the result is a foregone conclusion, present no meaningful opportunity for adjudication of conflicting claims, and thus, no case or controversy. [182] Under this second prong of the proposed test, federal courts should refuse to review domestic relations cases that may fairly be described as falling within either or both of these two categories. In these instances, the court does not abstain; it lacks jurisdiction.

The state courts' third-party function and the federal case or controversy requirement provide a test for federal diversity jurisdiction in domestic relations cases. Application of the test illuminates which domestic cases federal courts should hear.

B. The Test Applied

The test proposed in this Note requires federal courts to look to whether a state has chosen its courts to play a third-party role in a proceeding, and to whether the proceeding presents a case or controversy. This test has two ***1854** distinct characteristics. First, the test does not pass judgment on state treatment of domestic cases. Rather, it requires federal courts to respect state law and to approach domestic cases accordingly. Second, it gives new vitality to the case and controversy requirement, by giving teeth to the application of this traditional jurisdictional requirement to the domestic relations area.

1. Divorce. Under the proposed test, the appropriateness of reviewing divorce cases depends both on the role state law requires the court to play and on whether an article III case or controversy is present. Where state law allows uncontested

divorce, no case or controversy exists and federal diversity jurisdiction does not exist. Where the divorce is contested, a closer examination of state law is necessary to determine if the court is serving as an interested third party, or if the action, while technically contested, presents no case or controversy.

a. Court as Third Party. Traditionally, states have viewed divorce proceedings as a special form of adjudication, [183] and state laws have required judges to act as third parties to represent the interests of the state. [184] In contrast to regular judicial proceedings, judges in divorce cases often do not sit as impartial and passive arbiters whose role is to resolve the dispute on the basis of the arguments presented by the litigants; rather their function is to protect the state's interest in preserving the marriage. [185] The Maryland Supreme Court captured the unique role such a court plays:

> It is recognized that the marriage relation is a status based upon public necessity and controlled by law for the benefit of society. Although a divorce proceeding appears as a controversy between husband and wife, the State occupies the position of a third party to the contract, and it is always the duty of the courts to guard the marriage relation. This policy is founded upon the necessity for protecting the interests of children and others who, though not parties to the cause, might be deeply affected by its decision, and for preserving the public morals.... [186]

***1855** The advent of no-fault divorce, however, calls into question the states' interest in preserving the marriage. All but two states [187] now have some form of no-fault divorce, either as the sole ground for divorce or in addition to traditional fault grounds. [188] No-fault divorces are usually predicated upon a showing of irretrievable breakdown of the marriage, [189] or proof that the parties have lived apart for a specified period. [190] In some states, both conditions must be met. [191] Although no-fault is the prevalent form of divorce today, the court's role as a third party has continuing vitality. In certain states, the court still functions as a representative of the state, "sit ting as an overseeing participant to do its utmost to effect a healing of the marital wounds." [192] Although the enactment of a no-fault divorce statute may reflect a state's "public policy to terminate dead marriages, ... this policy is not to be construed as terminating the State's interest." [193]

That a judge acts as representative of the state in divorce proceedings is evident in three ways. First, the court's duty to attempt a reconciliation between the parties may be based on construction of the term "irretrievably broken" within the meaning of the no-fault statute. In such a case, the court must

> be satisfied that the parties can no longer live together because their difficulties are so deep and substantial that no reasonable effort ***1856** could eradicate them.... If the trial judge doubts the petitioner's testimony that his or her marriage has irretrievably broken down, he should continue the proceedings to determine if reconciliation is possible. [194]

Second, reconciliation proceedings may also be authorized or required by statute. [195] In such cases, the court must independently assess the probability of reconciliation. Third, the court's duty to further the interest of the state in preserving viable marriages and terminating dead ones may be manifested in its ability to refuse divorce on grounds outside the issues raised in the pleadings, [196] to grant an absolute divorce when only a limited divorce was sought, [197] and to grant divorces to both spouses. [198]

Where state law conforms to the traditional third-party model of divorce proceedings, federal courts should not exercise jurisdiction. Even where states, have adopted no-fault divorce, their third-party interests may nevertheless be present. In these cases, diversity jurisdiction should be declined.

b. Case or Controversy. Because article III requires a "real, earnest and vital controversy between individuals," [199] uncontested divorces—which account for the great majority of all divorces [200] —are not justiciable. " When both litigants desire precisely the same result ... t here is ... no case or controversy within the meaning of Art. III of the Constitution." [201]

Even a "contested" divorce may not present a case or controversy. No-fault divorce proceedings, for example, even if they do not involve the court's assuming a third-party role, may not satisfy article III since they often devolve into administrative approval of one party's desire to end a marriage with the other party, who is unable to refute the charge that the marriage is irretrievably ***1857** broken. Although a party may technically contest a no-fault divorce, the fact remains that very few contested no-fault divorce petitions are denied. [202] If the desire of one spouse,

under state law and practice, assures the party of a divorce, then the divorce proceeding "rubber stamps" a private decision to obtain a divorce, and the court awarding such a divorce performs " 'routine administration' rather than dispute settlement through adjudication." [203] In such proceedings, federal diversity courts lack constitutional adjudicatory authority. [204]

Similarly, federal courts would normally lack adjudicatory authority to hear disputes over property distribution. Under the law of most states, courts are empowered to distribute property only as an incident to divorce or annulment. [205] Because a court may divide property only when it has jurisdiction over the divorce, federal courts would have jurisdiction over controversies about property settlements only when they have jurisdiction over the underlying divorce. [206] Thus, parties seeking a simultaneous divorce and property ***1858** settlement would be barred from federal court unless the court had jurisdiction over the divorce. Moreover, parties would be precluded from obtaining a divorce in state court and then presenting a controversy over the property settlement to a federal court. [207]

In sum, federal courts lack jurisdiction to decide uncontested divorces since they do not constitute cases or controversies. Federal courts may similarly lack jurisdiction over contested divorces if under state law no real case or controversy is present. However, even if a true case or controversy exists in a contested divorce, a federal court may nonetheless be unable to hear the case if state law requires the state court to play a third-party role.

c. Cases Involving Divorce that are Appropriate for Federal Resolution. Divorce cases should be heard in federal court when, under the applicable state law, there is no third-party interest in the divorce and there is an actual case or controversy. This situation is most likely to occur in the case of a contested, fault-based divorce. If the amount in controversy requirement is met, federal diversity jurisdiction may also be appropriate when an exspouse applies for enforcement of an alimony decree, or where modification of a state decree awarding alimony is sought. In both cases, the claimants are likely both to be adverse and to present a case or controversy. If, however, in either case, the federal court is asked to take on a third-party function under the applicable state law, it should decline jurisdiction over the suit. For example, Firestone v. Cleveland Trust Co., [208] in which a federal court declined to hear an alimony enforcement suit, would be decided differently under the proposed test. An exwife brought suit in federal court for money damages and for declaratory and injunctive relief for the alleged failure of her former husband to fulfill his obligations under their divorce decree. The court held that the domestic relations

exception applied, largely because it was asked to interpret the divorce decree and to assess support obligations that had not been reduced to a money judgment by a state court.[209] Under the suggested approach, because the federal court was apparently not asked to perform third-party functions in its interpretation of the divorce decree or in its assessment of support obligations,[210] the action should not have been dismissed.[211]

***1859** 2. Child Custody. In litigation over the custody of children, more than in any other domestic relations suit, state law is likely to call on state courts to perform a third-party sovereign function. In applying the "best interests of the child" standard, state courts directly assume the role of a third party, representing the state in its capacity as parens patriae.[212] In so doing, the court ceases to be a passive arbiter who resolves the issue on the basis of the proofs offered by the parties. Rather, as one court observed,

> [t]he questions of the protection and welfare of children may be transcendent. So it is said that in an important sense the state is a quasi party and the children are real parties by representation. Indeed, the court becomes the legal protector of the rights of the children and [its] zealous concern in that respect may be paramount.[213]

Typically the court "is not adjudicating a controversy between adversary parties, to compose their private differences. [It] is not determining rights 'as between a parent and a child' or as between one parent and another.... Its concern is for the child."[214]

Because of its active involvement in child custody litigation, the court is not bound by any custody agreements between the parents.[215] In addition, as a consequence of the judiciary's role in such cases, appellate review of the trial court "is of the broadest type ... b ecause of the state's legitimate and overriding concern for the well-being of its children."[216]

***1860** Given the state's third-party role in protecting the child, federal diversity courts should abstain from making determinations of child custody.[217] Indeed, in such cases they may lack adjudicatory authority to do so.[218] However, some cases that arise in the background of a child custody dispute do not require the

court to play a third-party role. Such cases are not inappropriate for disposition in federal diversity court. For example, in Lloyd v. Loeffler, [219] suit was brought for tortious interference with custody prescribed by a sister-state decree; the federal district court awarded compensatory damages and punitive damages that were to increase by a fixed sum each month until the defendants returned the child. The federal court of appeals disapproved of the lower court's judgment, [220] writing that such punitive damages fall within the domestic relations exception, on the ground that putting such pressure on the defendants to return the child "is implicitly to answer the question who should have custody." [221] Under the suggested approach, the propriety of the district court's ordering such damages depends on state law and not on whether a federal court characterized the issue as domestic. If, for example, under state law, such damages were available on the basis of the defendant's uncooperative behavior alone, without consideration of the interests of the child, the federal court would have been merely applying state law in its normal manner and should have been permitted to make the award. [222] If, however, state law ***1861** based such damages on furthering the best interests of the child and awarded them only after consideration of those interests—requiring the court to assume an active role as representative of the state—the federal court should not have made the award. [223]

3. Domestic Cases Generally. The suggested approach should apply not only to cases in which the court is asked to grant a divorce or make a determination of child custody—categories into which the majority of domestic relations cases will fall—but should apply to domestic cases generally. Faced with such cases the court should ask not if the case presents a domestic or a traditional legal claim. Instead it should ask whether state courts express a third-party interest in the proceeding and whether the claim constitutes a case or controversy. [224] In contexts other than divorce or child custody, the exercise of jurisdiction over domestic cases is usually appropriate. In cases of tort or contract arising from a domestic background, for example, application of the proposed test normally would result in the federal court's hearing the case.

In Bacon v. Bacon, [225] for example, an exwife brought suit in federal court against her former husband for intentional infliction of mental anguish stemming from the defendant's alleged failure to make support payments and his attempts to influence their children against her. The court dismissed on the ground of the domestic relations exception. In this situation, there was no reason for the court to decline jurisdiction, provided the state expressed no third-party interest in the action. Assuming the complaint stated a cause of action under state law, the federal

court resolved the issue through regular judicial proceedings, just as it would have resolved any other tort case.

Similarly, federal courts should not refuse to decide cases simply because they involve questions of marital status. In Welker v. Metropolitan Life Insurance Co., [226] for example, the court, relying on the domestic relations exception, refused to decide whether the plaintiff was the putative wife of the decedent such that the plaintiff would be entitled to life insurance proceeds of the decedent. Under the suggested approach, the Welker court should have heard the case, since the issue apparently did not require it to perform a third-party function, and the questions presented were clearly justiciable. [227]

*1862 CONCLUSION

Modern federal courts are inconsistent in their characterization of cases as domestic, and often refuse to hear actions presenting traditional legal claims normally heard in federal diversity court merely because they arise in a domestic background. The appropriate test for determining which domestic cases should be heard in federal court abandons the need for characterizing cases as domestic and instead applies principles of federal-state relations and federal jurisdiction. Under this approach, federal courts confronting domestic relations diversity cases —as well as diversity actions generally—cannot hear suits in which they would be compelled, under state law, to assume a third-party role; similarly, federal courts cannot adjudicate actions that do not present an article III case or controversy. Application of the test suggests that it will seldom be appropriate for diversity courts to adjudicate cases of divorce and child custody, but that, in most instances, they should hear other actions currently excluded under the domestic relations exception.

Footnotes

1 "Domestic relations" cases usually involve issues of divorce, alimony, or child custody.

2 Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859); see also infra notes 37-53 and accompanying text.

3 In re Burrus, 136 U.S. 586, 593-94 (1890); accord Simms v. Simms, 175 U.S. 162, 167 (1899); see also infra notes 37-53 and accompanying text.

4 See infra notes 38, 112-13 and accompanying text.

5 See, e.g., Lloyd v. Loeffler, 694 F.2d 489, 492-93 (7th Cir.1982); Csibi v. Fustos, 670 F.2d 134 (9th Cir.1982); Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir.1980). See generally 13 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3609 (1975) [hereinafter cited as 13 Wright & Miller].

6 See, e.g., Spindel v. Spindel, 283 F.Supp. 797 (E.D.N.Y.1968) (criticizing exception).

7 See, e.g., Allen v. Allen, 518 F.Supp. 1234, 1236 (E.D.Pa.1981) (scope of domestic relations exception is a "gray area").
Just as confusion exists over the propriety of exercising diversity jurisdiction in the domestic relations area, so federal courts are unclear as to the appropriateness of exercising jurisdiction over federal questions that involve domestic issues. Compare Zak v. Pilla, 698 F.2d 800 (6th Cir.1983) (abstaining from deciding claim brought under 42 U.S.C. § 1983 (1976) on grounds of domestic relations exception), and 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"), and Magaziner v. Montemuro, 468 F.2d 782 (3rd Cir.1972) (abstaining from deciding claim brought under 42 U.S.C. §§ 1981, 1983 (1976) on grounds of domestic relations exception), with Hernstadt v. Hernstadt, 373 F.2d 316, 317-18 (2d Cir.1967) ("When a pure question of constitutional law is presented, this court has suggested that the District Court may assume jurisdiction even if the question arises out of a domestic relations dispute."), and Abdul-Rahman Omar Adru v. Clift, 195 F.Supp. 857 (D.D.C.1961) (determination of child custody in suit brought under 28 U.S.C. § 1350 (1976), governing tort suits brought by aliens, is permissible).

8 See Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir.1980) (federal courts cannot hear genuine divorce, alimony, or child custody cases: "Understandably but incorrectly in seeking to expand the exception to federal jurisdiction, district courts have ... referred more globally to exceptions founded on 'the domestic relations nature' of a case....") (emphasis in original).

9 E.g., Bennett v. Bennett, 682 F.2d 1039 (D.C.Cir.1982); Wiesenfeld v. New York, 474 F.Supp. 1141 (S.D.N.Y.1979); Le Thi Sang v. Levi, 426 F.Supp. 971 (E.D.Pa.1977); Stevens v. Sley, 407 F.Supp. 140 (E.D.Pa.1976).

10 Cherry v. Cherry, 438 F.Supp. 88 (D.Md.1977).

11 Id. at 89; see also Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.) (dismissing suit where plaintiff sought order restraining defendant from "illegally" removing children from the country and ordering her to return them, as well as compensatory and punitive damages), cert. denied, 414 U.S. 805 (1973).

12 Nouse v. Nouse, 450 F.Supp. 97 (D.Md.1978).

13 Id. at 100. In Jagiello v. Jagiello, 647 F.2d 561, 565 (5th Cir.1981), the court dismissed plaintiff's claim for alienation of his children's affections and infliction of mental anguish because the suit would "require inquiry into the ... parent-child relationship." Id. at 565. It did, however, uphold jurisdiction in claims for arrears in alimony payments. In Kilduff v. Kilduff, 473 F.Supp. 873 (S.D.N.Y.1979), the court refused to exercise its jurisdiction when plaintiff charged her exhusband with imprisoning the parties' children; the court relied heavily on the fact that investigation of custody rights by the state court was pending.

14 42 U.S.C. § 1983 (1976).

15 Magaziner v. Montemuro, 468 F.2d 782 (3d Cir.1972).

16 Id. at 787; see also Sutter v. Pitts, 639 F.2d 842 (1st Cir.1981) (suit against exhusband for disobeying visitation and custody orders and frustrating plaintiff's civil rights under state statutes, seeking damages and injunction against violation of state decree; court abstained on ground that case presented "domestic" issues).

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

18 Id. at 1042-43; accord Lloyd v. Loeffler, 694 F.2d 489, 494 (7th Cir.1982) (not awarding escalating punitive damages for breach of custody decree, as this would in effect be custody determination).

19 Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C.Cir.1982); see also Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir.1982) (suit by father of child against child's mother, stepfather, and grandparents for tortious interference with custody of child, in violation of state decree; held, "[s]ince the [defendants] do not contest the validity of the [state] custody decree, the tort issues in this case are not entangled with issues that only state courts are competent to resolve.").

20 671 F.2d 832 (4th Cir.1982).

21 Id. at 834-35.

22 Id. at 835 ("appellant is not seeking a determination of entitlement to custody or any other adjustment of family status."); see also Fenslage v. Dawkins, 629 F.2d 1107 (5th Cir.1980) (suit for infliction of mental anguish resulting from defendant's taking children from his exwife's lawful custody; no discussion of exception).

23 Wasserman, 671 F.2d at 835. In Ruffalo v. Civiletti, 702 F.2d 710 (8th Cir.1983), the court took a similar approach. An exwife brought suit for injunctive relief, alleging that her husband, a participant in the Federal Witness Protection Program, whose whereabouts were unknown, had wrongfully included their son in that program, thereby violating a prior state custody decree. The district court had refused to enforce the state custody decree and order the return of the child, and dismissed the case under the domestic relations exception. Ruffalo v. Civiletti, 549 F.Supp. 949, 956 n. 9 (W.D.Mo.1982), rev'd, 702 F.2d 710 (8th Cir.1983). The court of appeals reversed, writing that "the District Court was asked to enter an injunction which would confirm the state court decree and would not in any way conflict with it." 702 F.2d at 718. The court placed great weight on the fact that the plaintiff was, because of the circumstances of the case and the involvement of government agents, unable to obtain relief in state court. Id. The Eighth Circuit concluded that the district court "need not concern itself with [the child's] best interests, in the sense of whether his welfare would be better served by living with his mother as opposed to his father." Id. at 719.

24 See, e.g., Druen v. Druen, 247 F.Supp. 754 (D.Colo.1965) (suit for divorce and alimony removed from state court to federal court; dismissed for lack of jurisdiction under domestic relations exception). In addition, federal courts do not grant or modify alimony decrees, see, e.g., Thrower v. Cox, 425 F.Supp. 570 (D.S.C.1976), or enforce alimony decrees subject to modification, see, e.g., Walker v. Walker, 509 F.Supp. 853, 855 (E.D.Va.1981). Federal courts do, however, have jurisdiction to enforce nonmodifiable state alimony decrees. See Barber v. Barber, 62 U.S. (21 How.) 582 (1859).

25 Walker v. Walker, 509 F.Supp. 853 (E.D.Va.1981).

26 Id. at 855. The agreement contained an escalation clause, to be interpreted in light of any increases in the defendant's income.

27 Stevens v. Sley, 407 F.Supp. 140, 144 (E.D.Pa.1976).

28 Id.

29 Csibi v. Fustos, 670 F.2d 134 (9th Cir.1982). In Csibi, plaintiff sued to establish her status as spouse of the decedent for purposes of inheritance. Another woman whom decedent had married claimed to be decedent's good-faith putative spouse, and, as such, entitled to inherit the estate. The court dismissed the suit, writing that plaintiff had failed to establish her own status as decedent's legal spouse and to disprove the other woman's status as good-faith putative spouse "Accordingly, part of [plaintiff's] prayer for relief is a request for an annulment of [the other woman's] marriage to [decedent]. Thus, the primary issue in the instant case concerns the status of husband and wife, and federal courts lack subject matter jurisdiction...." Id. at 138 (footnote omitted).

30 Welker v. Metropolitan Life Ins. Co., 502 F.Supp. 268 (C.D.Cal.1980) (plaintiff sought a declaration that she was decedent's putative spouse and therefore entitled to recover insurance proceeds). But see Oxley v. Sweetland,

94 F.2d 33 (4th Cir.1938) (court has jurisdiction to pass on question of whether plaintiff was married to decedent and therefore entitled to decedent's property).

Paternity suits present direct issues of status. The traditional rule is that such cases are "domestic"—the illegitimacy of the child notwithstanding—and within the exception, Albanese v. Richter, 161 F.2d 689 (3d.Cir.1947), as they involve the "status of parent and child." Buenchold v. Ortiz, 400 F.2d 371, 372 (9th Cir.1968).

31 Courts have found no difficulties in determining questions of status when the domestic relations exception was not raised. E.g., Legory v. Finch, 424 F.2d 406 (3rd Cir.1970) (determining effect of New Jersey divorce decree for social security benefits purposes); Commissioner v. Eccles, 208 F.2d 796 (9th Cir.1953) (determining whether taxpayer was entitled to file joint return when final divorce granted after tax year, although interlocutory decree had been decided prior to end of tax year); see also Davis v. Califano, 603 F.2d 618 (7th Cir.1979). These cases suggest that the status/property dichotomy is an artificial distinction.

32 See, e.g., Lee v. Hunt, 431 F.Supp. 371, 377 (W.D.La.1977); Turpin v. Turpin, 415 F.Supp. 12, 14 (W.D.Okla.1975); see also Vestal & Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 Minn.L.Rev. 1, 31 n. 17 (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. It would seem that the court should examine the nature of the action. If it is purely an action concerning a right to recover a judgment because of some contractual, quasi-contractual or tortious wrong that has been committed, the federal courts should refuse to exercise jurisdiction in domestic relations cases only where a problem of status arises. Where only property rights are involved jurisdiction should be taken.

33 Zimmerman v. Zimmerman, 395 F.Supp. 719 (E.D.Pa.1975).

34 Id. at 721; accord, Davis v. Davis, 452 F.Supp. 44 (E.D.Pa.1978) (suit for default in alimony and support payments; no mention of domestic relations exception); Hemphill v. Hemphill, 398 F.Supp. 1134 (N.D.Ga.1975) (arrears of alimony due under agreement incorporated into divorce decree). Compare Erspan v. Badgett, 647 F.2d 550, 553 n. 1 (5th Cir.1981) (abstention not appropriate in action to enforce terms of divorce decree awarding plaintiff a share of defendant's accumulated right under Army Retirement benefits program), cert. denied, 455 U.S. 945 (1982), and Crouch v. Crouch, 566 F.2d 486 (5th Cir.1978) (suit for damages for breach of separation agreement; abstention not appropriate), and Korby v. Erickson, 550 F.Supp. 136 (S.D.N.Y.1982) (no abstention in dispute over agreement by unmarried couple), with Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir.1981) (suit for breach of separation agreement; court abstains), and Bossom v. Bossom, 551 F.2d 474, 475 (2d Cir.1976) (suit to declare invalid a stipulation incorporated into divorce decree; court abstained on grounds of domestic relations exception), and Kamhi v. Cohen, 512 F.2d 1051 (2d Cir.1975) (suit to set aside seizure of property by a receiver appointed in divorce decree; court abstains), and Brenhouse v. Bloch, 418 F.Supp. 412, 416 (S.D.N.Y.1976) (suit for breach of separation agreement; court abstains).

In Solomon v. Solomon, 516 F.2d 1018 (3d Cir.1975), an exwife sought damages and injunctive relief upon her exhusband's failure to make support payments pursuant to a separation agreement. In defense, her exspouse contended that she had committed the first material breach of the agreement by denying him his visitation rights. Id. at 1020. A state court action concerning the exwife's violation of the custody decree was pending. Id. at 1025. Relying on these facts, rather than on a clause of the agreement providing for litigation in state court, id. at 1025-26, and fearing lest the litigants "play one court system off against the other," id. at 1025, the court invoked the domestic relations exception and refused to exercise its jurisdiction. In a strong dissent, Judge Gibbons urged that the case presented a clear contractual claim, with no need to pass on visitation rights, id. at 1030, and, further, that the domestic relations exception itself is a "myth" and "hoary heresy." Id. The reasoning, but not the result, of the case is criticized in Comment, 7 Rut.-Cam.L.Rev. 603 (1976).

In Allen v. Allen, 518 F.Supp. 1234 (E.D.Pa.1981), interpreting Solomon, the litigation concerned the alleged breach of a postnuptial property settlement and a counterclaim of misrepresentation. The court dismissed under Solomon primarily because related state actions were pending. Courts, however, generally resolve disputes over separation and property settlements when none of the Solomon "dangers"—the presence of children and state actions pending—are present.

In any event, the issue of pending state action as grounds for abstention should be kept entirely separate from the question of how to treat domestic cases. The pendency of a concurrent suit can, in certain cases, serve as an independent basis for abstention, see Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Evans Trans. Co. v. Scullin Steel Co., 693 F.2d 715 (7th Cir.1982); 17 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4247 (1978) [hereinafter cited as 17 Wright & Miller], and should be viewed as such.

35 E.g., Csibi v. Fustos, 670 F.2d 134 (9th Cir.1982); Sutter v. Pitts, 639 F.2d 842 (1st Cir.1981); Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.1973).

36 E.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir.1981); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 511 (2d Cir.1973); Kilduff v. Kilduff, 473 F.Supp. 873 (S.D.N.Y.1979).

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

38 28 U.S.C. § 1332(a) (1976) reads in pertinent part: "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...."
The original diversity statute had granted jurisdiction over "all suits of a civil nature at common law or in equity." Act of Sept. 24, 1789, sec. 11, 1 Stat. 73, 78. The change to "all civil actions" was not intended to affect the substantive scope of the section. See Spindel v. Spindel, 283 F.Supp. 797, 801 (E.D.N.Y.1968).

39 62 U.S. (21 How.) 582 (1858).

40 Id. at 584.

41 Id.

42 Id. at 592. Although the majority opinion does not specifically state that English courts of common law and equity had no divorce jurisdiction, it is clear from the dissent and from subsequent Supreme Court cases interpreting Barber that the disclaimer was based on this premise. See, e.g., Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930).

43 Another early Supreme Court case, In re Burrus, 136 U.S. 586 (1890), is frequently, but incorrectly, cited to support a domestic relations exception. The Burrus Court held that the habeas corpus statute, § 753 of the Revised Statutes, codified at 28 U.S.C. §§ 2254-2255 (1976), does not confer upon a district court the power to issue a writ of habeas corpus to restore an infant to the custody of his father from the custody of the child's grandparents. The Court ruled that the right of the father and grandfather to custody of the child did not depend upon any law or treaty of the United States or its Constitution, within the meaning of the habeas corpus statute, as "[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." 136 U.S. at 593-94. Although this statement is not strictly relevant to the domestic relations exception, pertaining instead solely to the power of a district court under the habeas corpus statute to make an award of custody, subsequent decisions have taken it out of context to support excluding domestic relations cases from federal court. See, e.g., Overman v. United States, 563 F.2d 1287, 1292 (8th Cir.1977); Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir.1972). In fact, the Burrus Court reserved the question of federal diversity jurisdiction over the adjudication of custody rights:
But whether the diverse citizenship of parties contesting this right to the custody of the child, could, in the courts of the United States, give jurisdiction to those courts to determine that question, has never been decided by this court that we are aware of. Nor is it necessary to decide it in this case....

136 U.S. at 596; see also P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts and the Federal System 1189 (2d ed. 1973) [hereinafter cited as Hart & Wechsler].

44 175 U.S. 162 (1899).

45 201 U.S. 303 (1906).

46 Appeal in Simms was taken pursuant to Revised Statutes § 702, 18 Stat. 1, 131 (1878) (repealed 1911); in De La Rama, appeal was taken pursuant to Act of July 1, 1902, § 10, 32 Stat. 691, 695 (1902) (repealed 1960).

47 U.S. Const. art. IV, § 3, cl. 2:
The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be construed as to Prejudice any Claims of the United States, or of any particular State.

48 Simms, 175 U.S. at 168.

49 See infra note 54 and accompanying text.

50 280 U.S. 379 (1930).

51 The wife had first sued the husband in federal district court. That court dismissed for lack of jurisdiction, relying on the domestic relations exception. Popovici v. Popovici, 30 F.2d 185 (N.D.Ohio 1927). The wife then brought suit in Ohio state court. The husband objected to the state court's jurisdiction, but the objection was overruled. The Supreme Court of Ohio denied his application for a writ of prohibition. The Supreme Court then granted certiorari. 280 U.S. at 382.

52 U.S. Const. art. III, § 2, cl. 1: "The Judicial Power shall extend ... to all Cases affecting Ambassadors, other public Ministers and Consuls.... In all cases affecting Ambassadors, other public Ministers and Consuls ... the Supreme Court shall have original jurisdiction."
The Court also relied on the Act of March 3, 1911, ch. 11, § 256, 36 Stat. 1161 (1911) (codified as amended at 28 U.S.C. § 1251 (1976)):
The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: ... Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls.

53 280 U.S. at 383-84.

54 See, e.g., Csibi v. Fustos, 670 F.2d 134, 136 (9th Cir.1982); Solomon v. Solomon, 516 F.2d 1018, 1021-26 (3d Cir.1975); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 513 n. 4 (2d Cir.1973). But see Welker v. Metropolitan Life Ins. Co., 502 F.Supp. 268, 270 (C.D.Cal.1980) (exception goes to constitutional jurisdiction).

55 E.g., Wasserman v. Wasserman, 671 F.2d 832 (4th Cir.1982), cert. denied, 103 S.Ct. 372 (1982); Turpin v. Turpin, 415 F.Supp. 12 (W.D.Okla.1975).

56 For example, the possibility of congressional action expressly to eliminate the domestic relations exception would be severely limited were the exception constitutionally based. In addition, if the exception were constitutionally based, it would apply to domestic issues arising under federal question jurisdiction as well as diversity jurisdiction. See supra note 7.

57 Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976).

58 319 U.S. 315 (1943). The Court held that a suit brought under state law to review a state agency's grant of a drilling permit in an oil field should have been dismissed by the district court on abstention grounds. The Court relied primarily on the fact that the state had established its own system for dealing with the geographical

complexities of oil and gas fields, so that federal review of the agency's order would have led to "[d]elay, misunderstanding of local law, and needless federal conflict with the state policy." Id. at 327.

59 Abstention is also appropriate in "cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law," County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 189 (1959); Railroad Comm'n. v. Pullman Co., 312 U.S. 496 (1941), and when federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, Younger v. Harris, 401 U.S. 37 (1971). See also Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 816 (1976). See generally 17 Wright & Miller, supra note 34, § 4242.

60 See, e.g., Alabama Pub. Serv. Comm'n v. Southern Ry., 341 U.S. 341 (1951) (railroad passenger service); Construction Aggregates Corp. v. Rivera de Vicenty, 573 F.2d 86 (1st Cir.1978) (insurance rates); Allegheny Airlines v. Pennsylvania Pub. Utility Comm'n, 465 F.2d 237 (3d Cir.1972) (air rates).
The Burford court also considered relevant the difficulty of the state law question presented. Although difficulty of the question presented will not of itself warrant abstention, Meredith v. Winter Haven, 320 U.S. 228, 234 (1943), federal adjudication would presumably have a much less disruptive effect if the state law were clear. See generally 17 Wright & Miller, supra note 34, § 4244; Comment, Abstention by Federal Courts in Suits Challenging State Administrative Decisions: The Scope of the Burford Doctrine, 46 U.Chi.L.Rev. 971 (1979).

61 See, e.g., Csibi v. Fustos, 670 F.2d 134 (9th Cir.1982); Sutter v. Pitts, 639 F.2d 842 (1st Cir.1981); Bossom v. Bossom, 551 F.2d 474 (2d Cir.1976); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir.1973).

62 490 F.2d 509 (2d Cir.1973).

63 The court heard the case because the defendant had failed to make a timely motion, but made clear that it would have abstained had the issue been properly raised. Id. at 516-17.

64 Id. at 516. The court found that the claim would require interpretation of a state decree and of a "difficult field" of state law unfamiliar to federal judges. Id. at 515.

65 Id. at 516 (footnote omitted).

66 E.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212 (6th Cir.1981).

67 E.g., Kilduff v. Kilduff, 473 F.Supp. 873 (S.D.N.Y.1979); see also supra note 13.

68 E.g., In re Freiberg, 262 F.Supp. 482, 484 (E.D.La.1967) ("As a matter of constitutional and statutory law the district courts of the United States ... have jurisdiction of the subject matter over what may be called 'domestic relations' cases.").

69 Id. (emphasis by the court).

70 62 U.S. (21 How.) 582 (1859).

71 Id. at 592 (quoting Livingston v. Story, 34 U.S. (9 Pet.) 632 (1835)).

72 Id. at 584. The disclaimer evidently was made to appease the dissenters, who claimed, id. at 604-05, that the English courts, and thus the federal courts, lacked jurisdiction entirely over the case at bar. Comment, Domestic Relations—Federal Courts Held to Have Jurisdiction to Declare Divorce Invalid, 44 N.Y.U.L.Rev. 631, 635 (1969) [hereinafter cited as N.Y.U. Comment].

73 Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383-84 (1930). The Popovici Court also relied on the intervening cases of In re Burrus, 136 U.S. 586 (1890), see supra note 43, Simms v. Simms, 175 U.S. 162 (1899), see supra notes 44-48 and accompanying text, and De La Rama v. De La Rama, 201 U.S. 303 (1906), see supra notes 45-49 and accompanying text.

74 See infra notes 75-95 and accompanying text.

75 In the case of a divorce a vinculo [absolute divorce] the marriage bond is completely severed, and there is no continuance of the marriage status. But when a divorce a mensa et thoro [limited divorce] is decreed there is no severance of the marriage bond. The marital status is not affected thereby; and the parties remain husband and wife, though authorized by the decree to live in separation.
Gloth v. Gloth, 154 Va. 511, 535, 153 S.E. 879, 886 (1930). See generally E. Spencer, Treatise on the Law of Domestic Relations ¶ 326 (1911); 1 J. Bishop, New Commentaries on Marriage, Divorce and Separation 36 (1891); 1 W. Blackstone, Commentaries *433-42.
In England, until the passage of the Divorce and Matrimonial Causes Act of 1857, 20 & 21 Vict., ch. 84, divorces a mensa et thoro were granted by the ecclesiastical courts, and absolute divorces by Parliament. Gloth, 154 Va. at 538, 153 S.E. at 886.

76 145 Eng.Rep. 381 (Ch. 1656). Sir Thomas's land had been sequestered for failure to attend church. A statute allowed recovery of the land by procuring from a bishop a certificate attesting to the recommencing of proper worship. In Sir Thomas's case, however, the bishop had been "taken out of the way," (removed) because the jurisdiction of the ecclesiastical courts had been temporarily suspended during Cromwell's Interregnum. See, e.g., Whorwood v. Whorwood, 21 Eng.Rep. 556 (Ch. 1662-1663). The court held that the question could be tried by jury in a lay court.

77 145 Eng.Rep. at 382.

78 Id.; see also Allen et ux v. Grey, 89 Eng.Rep. 441 (K.B.1702) (plea of ne unques accouple en loyal matrimony, is not triable by jury; however, plea of no marriage in fact can be tried by jury).

79 145 Eng.Rep. at 383.

80 Id. at 382; accord Ilderton v. Ilderton, 126 Eng.Rep. 476, 483 (C.P.1793).

81 See Decree, 21 Eng.Rep. 123 (Ch.1581) (two decrees for divorces issued; unclear as to what type of divorce involved); see also 3 W. Blackstone, Commentaries *93 (describing how the ecclesiastical courts came to hear divorces a mensa et thoro); 1 G. Spence, The Equitable Jurisdiction of the Court of Chancery 702 (1846) ("It is not unlikely ... that the Court of Chancery under its clerical chancellors, exercized jurisdiction to decree a divorce a vinculo matrimonii....").

82 See Spindel v. Spindel, 283 F.Supp. 797, 808 (E.D.N.Y.1968); R. Grey, A System of English Ecclesiastical Law 336-38 (1730) ("[T]he Temporal and the Ecclesiastical Law are so coupled and interwoven, that the one cannot subsist without the other"; temporal courts assist spiritual courts by enforcing their decrees; ecclesiastical courts aid temporal courts by deciding issues of "Loyalty of Marriage, general Bastardy, or the like.") (emphasis in the original).

83 22 Eng.Rep. 720 (Ch.1668).

84 Id. at 720-21; see also Ex parte Whitmore, 21 Eng.Rep. 223 (Ch.1750); R. Grey, supra note 82 at 337.

85 Read, 22 Eng.Rep at 721; see also Spindel v. Spindel, 283 F.Supp. 797, 808 (E.D.N.Y.1968); Heyn's Case, 35 Eng.Rep. 288 (Ch.1813) (wife instituted suit in ecclesiastical court for divorce a mensa et thoro; wife fears that husband "will take the first Opportunity of doing her some great bodily Injury, unless restrained by this Court"; husband ordered to post security); Dickenson v. Mavie, 21 Eng.Rep. 397 (Ch.1771) (husband ordered to pay wife money to enable her to bring suit for jacitation of marriage in the ecclesiastical court).

86 See Spindel v. Spindel, 283 F.Supp. 797, 808 (E.D.N.Y.1968).

87 Robinson v. Greinold, 91 Eng.Rep. 112 (K.B.1704).

88 Id. at 113; see also Whorwood v. Whorwood, 21 Eng.Rep. 556 (Ch.1662-1663) (bill to reverse decree of alimony made previously by chancery court; "a Bill of Review doth not lie for Want of Authority in that [chancery] Court to make Decrees in Cases of Alimony"); Russel v. Bodvil, 21 Eng.Rep. 545 (Ch.1660-1661) (enforcing decree of

alimony made earlier by the court, over defendant's objection that "there is now no Jurisdiction in this Court"); Ashton v. Ashton, 21 Eng.Rep. 538 (Ch.1650) (court ordered husband to pay alimony).

A later court distinguished Whorwood on the ground that "it was determined during the usurpation, and while the jurisdiction of the ecclesiastical court was suspended." Head v. Head, 26 Eng.Rep. 972, 973 (Ch.1745). Fonblanque asserts that those cases were decided "during the time of troubles, when commissioners were appointed, to whom jurisdiction was expressly given [to decree alimony], and whose decrees were held to be confirmed by the act for the confirmation of judicial proceedings." 1 J. Fonblanque, A Treatise of Equity 99 (4th ed. Philadelphia 1835), followed in J. Bishop, New Commentaries on Marriage, Divorce and Separation § 1394 & n. 2 (1891). Fonblanque cites no authority, however, and the cases make no mention of any specific statute or commission. See, e.g., Whorwood v. Whorwood, 21 Eng.Rep. 556 (Ch.1662-1663) (merely stating that "Decrees for alimony made in the Court of Chancery in the late Times, are confirmed by the Act for Confirmation of judicial Proceedings").

The cases show that the courts of chancery naturally assumed jurisdiction over cases of alimony during the interregnum. However, the interregnum does not present an exception to the general rule of jurisdiction, since the equity courts also assumed such jurisdiction during ordinary times. See generally General Abridgement of Cases in Equity, 21 Eng.Rep. 828, 878-81 (1744). Furthermore, any dispute as to whether the interregnum involved merely an exception, or whether it illustrated the natural power of lay courts, involves only cases of alimony. Domestic relations cases generally during this period show the general power of lay courts to hear domestic suits.

89 25 Eng.Rep. 301, 304 (Ch.1729). The plaintiff's husband abandoned her without support, having put his personal estate in a trust for payment of his debts. The wife brought an action to secure the sums for her use, as pursuant to her marriage contract. Id. at 301. Over the trustee's objections, the court found for the wife.

90 Id. at 305. The court referred the case to a master, who would set maintenance to be paid until the husband "shall return and cohabit." Id. at 306; see also Wright v. Morley, 32 Eng.Rep. 992 (Ch.1805); Watkyns v. Watkyns, 26 Eng.Rep. 460, 461 (Ch.1740) ("as ... the husband ... is gone out of the kingdom without leaving a provision or maintenance for [his wife], I decree that the interest arising from the trust money shall be paid to her, till he thinks proper to return and maintain her as he ought"); Nicholls v. Danvers, 23 Eng.Rep. 1037 (Ch.1711) (husband forced wife "to separate from him"; court directed income of trust to be used for wife's maintenance); Oxenden v. Oxenden, 23 Eng.Rep. 916 (Ch.1705). But see Head v. Head, 26 Eng Rep. 1115, 1116 (Ch.1747) (court cannot compel husband, who is present, to pay maintenance for wife "unless upon an agreement between them").

Although the later English practice in the 18th century in suits for maintenance was to limit access to chancery to cases where the action arose incidental to other matters within the court's jurisdiction, Duncan v. Duncan, 34 Eng.Rep. 564 (Ch.1815), clearly this practice did not reflect a limitation on the inherent power of the court.

91 Tombes v. Elers, 21 Eng.Rep. 201 (Ch.1747).

92 Id; see also Smith v. Bate, 21 Eng.Rep. 416 (Ch.1784) (testamentary guardian declared bankrupt; case referred to master to approve of guardian for child); Wilcox v. Drake, 21 Eng.Rep. 416 (Ch.1784) (father declared bankrupt; same disposition of case).

The English courts also entertained paternity suits, see, e.g., Rex v. Inhabitants of Bedall, 93 Eng.Rep. 1042 (K.B.1737); Pendrell v. Pendrell, 93 Eng.Rep. 945 (K.B.1732), and actions for the maintenance of bastards, see, e.g., Reg. v. Odam, 91 Eng.Rep. 116 (K.B.1713); Villa de Tewksbury v. Villa de Twyning, 80 Eng.Rep. 1176 (K.B.1632).

The jurisdictions of the equity courts at times overlapped that of the spiritual courts. See, e.g., Howell and Waldron, (Ch.1682), reported in General Abridgement of Cases in Equity, 21 Eng.Rep. 828, 940 (1744) (infant legatee's suit in ecclesiastical court not bar to subsequent suit in Chancery). In certain cases, appeal could be had from the sentence of ecclesiastical courts, see Symes v. Symes, 97 Eng.Rep. 576 (K.B.1759), and writs of prohibition or praemunire would lie when the spiritual court exceeded its jurisdiction, see id.; Gould v. Gapper, 102 Eng.Rep. 1102 (K.B.1804) (writ of prohibition lies when spiritual court misconstrues act of Parliament); R. Grey, supra note 82, at 383, or when suit in spiritual court would interfere with chancery proceedings. See Stonehouse v. Stonehouse, 21 Eng.Rep. 205 (Ch.1745) ("[i]njunction granted to stay proceeding in the spiritual court for payment of a legacy until the hearing, and the plaintiff to speed the cause").

93 Poor Relief (Deserted Wives and Children) Act, 1718, 5 Geo. 1, ch. 8.

94 Id. See generally 1 Blackstone, Commentaries *446-49 (account of law relating to parent and child).
The division between common law, equity, and ecclesiastical courts may have compelled the English legal system to focus on the precise nature of the relief sought, rather than on the domestic nature of a case. For example, in Angier v. Angier, 25 Eng.Rep. 107 (Ch.1718), suit was brought to enforce an agreement for separate maintenance. The husband contended that the case "was the Business only of the Spiritual Court." The Lord Chancellor rejected this argument, noting "that if these Articles could not be decreed here, they could be of no Force anywhere; that there was no remedy upon them at Common Law, for there the Wife may not sue her Husband; that it could not be pretended that the Spiritual Court had any Power to decree a performance of them." Id. at 107.

95 See, e.g., Worsal v. Marlar, 21 Eng.Rep. 423 (Ch.1784). The wife of a bankrupt became entitled to a contingent legacy. The husband's assignees claimed that the contingent interest vested in them, as assignees, at the time of the bankruptcy. The court refused this claim, ruling that the assignees stood in the shoes of the husband. The Chancellor held that "as the legacy could not be paid without the aid of the Court, the Court would take care of the interest of the wife, in the same manner as if the husband had not been bankrupt." Id. Ironically, many federal courts would today deem such a case domestic and refuse jurisdiction.
It can be argued that the jurisdictional practices before 1789 and not simply English practice before 1789 should be used as the relevant benchmark in determining federal jurisdiction; that is to say, modern courts should look not only to the practices of the English courts of 1789 but also to those of the American colonial courts. See Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir.1982); cf. Dragan v. Miller, 679 F.2d 712, 713 (7th Cir.1982) ("it is not obvious why the language of the Judiciary Act of 1789 should be taken to refer exclusively to English rather than [18th century] American courts.").
A review of the jurisdiction of the colonial courts compels a conclusion similar to that suggested by the examination of pre-1789 British practice. Unlike England, the colonies had no ecclesiastical courts. 2 G. Howard, A History of Matrimonial Institutions 328-87 (1964). Although typically the legislature of the emerging colonies granted divorces, several courts did have regular divorce jurisdiction. See, e.g., 2 G. Howard, supra, at 332-50, 356-58, 364-65 (divorces granted in Massachusetts, Connecticut, and Rhode Island in 17th century). Those colonial courts not empowered to grant divorces still entertained other domestic actions. See, e.g., Macnamara's Case (1707), reprinted in Helms v. Franciscus, 2 Bland 544, 566-67 (Md.Ch.1830) (court, not competent to decree divorce or separation, hears suit for separate alimony as part of inherent equitable powers); 2 G. Howard, supra, at 366-76.
Moreover, in the colonies, there was no strict separation of powers. Thus in Massachusetts, for example, "the general court was at once the legislature and the supreme judicial tribunal of the colony." 2 G. Howard, supra, at 337; see Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Probs. 3, 5 (1948). As the nation developed, the separate functions of the different branches of government became more clear, and the power to grant divorce devolved solely on the judiciary. See State v. Fry, 4 Mo. 81, 120-21 (1835) (legislative act granting divorce held exercise of judicial powers in violation of state constitution); accord Sparhawk v. Sparhawk, 116 Mass. 315, 318 (1874).

96 694 F.2d 489 (7th Cir.1982).

97 Id. at 491-92; accord Solomon v. Solomon, 516 F.2d 1018, 1026 (3d Cir.1975); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir.1973); Spindel v. Spindel, 283 F.Supp. 797, 802 (E.D.N.Y.1968). But see Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C.1976) (domestic relations exception "has a sound historical basis").

98 175 U.S. 162, 167 (1899).

99 280 U.S. 379 (1930).

100 Id. at 383-84. Interestingly, in De La Rama v. De La Rama, 201 U.S. 303, 307 (1906), the Court wrote that there was no diversity jurisdiction over divorce because wives and husbands could not be citizens of different states and because a suit for divorce could not meet the amount in controversy requirement, "for divorce in

itself involves no pecuniary value." Id. at 307. No mention was made of English equity jurisdiction. The two obstacles to federal jurisdiction raised in De La Rama no longer present any difficulty. See infra notes 144, 146 and accompanying text.

101 Markham v. Allen, 326 U.S. 490, 494 (1946).

102 Federal courts will hear such cases only as long as they do not interfere with the local probate proceedings or assume general jurisdiction of the probate or control of the property in the state court's custody. Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43-44 (1909). See generally Hart & Wechsler, supra note 43, at 1183-89.

103 109 U.S. 485, 496-97 (1883).

104 See id. at 497:
It has often been decided by this Court that the terms "laws" and "equity" as used in the Constitution, although intended to mark and fix the distinctions between the two systems of jurisdiction as known and practiced at the time of its adoption, do not restrict the jurisdiction confined on it to the very rights and remedies then recognized and employed, but embrace as well rights ... newly created by statutes of the states....
See also Gaines v. Fuentes, 92 U.S. 10, 20-21 (1875) (federal court jurisdiction over suit to annul a will upheld, over objection that proceeding was not a suit at common law or equity under English practice; action is "in all essential particulars, a suit for equitable relief, ... and if by the law obtaining in the State, customary or statutory, ... can be maintained in a State court ... we think [it] may be maintained by original process in a Federal court"); cf. Henrietta Mills v. Rutherford County, N.C., 281 U.S. 121, 127-28 (1930) (federal court can enforce state statute creating new equitable right as long as it does not conflict with Constitution or laws of the United States).

105 See generally Foster & Freed, Divorce in the Fifty States: An Overview, 14 Fam.L.Q. 229 (1981).

106 In In re Sawyer, 124 U.S. 200, 211 (1888), the Court cited English cases for the proposition that federal courts have no jurisdiction to grant an injunction to stay state criminal law proceedings. In later cases, however, the Court, without bothering to refute its previous view of history, recast its argument in terms of equitable discretion, see Di Giovanni v. Camden Fire Ins. Ass'n, 296 U.S. 64, 69 (1935), and crafted a doctrine that culminated in Younger v. Harris, 401 U.S. 37, 43 (1971) (a federal court cannot enjoin a pending state criminal prosecution except under extraordinary circumstances when the danger of irreparable loss is both great and immediate). See Wechsler, Federal Courts, State Criminal Law and the First Amendment, 49 N.Y.U.L.Rev. 740, 750 (1974).
The Court also "revised" its historical view of sovereign immunity. See, e.g., Williams v. United States, 289 U.S. 553, 573 (1933) (understanding in 1789 that sovereign could not be sued under article III), overruled by Glidden Co. v. Zdanok, 370 U.S. 530, 563 (1962) ("[s]uits against the English Sovereign ... were well-established before the Revolution.... This history ... undoubtedly was familiar to the Framers of the Constitution").

107 136 U.S. 586 (1890).

108 Id. at 596.

109 See supra notes 96-97 and accompanying text.

110 See infra notes 138-71 and accompanying text. Courts that view the domestic relations exception as a jurisdictional limitation and courts that abstain in domestic cases offer such policy considerations.

111 See infra note 171.

112 28 U.S.C. § 1332 (1976). In addition, the amount in controversy requirement must be met. Id. § 1332(a).

113 See supra note 38; see also Cole v. Cole, 633 F.2d 1083, 1089 (4th Cir.1980) ("So long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rag-and-bone shop of the heart.").

The issue of whether federal courts should abstain from exercising their powers is a question separate from the existence of that power. Determining that jurisdiction exists must precede evaluating the appropriateness of abstention.

114 Guaranty Trust Co. v. York, 326 U.S. 99, 111 (1945); see also Meredith v. City of Winter Haven, 320 U.S. 228, 234 (1943) ("The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity ... to assert their rights in the federal rather than in the state courts."). See generally Goldman & Marks, Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry, 9 J.Legal Stud. 93 (1980); Slonim, Diversity Jurisdiction: Ripe for Cutting?, 66 A.B.A.J. 1198 (1980); Shapiro, Federal Diversity Jurisdiction: A Survey and a Proposal, 91 Harv.L.Rev. 317 (1977).

115 For example, in Allen v. Allen, 518 F.Supp. 1234 (E.D.Pa1981), suit was brought in state court by a husband against his wife for breach of a postnuptial property settlement agreement. The wife sought to remove the action to federal court, contending that she would not get fair consideration in the county court because of her husband's position as a member of the county bar. Id. at 1237 n. 7. Notwithstanding the wife's concern over local bias, the case was dismissed under the domestic relations exception.

116 Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir.1973). In fact the court gave this concern little weight because it was raised by an "in-stater." Id. at 515; accord Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir.1982); Brenhouse v. Bloch, 418 F.Supp. 412, 416 (S.D.N.Y.1976). In Bossom v. Bossom, 551 F.2d 474, 475-76 (2d Cir.1976), however, the court abstained when its jurisdiction was invoked by an "out-of-stater," writing that fear of local bias was "only one of the factors" relied upon in Phillips, Nizer.

117 See Comment, 54 Iowa L.Rev. 390, 397-98 (1968) [hereinafter cited as Iowa Comment]; see also Comment, Federal Jurisdiction in Domestic Relations Cases, Spindel v. Spindel, 28 Md.L.Rev. 376, 385-86 (1968) ("If substantial prejudice does exist, such prejudice should be grounds for removal to the federal district court.") [hereinafter cited as Maryland Comment].

118 304 U.S. 64 (1938).

119 62 U.S. (21 How.) 582 (1859).

120 Id. at 602-03 (Daniel, J., dissenting).

121 201 U.S. 303 (1906).

122 See supra notes 45-49 and accompanying text.

123 201 U.S. at 308.

124 See N.Y.U.Comment, supra note 72, at 636.

125 See, e.g., Kichberg v. Feenstra, 450 U.S. 455 (1981) (statute giving husband unilateral right to dispose of jointly owned community property held violative of equal protection clause); Orr v. Orr, 440 U.S. 268 (1979) (state statute imposing alimony obligations on husbands, but not wives, held violative of equal protection clause).

126 Apart from fear of local bias, litigants may prefer federal courts for reasons including more liberal discovery, geographical convenience, and less congestion. See generally M. Rosenberg, J. Weinstein, H. Smit & H. Korn, Elements of Civil Procedure 212 (3d ed. 1976); Summers, Analysis of Factors that Influence Choice of Forum in Diversity Cases, 47 Iowa L.Rev. 933 (1962); Note, The Choice Between State and Federal Court in Diversity Cases in Virginia, 51 Va.L.Rev. 178 (1965). In addition, Fed.R.Civ.P. 4(f) may enable a litigant to obtain jurisdiction over his adversary where jurisdiction could not be gotten in state court. See Coleman v. American Export Isbrandtsen Lines, Inc., 405 F.2d 250 (2d Cir.1968); 2 J. Moore, J. Lucas, H. Fink & C Thompson, Moore's Federal Practice ¶ 4.42[2] (2d ed. 1982).

127 See 28 U.S.C. § 1441 (1976). Some courts, however, also deny federal question jurisdiction in domestic cases. See supra note 7.

128 See 28 U.S.C. § 1332(a) (1976).

129 Not infrequently, federal courts are precluded from passing on significant federal questions raised by the defendant. For instance, in Orr v. Orr, 440 U.S. 268 (1979), a state statute providing that husbands, but not wives, are required to pay alimony was struck down by the Supreme Court as violating the equal protection clause. The defendant had to depend on an appeal to the Supreme Court from the Alabama state courts for federal disposition of the constitutional issues because the plaintiff pleaded no federal question. In Orr, however, the parties were not diverse.

130 See, e.g., id.

131 Cases of preclusion of federal issues frequently occur where the federal interest is statutory, not constitutional. In McCarty v. McCarty, 453 U.S. 210 (1981), for example, the Supreme Court ruled that federal law barred a state court from dividing military retirement pay pursuant to state community property laws upon the dissolution of a marriage. The Court held that application of state law would frustrate the federal policy underlying the statutory distribution of such pay. Id.; see also Ridgway v. Ridgway, 454 U.S. 46 (1981) (federal, not state, law governs distribution of life insurance policy issued under the Servicemen's Group Life Insurance Act of 1965, 38 U.S.C. § 770(a) (1976)); Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) (retirement benefits under the Railroad Retirement Act of 1974, 45 U.S.C. § 231d(c)(3) (1976), may not be divided under state community property law upon divorce). Federal courts have a strong interest in hearing cases that call for construction of federal statutes.

132 436 U.S. 84 (1978).

133 Id. at 98; see also Yarborough v. Yarborough, 290 U.S. 202 (1933) (Stone J., dissenting) (intent of state in promoting best interests of child outweighs federal policy of full faith and credit so that state can disregard sister state custody or support decree when welfare of child so requires); Restatement (Second) of Conflict of Laws § 103 comment b and reporter's note (1971) (adopting view expressed in Justice Stone's dissent).

134 In the context of habeas corpus, for example, several commentators have argued that the costs of adding a tier of federal review of constitutional issues already fairly heard by the state courts outweighs the benefits. See, e.g., Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv.L.Rev. 441 (1963).

135 See N.Y.U. Comment, supra note 72, at 636.

136 See, e.g., Bellotti v. Baird, 443 U.S. 622, 634 (1979) (observing, in context of striking down statute requiring parental consent for abortion, that "constitutional principles [should] be applied with sensitivity and flexibility to the special needs of parents and children"); Parham v. J.R., 442 U.S. 584, 601 (1979) (prescribing constitutional test for parental commitment of children to mental hospitals). See generally Developments in the Law—The Constitution and the Family, 93 Harv.L.Rev. 1156 (1980), (collecting cases in which the Supreme Court has "constitutionalized" family law) [hereinafter cited as Harvard Developments].

137 For example, congressional interest in the resolution of domestic disputes and problems is evidenced by legislation such as the Parental Kidnapping Prevention Act of 1980, Pub.L. No. 96-611, §§ 6-10, 94 Stat. 3568-3573 (designed to "discourage continuing interstate controversies over child custody in the interest of greater stability of home environment and of secure family relationships for the child," 28 U.S.C. § 1738A note, and the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 42 U.S.C. §§ 5101-5115 (Supp. V 1981) (offering federal aid to combat child abuse and to "provide permanent and loving home environments for children"). Id. § 5111.

138 See, e.g., Csibi v. Fustos, 670 F.2d 134, 136-37 (9th Cir.1982); Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir.1975); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir.1973); Walker v. Walker, 509 F.Supp. 853, 855 (E.D.Va.1981).

139 See supra notes 135-37 and accompanying text.

140 N.Y.U. Comment, supra note 72, at 636-37; see supra notes 120-24 and accompanying text.

141 For example, in Boom Co. v. Patterson, 98 U.S. 403 (1878), removal to diversity court was upheld where the federal court was asked to determine de novo the value of land taken by the state government. Although noting that the power of eminent domain belongs to the states as an attribute of state sovereignty, the Court concluded that the question of valuation of land itself was resolvable through judicial inquiry, and that "[i]f that inquiry take the form of a proceeding before the courts between parties ... there is a controversy which is subject to the ordinary incidents of a civil suit, and its determination derogates in no respect from the sovereignty of the State." Id. at 406. In County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959), respondent had brought suit in district court, alleging that the county had unlawfully invoked the power of eminent domain; the district court abstained on the ground that retention of jurisdiction would constitute interference with the administration of local affairs. Id. at 188. The Supreme Court held that abstention was unwarranted: "the fact that a case concerns a State's power of eminent domain no more justifies abstention than the fact that it involves any other issue related to [state] sovereignty." Id. at 191-92.
This same principle holds true in the areas of probate, where federal courts hear all cases except the actual probate of a will and proceedings directly collateral to the probate. See infra note 204; see also McClellan v. Carland, 217 U.S. 268, 281 (1910) (federal court can hear case brought in diversity court to have plaintiffs declared sole heirs at law of decedent even though state was about to bring suit in state court to determine on escheat of the state; holding otherwise would result in federal court's "practically abandon[ing] its jurisdiction"); Gaines v. Fuentes, 92 U.S. 10 (1875) (removal to federal court is available in diversity suit whose object is the annulment of a decree probating a will).

142 For a discussion of federal adjudication of matters of substantial state interest, see generally Maryland Comment, supra note 117, at 382.

143 E.g., Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C.1976) (allowing federal courts to hear domestic relations cases would "greatly increase the workload of an already overburdened court system"); accord Iowa Comment, supra note 117, at 394; Maryland Comment, supra note 117, at 386.

144 Split marital domicile is, however, possible. E.g., Druen v. Druen, 247 F.Supp. 754, 755 (D.Colo.1965); Garberson v. Garberson, 82 F.Supp. 706 (N.D.Iowa 1949); W. Reese & M. Rosenberg, Cases and Materials on Conflict of Laws 23 (1978); Restatement (Second) of Conflict of Laws § 21 (1971).

145 28 U.S.C. § 1332 (1976).

146 The amount in controversy requirement would often be satisfied in divorce cases. See Druen v. Druen, 247 F.Supp. 754, 755 (D.Colo.1965); Vestal & Foster, supra note 32, at 28. Ordinarily, however, the citizenship of the parties to a divorce case is not diverse.

147 Clifford v. Williams, 131 F. 100, 102 (C.C.D.Wash.1904); Hoadly v. Chase, 126 F. 818, 823 (C.C.D.Ind.1904) (amount in controversy requirement not satisfied in habeas corpus proceeding involving an insane person); see also Senate Select Comm. on Presidential Campaign Activities v. Nixon, 366 F.Supp. 51, 60-61 (D.D.C.1973) (value of object of suit to compel production of Nixon tapes not quantifiable to meet $10,000 amount in controversy requirement under 28 U.S.C. § 1332 (1976)); Vestal & Foster, supra note 32, at 28 n. 132, 34-35.

148 If the award of alimony is modifiable, only amounts past due may be considered in calculating the amount in controversy, since future payments may be reduced or terminated at any time. If the award of alimony is not modifiable, payments subsequently accruing may be tabulated if the court is asked to adopt the decree as its own. See Keating v. Keating, 542 F.2d 910 (4th Cir.1976); Harrison v. Harrison, 214 F.2d 571 (4th Cir.1954).

149 See McGraw, Sterin & Davis, A Case Study in Divorce Law Reform and its Aftermath, 20 J.Fam.L. 443, 462-85 (1981-1982) (alimony in study awarded infrequently, and, when awarded, typically less than 20% of husband's income).

150 See supra notes 17-23, 31-34 and accompanying text.

151 In addition, litigants qualified to bring suit in diversity court may prefer to sue in state court for reasons including geographical convenience, court costs, and state expertise and knowledge of local conditions. See Currie, Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax, 34 U.Chi.L.Rev. 26, 51-52 (1966).

152 E.g., Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir.1982); Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C.1976).

153 286 U.S. 106, 114 (1932).

154 E.g., Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir.1982) (Federal courts "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."); Csibi v. Fustos, 670 F.2d 134, 137 (9th Cir.1982) ("state courts have more expertise in the field of domestic relations"); accord Walker v. Walker, 509 F.Supp. 853 (E.D.Va.1981); Iowa Comment, supra note 117, at 394-95; Maryland Comment, supra note 117, at 386.

155 See, e.g., Thrower v. Cox, 425 F.Supp. 570, 573-74 (D.S.C.1976) (States have specialized family courts, and in case then at bar, the federal judge would "be required to hear the ... sordid evidence concerning adultery."); Iowa Comment, supra note 117, at 394; Maryland Comment, supra note 117, at 386.

156 N.Y.U. Comment, supra note 72, at 637.

157 See Comment, 35 Brooklyn L.Rev. 313, 318-19 (1969).

158 Many courts, for example, apply the domestic relations exception narrowly and thus hear family related cases. Federal courts, for example, have already proved themselves competent to hear cases of tort or contract that arise in domestic settings. See supra notes 17-23, 31-34 and accompanying text.

159 195 F.Supp. 857 (D.Md.1961).

160 28 U.S.C. § 1350 (1976): "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

161 The court declined to dismiss on the grounds of the domestic relations exception as the action was brought under federal question and not diversity jurisdiction. 195 F.Supp. at 865; see also supra notes 17-23, 31-34 and accompanying text.

162 28 U.S.C. § 1294 (Supp. V 1981) authorizes the Third Circuit to hear appeals from the District Court of the Virgin Islands. When the Third Circuit hears such appeals, it functions as a territorial court. Magaziner v. Montemuro, 468 F.2d 782, 787 n. 4 (3d Cir.1972).

163 E.g., Francois v. Francois, 599 F.2d 1286 (3d Cir.1979), cert. denied, 444 U.S. 1021 (1980); Lee v. Lee, 537 F.2d 762 (3d Cir.1976); Hodge v. Hodge, 507 F.2d 87 (3d Cir.1975); Cox v. Cox, 457 F.2d 1190 (3d Cir.1972).

164 44 Cal.2d 465, 283 P.2d 19 (1955).

165 Id. at 474, 283 P.2d at 25.

166 This difficulty may not arise where the laws of the foreign state are identical to the laws of the forum state.

167 61 U.S. (20 How.) 170 (1857).

168 Id. at 175; accord Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909); Chicot County v. Sherwood, 148 U.S. 529, 533-34 (1893); Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868).

169 See Maureen F.G. v. George W.G., 445 A.2d 934 (Del.1982); supra note 58 and accompanying text.

170 E.g., Williams v. Green Bay & W.R.R., 326 U.S. 549, 556 n. 7 (1946); Slater v. Mexican Nat'l R.R., 194 U.S. 120 (1904).

171 The test proposed by this Note, however, incidentally resolves many of the fears expressed by courts that continue to use the exception. Under the proposed test, no flood of litigation would result from a new influx of domestic cases into federal court; federal courts would not be required to hear cases in which a state would invoke the aid of a state social service agency; federal courts would not decide cases that involved continuing litigation, and the jurisdiction of specialized state tribunals would remain intact. See infra notes 183-227 and accompanying text.

172 See supra ntoes 110-71 and accompanying text.

173 For example, in Commissioners of Road Dist. No. 2 v. St. Louis S.W. Ry., 257 U.S. 547 (1922), the Court was asked to determine the removability to federal court of a state county court proceeding to assess benefits and damages from a road improvement. Although noting that the state court proceedings were mainly legislative and administrative, id. at 553, the Court held that the case conformed to the article III requirements of a judicial case or controversy because it had "all the elements of a judicial controversy ... to wit, adversary parties and an issue in which the claim of one of the parties against the other [is] capable of pecuniary estimation ..., and is to be determined." Id. at 557; accord Fidelity Nat'l Bank v. Swope, 274 U.S. 123 (1927) (proceeding brought under city charter presents justiciable case or controversy).

174 U.S. Const. art. III, § 2, cl. 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, ... to Controversies ... between Citizens of different States...."

175 See, e.g., Flast v. Cohen, 392 U.S. 83, 96-97 (1968); Muskrat v. United States, 219 U.S. 346, 357 (1911); cf. Chayes, The Role of the Judge in Public Law Litigation, 89 Harv.L.Rev. 1281, 1282-83 (1976) (exposition of "traditional" model of litigation).

176 The assumption of a third-party role can be viewed as an impermissible exercise of nonjudicial powers. See Fontain v. Ravenel, 58 U.S. 369, 393 (1854) (Taney, C.J., dissenting):
The 2d section of the 3d article of the constitution declares that the judicial power of the United States shall extend to all cases in law and equity specified in the section. These words obviously confer judicial power and nothing more; and cannot, upon any fair construction, be held to embrace the prerogative powers, which the king as parens patriae, in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the constitution, extends only to cases over which the court of chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants, lunatics, or idiots, or charities, has not been conferred.
See also Johns v. Department of Justice, 653 F.2d 884, 894 n. 25 (5th Cir.1981) (article III of jurisdiction "does not extend to matters of sovereign prerogative power in which the state acts as parens patriae"); Anderson v. Gladden, 188 F.Supp. 666, 670 (D.Or.1960) (same).

177 The state court by acting as a third party expresses a strong state interest in the suit. This state interest differs from the state interest relied upon by courts invoking the domestic relations exception in that the latter is a state's general interest in having issues of state law litigated in state court. By contrast, the state interest involved in cases where the court assumes a third-party role changes the proceeding's nature. Because the state in these cases manifests its sovereignty through its courts, federal diversity courts are without constitutional adjudicatory authority lest they derogate "from the sovereignty of the State." Boom Co. v. Patterson, 98 U.S. 403, 406 (1878); see also supra notes 139-42 and accompanying text.

178 See Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813-16 (1976) (abstention appropriate to avoid federal-state friction); Younger v. Harris, 401 U.S. 37, 44-45 (1971) (abstention appropriate where federal jurisdiction invoked for purpose of restraining state criminal proceeding, under "Our Federalism"); cf. Martin v. Creasy, 360 U.S. 219, 224 (1959) (abstention allowed in suit challenging constitutionality of state eminent domain statute to avoid "unseemly conflict between two sovereignties, the unnecessary impairment of state functions, and the premature determination of constitutional questions").

The abstention advocated in this Note is appropriate only when the state third-party role reflects a genuine attribute of state sovereignty. Thus, a state court cannot assume a third-party role in all judicial proceedings. If the state did assume such a role, it could result in a denial of procedural due process. For example, if litigants in a contract dispute were not given an impartial tribunal by the state, the state could not claim that the tribunal was acting as a third party to further a legitimate sovereign interest of the state.

179 U.S. Const., art. III, § 2, cl. 1.

180 Flast v. Cohen, 392 U.S. 83, 96-97 (1968); cf. Fuller, The Forms and Limits of Adjudication, 92 Harv.L.Rev. 353, 369 (1978) ("Adjudication is a process of decision that grants to the affected party a form of participation that consists in the opportunity to present proofs and reasoned arguments.").

181 Moore v. Charlotte-Mecklenberg Bd. of Educ., 402 U.S. 47, 47-48 (1971); In re S.L.E. Inc., 674 F.2d 359, 360 (5th Cir.1982); Brown v. Wathins Motor Lines, 596 F.2d 129, 131-32 (5th Cir.1979); cf. 13 Wright & Miller, supra note 5, § 3530.

182 See infra notes 199-204 and accompanying text.

183 E.g., Williams v. North Carolina, 325 U.S. 226, 232 (1945) ("it is now settled that a suit for divorce is not an ordinary adversary proceeding").

184 See infra notes 185-86 and accompanying text.

185 See, e.g., Hill v. Rowles, 223 Ark. 115, 264 S.W.2d 638 (1954); McKim v. McKim, 6 Cal.3d 673, 493 P.2d 868, 100 Cal.Rptr. 140 (1972); Iovino v. Iovino, 58 N.J.Super. 138, 155 A.2d 578 (1959); Commonwealth v. Sanders, 187 Pa.Super. 494, 144 A.2d 749 (1958); Comment, The End of Innocence: Elimination of Fault in California Divorce Law, 17 U.C.L.A.L.Rev. 1306, 1323-25 (1970). See generally Foster, Conciliation and Counseling in the Courts in Family Law Cases, 41 N.Y.U.L.Rev. 353 (1966); Foster & Freed, Divorce Reform: Brakes on Breakdown?, 13 J.Fam.L. 443 (1973-1974); Hawke, Divorce Procedure: A Fraud on Children, Spouses and Society, 3 Fam.L.Q. 240 (1969); Maddi, The Effect of Conciliation Court Proceedings on Petitions for Dissolution of Marriage, 13 J.Fam.L. 495 (1973-1974).

186 Lickle v. Boone, 187 Md. 579, 585-86, 51 A.2d 162, 165 (1947); see also Hove v. Hove, 219 Minn. 590, 593, 18 N.W.2d 580, 582 (1945) (marriage contract cannot be viewed as ordinary contract as society and state have interest in preserving marriage); Van DeRyt v. Van DeRyt, 6 Ohio St.2d 31, 40, 215 N.E.2d 698, 706 (1966) ("the state is a party to every divorce and ... the court represents the state"; the court must guard vigilantly against collusion); Rheaume v. Rheaume, 107 R.I. 500, 504, 268 A.2d 437, 440 (1970) ("divorce proceedings differ substantially from all other civil actions in that the state is an interested party which seeks the preservation of the marital status"). One result of the "tripartite" structure of a divorce proceeding is that litigants in many states cannot stipulate facts that would entitle them to divorce, lest divorce be lightly granted. See, e.g., Sands v. Sands, 188 Conn. 98, 448 A.2d 822, 825 (1982), cert. denied, 103 S.Ct. 792 (1983); Dougherty v. Dougherty, 187 Md. 21, 28-29, 48 A.2d 451, 455 (1946).

The state's role as third party to a divorce proceeding has been recognized by the Supreme Court. In Williams v. North Carolina, 325 U.S. 226 (1945), the Court was asked to decide the full faith and credit effect to be given an ex parte divorce decree granted by a sister state. The Court held that a spouse domiciled in North Carolina was not necessarily bound by the determination of a Nevada court that the spouse seeking the divorce was a Nevada domiciliary. The Court based its decision on North Carolina's great interest in the marital affairs of its domiciliaries and viewed the state as a third party to a divorce. Although the North Carolina wife, who did not appear in the Nevada proceeding was bound by the Nevada decree, Williams v. North Carolina, 317 U.S. 287 (1942), the Court reasoned that "those not parties to a litigation ought not to be foreclosed by the interested actions of others; especially not a State which is concerned with the vindication of its own social policy." Williams v. North Carolina, 325 U.S. 266, 230 (1945).

187 See Foster & Freed, supra note 105, at 241.

188 See id. at 241-52.

189 See, e.g., Cal.Civ.Code § 4506(1) (West 1983); Iowa Code Ann. § 598.5(7) (West 1981); R.I.Gen.Laws § 15-5-3.1 (Supp.1980); see also Foster & Freed, supra note 105, at 241-43.

190 See, e.g., Idaho Code § 32-610 (1963) (5 yrs.); N.J.Stat.Ann. § 2A:34-2 (West Supp.1983) (18 mos.); S.C.Code Ann. § 20-3-10(5) (Law.Co-op.Supp.1982) (1 yr.); Vt.Stat.Ann. tit. 15, § 551(7) (1971) (6 mos.); see also Foster & Freed, supra note 105, at 243-44.

191 See, e.g., Ky.Rev.Stat. § 403.170 (Supp.1982); Mo.Ann.Stat. § 452.320(d), (e) (Vernon Supp.1982) (when divorce is contested); see also Foster & Freed, supra note 105, at 241-43.

192 McKim v. McKim, 6 Cal.3d 673, 679, 493 P.2d 868, 871, 100 Cal.Rptr. 140, 143 (1972); accord Flowers v. Flowers, 334 So.2d 856, 858 (Ala.1976); Sands v. Sands, 188 Conn. 98, 448 A.2d 822, 825 (1982), cert. denied, 103 S.Ct. 792 (1983); Campbell v. Campbell, 325 A.2d 188, 189 (D.C.1974); Riley v. Riley, 271 So.2d 181, 183-84 (Fla.Dist.Ct.App.1972); Martin v. Martin, 57 Ill.App.3d 486, 373 N.E.2d 602 (1974); Mattson v. Mattson, 376 A.2d 473 (Me.1977); Hagerty v. Hagerty, 281 N.W.2d 386, 388 (Minn.1979); Hawn v. Hawn, 505 S.W.2d 459, 463 (Mo.Ct.App.1974); Weber v. Weber, 200 Neb. 659, 265 N.W.2d 436 (1978).

193 Manion v. Manion, 143 N.J.Super. 499, 502, 363 A.2d 921, 923 (1976) (citation omitted); see also Sands v. Sands, 188 Conn. 98, 448 A.2d 822, 825 (1982), cert. denied, 103 S.Ct. 792 (1983).

194 Riley v. Riley, 271 So.2d 181, 184 (Fla.Dist.Ct.App.1972).

195 E.g., Cal.Civ.Code § 4508 (West Supp.1983); Cal.Civ.Proc.Code §§ 1740-1749 (West 1982) (if there is reasonable possibility of reconciliation, court may grant continuance for parties to go to conciliation court); Iowa Code Ann. § 598.16 (1981) (majority of judges in any district may, with cooperation of social welfare agency, establish a domestic relations division for counseling and related functions); Ky.Rev.Stat. § 403.033 (1972) ("The judge of any circuit court may appoint an advisory committee to counsel with litigants in divorce actions."); N.H.Rev.Stat.Ann. § 458:7-a (1979) (whenever "Court shall determine that there is a likelihood for rehabilitation of the marriage relationship, the court shall refer the parties to an appropriate counseling agency"). See generally Foster & Freed, supra note 185.

196 See Edmond v. Edmond, 20 Ill.App.3d 40, 44-45, 312 N.E.2d 766, 770-71 (1974); cf. Fuller, supra note 180, at 388-91.

197 See Romanchuk v. Romanchuk, 39 Mich.App. 634, 197 N.W.2d 874 (1972); Husting v. Husting, 54 Wis.2d 87, 194 N.W.2d 800 (1972); Annot., 14 A.L.R.3d 703 (1967).

198 See Lagarde v. Lagarde, 437 A.2d 872 (Me.1981); Annot., 13 A.L.R.3d 1364 (1967).

199 Chicago & G.T. Ry. v. Wellman, 143 U.S. 339, 345 (1892); accord Flast v. Cohen, 392 U.S. 83, 96-97 (1968); Muskrat v. United States, 219 U.S. 346, 357 (1911).

200 Probably fewer than ten percent of all divorces are contested. Mnookin & Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 951 n. 3 (1979); see also 1 L. Marshall & G. May, The Divorce Court 199 (1932).

201 Moore v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 47, 48 (1971); see also supra notes 179-80 and accompanying text. Uncontested divorce is clearly not a case or controversy when both parties appear before the court and express a mutual desire for a divorce. In the event of uncontested ex parte divorce, it is often reasonable to presume that the nonappearing spouse assents to the divorce. See Mnookin & Kornhauser, supra note 200. In this respect a no-fault divorce is distinguishable from an ordinary default judgment.

202 Divorce petitions based on grounds of fault are more likely to be denied than ones based on no-fault. See, e.g., Fox v. Fox, 277 S.C. 400, 288 S.E.2d 390 (1982) (divorce on ground of adultery reversed as not established by a clear preponderance of the evidence; counterclaim for divorce based on one year's continuous separation

granted); cf. Palmer v. Palmer, 281 N.W.2d 263 (S.D.1979) (decree of divorce reversed; evidence insufficient to sustain charge of extreme cruelty).

203 Mnookin & Kornhauser, supra note 200, at 951 n. 2; accord Dickson v. Dickson, 238 Ga. 672, 678-79, 235 S.E.2d 479, 484-85 (1977) (Ingram, J., concurring). This phenomenon results from the reality that "[a]s a practical matter, no answer can be made to the allegation of breakdown if one spouse firmly insists the marriage is at an end." Glendon, Marriage and the State: The Withering Away of Marriage, 62 Va.L.Rev. 663, 705 (1976); accord Grotelueschen v. Grotelueschen, 113 Mich.App. 395, 398-99, 318 N.W.2d 227, 229 (1982) ("If either party in a marriage relationship is unwilling to live together, then the objects of matrimony have been destroyed."); M. Wheeler, No-Fault Divorce 30 (1974); Foster & Freed, supra note 185, at 446-47 (in California and other states, "divorce is available upon unilateral demand"); cf. Friedman & Percival, A Tale of Two Courts: Litigation in Alameda and San Benito Counties, 10 Law & Soc'y Rev. 267, 296 (1976) (state trial courts studied generally perform routine administration rather than dispute settlement). The increasing ability of one party to terminate a marriage over his spouse's objections is evident also in fault divorce, where, as in no-fault, corroboration of allegations of the statutory requirements for divorce may need to be relatively "slight." Nesmith v. Nesmith, 112 Ariz. 248, 250, 540 P.2d 1229, 1231 (1975) (divorce on ground of desertion); accord Fleck v. Fleck, 79 N.D. 561, 566-67, 58 N.W.2d 765, 769 (1953); see also Riley v. Riley, 271 So.2d 181, 183 (Fla.Dist.Ct.App.1972) (no fault; no corroboration required); Garner v. Garner, 257 Md. 723, 264 A.2d 858 (1970) (no-fault requirement of voluntary separation).

204 In the analogous area of probate, see Ellis v. Davis, 109 U.S. 485, 497 (1883):
The original probate, of course, is mere matter of State regulation, and depends entirely upon the local law; ... no instrument can be effective as a will until proved, no rights in relation to it, capable of being contested between parties, can arise until preliminary probate has been first made. Jurisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is ex parte and merely administrative, it is not conferred....
Accord Farrell v. O'Brien, 199 U.S. 89, 107 (1905).

205 See, e.g., Blumenthal v. Monumental Sec. Storage, Inc., 271 Md. 298, 302-03, 316 A.2d 243, 245-46 (1974); Russell v. Russell, 50 Md.App. 185, 436 A.2d 524 (1981); Cal.Civ.Code § 4351 (West Supp.1982); Del.Code Ann. tit. 13, § 1513 (1974); V.I.Stat.Ann. tit. 33, § 2305(d) (1967).

206 See Stridiron v. Stridiron, 698 F.2d 204 (3d Cir.1983) (court can make equitable distribution of real property only when divorce granted); Russell v. Russell, 50 Md.App. 185, 436 A.2d 524 (1981) (statute enabled court to distribute marital property within specified time after granting divorce; court lost jurisdiction to divide property when it made property award after such period had expired, and property determination was therefore nugatory); Kozlowski v. Kozlowski, 80 N.J. 378, 383, 403 A.2d 902, 905 (1979) (palimony suit: "equitable distribution [of property] is awarded only in actions for divorce").

207 See infra note 211.

208 654 F.2d 1212 (6th Cir.1981).

209 Id. at 1217.

210 The court feared that "the district court would have to hear extensive evidence on the parties' personal needs and finances, and would have to interpret and apply the provisions of the divorce decree to determine what sums are due the appellants." Id. As long as the federal court is able effectively to apply state law, such fears alone are not adequate reasons for declining jurisdiction.

211 Similarly, disputes over property distribution would be cognizable in federal court if, under state law, such disputes could be litigated entirely independently from divorce and the court were not asked to assume a third-party role. Cf. N.M.Stat.Ann. § 40-4-3 (1978) (husband and wife may institute proceedings to divide property without seeking divorce); N.M.Stat.Ann. § 40-4-20 (1978) (failure of parties to divide property during divorce proceedings does not bar them from bringing issue to court later).

212 See Winter v. Crowley, 374 F.2d 317, 320 (D.C.Cir.1967); Ziehm v. Ziehm, 433 A.2d 725, 728 (Me.1981); Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925); Harvard Developments, supra note 136, at 1198-99, 1221-42; supra notes 175-78 and accompanying text.

213 Huls v. Smith, 252 S.W.2d 917, 918-19 (Ky.1952); accord Seymour v. Seymour, 180 Conn. 705, 433 A.2d 1005 (1980); Owen v. Owen, 427 A.2d 933, 938 (D.C.1981); Huff v. Huff, 444 A.2d 396, 398 (Me.1982); Forde v. Sommers, 117 N.H. 356, 360, 373 A.2d 358, 360 (1977); Foster & Freed, Child Custody (pt. 1), 39 N.Y.U.L.Rev. 423 (1964); Foster, supra note 185; Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, Law & Contemp.Probs., Summer 1975, at 226. For a suggestion that the "best interests" standard is constitutionally mandated, see Strickmann, Marriage, Divorce and the Constitution, 15 Fam.L.Q. 259, 328-29 (1982).

214 Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 626 (1925) (citation omitted). A court may, if it finds that the best interests of the child so require, award custody to nonparents. See Foster, supra note 185, at 435 & n. 57 (citing cases).

215 See, e.g., Owen v. Owen, 427 A.2d 933 (D.C.1981).

216 In re Arnold, 286 Pa.Super. 171, 173-74, 428 A.2d 627, 628 (1981).

In addition, child custody proceedings are inappropriate for resolution in federal court because they transgress the "forms and limits of adjudication." See generally Eisenberg, Participation, Responsiveness, and the Consultative Process: An Essay for Lon Fuller, 92 Harv.L.Rev. 410 (1978); Fuller, supra note 180. Professor Mnookin identifies four major areas in which child custody litigation differs from regular judicial proceedings. Mnookin, supra note 213. First, the inquiry does not concern an identified set of facts and their legal consequences, but is "person oriented," as the court must evaluate "what kind of person each parent is, and what the child is like." Id. at 251. Second, the controversy does not revolve around a set of completed events, but requires the court to make an "individualized prediction" as to which parent will be better for the child in future years. Id. at 251-52. Third, the inquiry demands consideration of interdependent factors; for example, "awarding custody to the mother may affect the father's behavior, which, in turn, can affect the mother's behavior and the child. The possibility of such feedback must be considered in applying the best-interests standard." Id. at 252-53. Fourth, the "best-interests" standard is itself vague, and since the trial judge has very wide discretion in awarding custody, no authoritative standards have been formulated. Id. at 253-54, 255-62.

Professor Fuller has suggested that a judge applying the best-interests standard is " 'not applying legal rules at all, but is exercising administrative discretion.' " Id. at 255 (quoting Fuller, Interaction Between Law and its Social Context 11 (1971) (unpublished manuscript) (on file at the offices of the Columbia Law Review); see also Foster & Freed, supra note 213, at 438-43. Finally, not all interested parties have an opportunity to participate. The ability of those seeking custody to affect the outcome is lessened by the fact that the court need not base its decision on the proofs and arguments presented by the litigants; it can take on a third-party role in determining the best interests of the child. The party most affected—the child—is not a true participant in the litigation, as the child's preferences as to who should have custody are normally not controlling, Mnookin, supra note 213, at 254 & n. 149; Harvard Developments, supra note 136, at 1345-50, and the child is either without outside representation or bound by the decision of his representative. Mlyniec, The Child Advocate in Private Custody Disputes: A Role in Search of a Standard, 16 J.Fam.L. 1 (1977-1978); Mnookin, supra note 213, at 254-55.

Professor Mnookin suggests that the peculiar characteristics of child custody litigation set it apart from traditional adjudication and that use of the best-interests standard is inappropriate for judicial proceedings. On a federal level, these attributes of child custody disputes involving the best-interests standard cause such proceedings to transgress the limitations of the case or controversy requirement of article III. See supra notes 175-76 and accompanying text.

217 See supra notes 177-78 and accompanying text.

218 See supra notes 175-76 and accompanying text. Because the suggested approach is grounded mainly in article III jurisprudence, it is applicable to federal courts asked to make child custody determinations in a nondiversity context. See supra note 7. Under this approach, the court in Abdul-Rahman Omar Adra v. Clift, 195 F.Supp. 857

(D.Md.1961), improperly made a determination as to the custody of a child residing in Maryland, as this decision caused the federal court to assume the position of the state. See supra notes 175-78 and accompanying text.

219 694 F.2d 489 (7th Cir.1982).

220 The punitive damages issue was not raised on appeal. Id. at 494.

221 Id.; see also Bennett v. Bennett, 682 F.2d 1039 (D.C.Cir.1982).

222 See Ruffalo v. Civiletti, 702 F.2d 710 (8th Cir.1983) (federal injunction for parent to obey state custody decree not within exception).

223 See Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C.Cir.1982) (awarding injunctive relief to compel return of child according to state custody decree would "require an inquiry into the present interests of the minor children"); cf. id. at 1045 (Edwards, J., dissenting in part) (distinguishing between determining custody of children and enforcing custody decree).

224 Federal courts should look at how state law mandates the state courts to act and should not rely on how state courts characterize particular actions. However, it is more likely that third-party interest exists in a case if state courts characterize it as domestic, rather than as tort or contract.

225 365 F.Supp. 1019 (D.Or.1973).

226 502 F.Supp. 268 (C.D.Cal.1980).

227 Similar principles should guide federal courts in paternity suits. If, under state law, the court sits to represent the state, jurisdiction should be denied. If, however, the suit involves simple fact-finding to establish paternity and application of general equitable principles to determine support, there should be no bar to federal jurisdiction.

83 CLMLR 1824

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