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The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation

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NOTES

THE DOMESTIC RELATIONS EXCEPTION TO DIVERSITY JURISDICTION: A RE-EVALUATION

The First Judiciary Act of 1789,[1] creating the federal court system, vested in the lower federal courts power to hear controversies between citizens of different states.[2] Today, original jurisdiction over diversity cases lies with the federal district courts pursuant to Title 28 of the United States Code.[3] On its face, 28 U.S.C. section 1332 appears to grant district courts unrestricted power to hear cases between litigants of diverse citizenship, subject only to the condition that the amount in controversy exceed $10,000.[4] Despite the apparent breadth of the jurisdiction granted, there are cases in which the federal courts will not act, though the statutory requirements of diversity of citizenship and $10,000 in controversy have been satisfied.[5] One judicially created exception to such diversity jurisdiction is the domestic relations exception.[6] Generally stated, this exception excludes from federal court diversity jurisdiction the power to hear domestic matters, including the power to grant divorces, or to determine alimony, support or child custody rights.[7] The domestic relations exception originated in the dicta of two Supreme Court cases.[8] In applying the exception, many federal courts have interpreted the phrase "domestic rela-

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[1] Act of Sept. 24, 1789, Sec. 11, 1 Stat. 78.

[2] *And be it further enacted*, That the circuit courts shall have original cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and ... the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Id. Congress enacted this statute pursuant to Article III of the Constitution, which provides in part: "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.... (t)he judicial Power shall extend ... to Controversies ... between Citizens of different States...." U.S. CONST. art. III, §§ 1,2. The power to hear controversies between citizens of different states is commonly referred to as diversity jurisdiction. C. WRIGHT, LAW OF FEDERAL COURTS § 23, at 85 (3d ed. 1976).

[3] 28 U.S.C. § 1332 (1976 & Supp. III 1979). Original jurisdiction over diversity cases was originally vested in the circuit courts, pursuant to the First Judiciary Act. C. WRIGHT, *supra* note 2, § 1, at 4. For the relevant language of the statute, see *supra* note 2. Diversity jurisdiction was established in the district courts with the enactment of the Judicial Code of 1911, which abolished the circuit courts and transferred their jurisdiction to the district courts. *See id.* at 6.

[4] "The district courts shall have original jurisidiction of all civil action 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...." *Id.*

[5] *See* C. WRIGHT, *supra* note 2, § 25, at 96-99.

[6] *Id.* at 97. Another judicially created exception is the probate exception. For a general discussion of the probate exception to diversity jurisdiction, see C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3610 (1975).

[7] Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.), *cert. denied*, 103 S. Ct. 372 (1982).

[8] *Id. See In re* Burrus, 136 U.S. 586, 593-94 (1890); Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858).

tions'' expansively.[9] Thus, the doctrine has been applied to exclude a myriad of cases from the courts' jurisdiction.[10]

Acceptance of the domestic relations exception has not, however, been universal. Critics of the exception focus on three specific issues: the doctrine's source in dicta,[11] its broad scope as applied by the federal courts today,[12] and the various justifications developed for it by these same courts.[13] Despite these criticisms, the domestic relations exception has remained well entrenched in the law of federal courts. The courts appear to be unwilling to abolish it, absent word from Congress or the Supreme Court to the contrary.[14]

Criticism of the exception is well taken. Despite its long history, there are several reasons why the doctrine is, as currently applied, in need of re-evaluation. First, the exception does not apply to all cases which involve family members.[15] Rather, it is applicable only to ''true domestic relations claims.''[16] The federal courts have developed methods for determining whether such ''true claims'' are present. These methods, however, are not satisfactory because they cannot, in some cases, be applied consistently and because they may produce results which are inequitable. Second, the justifications offered for the doctrine by the federal courts are not convincing support for the doctrine. These justifications, whether based on jurisdictional[17] or policy grounds,[18] are either no longer valid, due to changes in the law of federal courts, or based on fallacious reasoning. Thus, they do not justify a doctrine which has developed from unexplained dicta and which has, in general, been

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[9] Spindel v. Spindel, 283 F. Supp. 797, 806 (E.D.N.Y. 1968).

[10] For examples of cases applying the domestic relations exception, see Sutter v. Pitts, 639 F.2d 842 (1st Cir. 1981) (suit to redress frustration of civil rights due to disobedience of visitation and custody orders); Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (suit to establish paternity and child support); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967) (suit to establish custody and visitation rights); Albanese v. Richter, 161 F.2d 688 (3rd Cir.) (suit by illegitimate child against putative father to invalidate fraudulently obtained agreement), *cert. denied*, 332 U.S. 782 (1947); Carqueville v. Woodruff, 153 F.2d 1011 (6th Cir. 1946) (habeas corpus proceedings for child custody); Williamson v. Williamson, 306 F. Supp. 516 (W.D. Okla. 1969) (suit for division of marital assets); *In re* Freiberg, 262 F. Supp. 482 (E.D. La. 1967) (adoption proceedings); Bercovitch v. Tanburn, 103 F. Supp. 62 (S.D.N.Y 1952) (suit to recover money for necessaries supplied to wife); Linscott v. Linscott, 98 F. Supp. 802 (S.D. Iowa 1951) (action to have property settlement declared void on grounds of fraud and duress); Garberson v. Garberson, 82 F. Supp. 706 (N.D. Iowa 1949) (suit for maintenance).

[11] *See* Solomon v. Solomon, 516 F.2d 1018, 1030 (3rd Cir. 1975) (Gibbons, J., dissenting).

[12] *See id.;* Spindel v. Spindel, 283 F. Supp. 797, 806 (E.D.N.Y. 1968). *Cf.* Phillips Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir. 1973) (suggesting that the domestic relations exception has been narrowly confined).

[13] *See* Spindel v. Spindel, 283 F. Supp. at 806-10.

[14] Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1981); Armstrong v. Armstrong, 508 F.2d 348, 349-50 (1st Cir. 1974); Blank v. Blank, 320 F. Supp. 1389, 1391-92 (W.D. Pa. 1971); Druen v. Druen, 247 F. Supp. 754, 756 (D. Colo. 1965).

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

[16] *Id.*

[17] *See infra* notes 63-75 and accompanying text.

[18] *See infra* notes 76-80 and accompanying text.

applied by the federal courts without sufficient reasoned explanation. Finally, the validity of the domestic relations exception itself currently is being challenged. The recognition of federal constitutional rights pervading the field of state law pertaining to the family has severely undermined the basic premise on which the exception is based.[19] This trend signals the need to reconsider a doctrine based on the notion that resolution of family matters belongs solely to the states, and not the federal government.

This note will suggest that the domestic relations exception ought to be abolished. First, the note examines the historical development of the domestic relations exception, tracing its origin to the dicta of two Supreme Court cases decided in the nineteenth century. The development of this dicta into currently held doctrine will then be explored. The post hoc justifications offered by federal courts for both the dicta and the domestic relations exception it spawned will be described, as will the methods developed by the federal courts to determine what matters fall within the exception. This discussion will illustrate that the domestic relations exception has grown into a well-established, but inconsistent and confusing doctrine which excludes from federal diversity jurisdiction controversies involving many different aspects of domestic law. In the next section, an analysis of the domestic relations exception will be presented. The analysis will begin by critiquing the current application of the exception. First, the potential for undesirable outcomes inherent in the methods of applying the exception will be illustrated. Second, the fallacies in the justifications offered for the domestic relations exception will be addressed. It will be submitted that problems in applying and justifying the exception suggest the need to re-evaluate it. Then the analysis will proceed with a critique of the theory behind the exception. A discussion of the recent trend in the area of federal constitutional rights pervading the field of family law will be presented, and the inconsistency of the exception with this trend will be suggested. This note will argue that because the exception is based on a notion no longer reflecting the reality of federal law regarding the family, it ought to be abolished. Federal court jurisdiction should be extended to domestic controversies which otherwise meet the requirements of diversity jurisdiction.

I. Development of the Domestic Relations Exception

While the domestic relations exception is, at present, well-entrenched in the law of federal courts, this was not always the case. Rather, the exception as currently applied by the courts is the product of a 125 year evolution, through which the dicta of two Supreme Court cases has been reiterated, justified and developed by the lower federal courts. An understanding of the reasons why the exception is no longer valid requires first an understanding of how the exception has developed. Thus, before an argument for abolition of the exception

[19] *See infra* notes 260-93 and accompanying text.

is proffered, the historical development of it will be presented in three parts: historical source, justifications, and application.

A. *Historical Source*

The domestic relations exception, invoked by the federal courts to exclude from federal diversity jurisdiction a range of disputes falling within or closely related to the field of domestic relations,[20] has its source in Supreme Court dicta. The Court first considered the role of federal courts in family law matters over a century ago in *Barber v. Barber*.[21]

Barber involved an appeal from an order issued from the equity side of the United States district court for the district of Wisconsin.[22] The order mandated that the defendant pay alimony due the plaintiff pursuant to a divorce decree rendered by a New York state court.[23] On appeal, the Supreme Court affirmed the district court's decree.[24] In doing so, the Court held that a divorce decree from a state court having jurisidiction over the parties will have the same effect in every state, and that such a decree may be enforced by the equity courts of the United States.[25] The Supreme Court prefaced its discussion of the case with a caveat as to the scope of the federal courts' power in cases like the one before it. The Court noted that the plaintiff had not asked the district court for the allowance of alimony because alimony had already been granted by a state court of competent jurisdiction.[26] Rather, the district court was asked only to prevent that decree from being avoided by fraudulent behavior on the part of the defendant.[27] The Court then noted that federal courts do not have jurisdiction over the subject of divorce or alimony.[28] In this significant dicta[29] the Su-

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[20] Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1981); Bossom v. Bossom, 551 F.2d 474, 475 (2d Cir. 1976). Some courts have, however, advocated a narrower scope of the exception. *See* Wasserman v. Wasserman, 671 F.2d 832, 835 (4th Cir.), *cert. denied,* 103 S. Ct. 372 (1982); Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980); Spindel v. Spindel, 283 F. Supp. 797, 806 (E.D.N.Y. 1968).

[21] 62 U.S. (21 How.) 582 (1858).

[22] *Id.* at 583.

[23] *Id.* at 587. The plaintiff, Huldah Barber, had previously made an application for a divorce from the defendant, Hiram Barber, in the Court of Chancery for the fourth district of the state of New York. *Id.* at 584-85. A decree of divorce *a mensa et thoro* (from bed and board) was issued from that court, ordering the defendant to pay to the plaintiff $360 per year in support. *Id.* at 585. Shortly after the decree was issued, the defendant left New York and established domicile in Wisconsin. *Id.* at 584. He thereafter refused to make the payments ordered in the divorce decree. *Id.* at 585. The plaintiff brought suit in federal district court in Wisconsin to enforce the terms of the divorce decree. *Id.* at 586. She received from that court a decree ordering the defendant to pay to the plaintiff $5,936.80, the alimony due at the time of suit, plus interest. *Id.* at 587.

[24] *Id.* at 600.

[25] *Id.* at 591. The Court reached its decision by reasoning that because equity courts in England had the power to enforce alimony decrees granted by the ecclesiastical courts, and because the equity courts of the United States have the same jurisdiction as the English equity courts, therefore United States equity courts may enforce state divorce decrees. *Id.* at 590-92.

[26] *Id.* at 584.

[27] *Id.*

[28] *Id.*

[29] "We disclaim altogether any jurisdiction in the courts of the United States upon the

preme Court laid the foundation for the principle that federal courts do not have jurisdiction to hear domestic relations matters. This principle of no jurisdiction, rather than the narrower *Barber* holding that federal jurisdiction exists to enforce accrued alimony, has been repeatedly cited to and elaborated on by federal courts.[30]

The principle of no jurisdiction over claims for divorce or alimony enunciated in *Barber* was broadened by the Supreme Court in *In re Burrus*.[31] In *Burrus*, the Court entertained a writ of habeas corpus brought by Thomas Burrus, who had been imprisoned for disobeying a child custody order issued by a federal district court in a habeas corpus proceeding.[32] Burrus argued that he had been improperly imprisoned because the federal court did not have jurisdiction to hear the original habeas corpus proceeding, and, therefore, he could not be imprisoned for disobeying the court.[33]

The Supreme Court agreed with Burrus and issued the writ.[34] After discussing the history of the writ of habeas corpus, the Court stated that the United States courts, and the judges and justices of these courts, are authorized to issue the writ of habeas corpus in any case in which a party is imprisoned or held in custody in violation of a United States law, the Constitution, the law of

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subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board." *Id.* The different types of divorce were adopted from the English ecclesiastical courts which originally had exclusive jurisdiction over divorce. CLARK, LAW OF DOMESTIC RELATIONS § 11.1 at 281 (1968). Under ecclesiastical law, true divorce could never be granted. *Id.* Divorce *a vinculo* was the predecessor to modern suits to annul. *Id.* § 3.1, at 119. Divorces *a vinculo* were freely given for impediments existing when the parties married. *Id.* § 11.1, at 281. Divorce from bed and board (divorce *a mensa et thoro*) was a limited divorce granted for adultery and cruelty. *Id.* Parties who received a divorce from bed and board could not remarry. *Id.*

[30] Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 24 (1956). Federal courts have relied on *Barber* as grounds for the dismissal of suits involving a variety of situations relating to divorce and other aspects of domestic law. *See, e.g.*, Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968) (suit to establish paternity and child support); Morris v. Morris, 273 F.2d 678, 682 (7th Cir. 1960) (enforcement of divorce decree still subject to modification); Druen v. Druen, 247 F. Supp. 754, 756 (D. Colo. 1965) (suit to establish common law marriage); Manary v. Manary, 151 F. Supp. 446, 448 n. 3 (N.D. Cal. 1957) (suit to vacate divorce decree and for award of community property); Garberson v. Garberson, 82 F. Supp. 706, 709 (N.D. Iowa 1949) (suit for separation, support and custody); Gonzales v. Gonzales, 74 F. Supp. 883, 885 (E.D. Pa. 1947) (suit to enforce support decree).

[31] 136 U.S. 586 (1890).

[32] *Id.* Burrus and his wife were the grandparents of a child born to Louis and Evelyn Miller. *Id.* at 587. When Evelyn Miller took ill, Louis Miller asked the Burruses to care for the child. *Id.* Evelyn Miller died, and Louis Miller remarried. *Id.* He tried to regain possession of the child, but the Burruses refused to give back the child. *Id.* Miller applied to the district court in Nebraska for a writ of habeas corpus to recover the child. *Id.* The district court held that the child was improperly detained by the Burruses and ordered that Miller be given custody of the child. *Id.* at 588. The Burruses initially delivered the child to Miller, but subsequently retook the child by force from Miller's home in Ohio, and brought her to Nebraska. *Id.* Burrus was called before the district court by a writ of attachment for contempt in disobeying the court, and was committed to jail for three months in the custody of the United States Marshall for Nebraska. *Id.* at 588-89.

[33] *Id.* at 589.

[34] *Id.* at 597.

nations, or a United States treaty.[35] In considering whether such a requirement was met in the habeas corpus proceeding to recover custody of the child, the Court stated that the area of domestic relations between husband and wife, and between parent and child, is one belonging to state and not federal law.[36] The right to control and possess a child does not, therefore, depend on an Act of Congress, a treaty, the law of nations or the Constitution.[37] As a result, the Court held, the writ for custody of the child should not have been issued by a federal court, and Burrus could not be imprisoned for disobeying it.[38] As in *Barber,* the Court cited no authority for the proposition that domestic law matters belong to the states.

In *Burrus,* the Supreme Court dealt with a habeas corpus proceeding that had been brought in a federal *district* court. At the time that *Burrus* was decided, district courts had limited jurisdictional powers that did not include general diversity jurisdiction.[39] The *Burrus* court specifically left open whether jurisdiction over the writ would have been proper if the writ had been brought in a circuit court,[40] which had original diversity jurisdiction.[41] Nevertheless, federal courts consistently have relied on the broad language of *Burrus* as precedent for declining jurisdiction in diversity cases involving family related controversies.[42]

The Supreme Court again considered the propriety of federal court jurisdiction over domestic matters in three other cases decided shortly after *Burrus.* Reiterating in these cases its broad disclaimer of jurisdiction over domestic matters, the Court nevertheless recognized in the federal judiciary power to hear domestic law controversies where jurisdiction is not based on diversity of citizenship. In *Simms v. Simms,*[43] the Supreme Court entertained an appeal from the Supreme Court of the territory of Arizona, which had affirmed a territorial district court's decision in a divorce action.[44] There the Court reaf-

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[35] *Id.* at 591.

[36] "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." *Id.* at 593-94.

[37] *Id.* at 594.

[38] *Id.* at 596.

[39] Solomon v. Solomon, 516 F.2d 1018, 1032 (3d Cir. 1975) (Gibbons, J., dissenting). At the time *Burrus* was decided, the circuit courts had general diversity jurisdiction. *See supra* note 3.

[40] *In re* Burrus, 136 U.S. 586, 596 (1890).

[41] C. WRIGHT, *supra* note 2, § 1, at 4. Diversity jurisdiction was not extended to the federal district courts until 1911. *See supra* note 3.

[42] For examples of diversity cases citing *Burrus* as grounds for dismissal based on lack of jurisdiction, see Wilkins v. Rogers, 581 F.2d 399, 403 (4th Cir. 1978) (suit to determine title to realty purchased during marriage); Gargallo v. Gargallo, 487 F.2d 914 (6th Cir. 1973) (suit for perjury committed in divorce proceedings, conversion and malicious prosecution); Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968) (suit to establish paternity); Hernstadt v. Hernstadt, 373 F.2d 316, 317 (2d Cir. 1967) (suit involving dispute over visitation rights); Morris v. Morris, 273 F.2d 678, 682 (7th Cir. 1960) (suit to enforce separation agreement); Bacon v. Bacon, 365 F. Supp. 1019, 1020 (D. Or. 1973) (suit for intentional infliction of emotional distress caused by withholding support payments); *In re* Freiberg, 262 F. Supp. 482, 484 (E.D. La. 1967) (adoption proceedings).

[43] 175 U.S. 162 (1899).

[44] *Id.* at 163.

firmed its language in *Barber* and *Burrus* that domestic matters, including divorce and alimony, are state and not federal concerns.[45] The Court specified, however, that this restriction did not apply to jurisdiction over domestic suits in territorial district courts, or to appeals from the same.[46] The *Simms* Court therefore upheld its own appellate jurisdiction in the case.[47]

Seven years later, the Court again considered a question of appellate jurisdiction over domestic relations suits in *De La Rama v. De La Rama.*[48] In *De La Rama,* the Court upheld its appellate jurisdiction over appeals from the Phillipines courts concerning domestic controversies.[49] The Court stated once again that the United States courts have no jurisdiction over divorce and alimony.[50] This is so, the Court suggested, because the requirements of diversity jurisdiction cannot be met in domestic controversies.[51] While reaffirming its earlier dicta and offering for the first time a reason for the dicta, the *De La Rama* Court nevertheless held that such a limitation did not apply to appeals from the Phillipine courts.[52] The *De La Rama* court alluded to a possible rationale for this distinction. The Court suggested, as it had in *Simms,*[53] that the role of the federal legislature and presumably the federal courts as well, in the territories is that analogous to state, and not federal, government.[54] The Court suggested, therefore, that the considerations in *Barber* and *Burrus,* which distinguish between state and federal roles in domestic matters, do not apply in territorial cases and appeals from the same.[55]

The Supreme Court's final significant decision addressing the scope of federal jurisdiction over domestic relations matters was *Ohio ex rel. Popovici v. Agler.*[56] *Popovici* involved a suit brought in the Supreme Court for a writ of prohibition to stop a divorce action instituted by the wife of a foreign vice consul in a state court.[57] The petitioner argued that because Congress had granted to

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[45] *Id.* at 167.

[46] *Id.* at 167-68.

[47] *Id.* at 168.

[48] 201 U.S. 303 (1906).

[49] *Id.* at 308. *De La Rama* involved an appeal from a divorce suit brought in a Court of First Instance in the Phillipines. *Id.* at 304.

[50] *Id.* at 307.

[51] *Id.* The Court offered two reasons for the statement. First, husbands and wives could not, historically, be citizens of different states for purposes of establishing diverse citizenship so long as the marriage relationship continued. *Id.* This is so because at common law, the legal existence of a wife was incorporated into that of her husband, thus destroying her capacity to establish domicile independent of his. CLARK, *supra* note 29, § 4.3, at 149. Second, the Court noted, a suit for divorce itself involves no pecuniary value. De La Rama v. De La Rama, 201 U.S. at 307. Thus, the jurisdictional amount could not be met.

[52] *Id.* at 308.

[53] Simms v. Simms, 175 U.S. 162, 168 (1899).

[54] De La Rama v. De La Rama, 201 U.S. 303, 308 (1906).

[55] *Id.* By recognizing federal court jurisdiction over such cases, the Court effectively limited the broad disclaimer previously proclaimed in *Barber* and *Burrus* to cases based on diversity jurisdiction, an interpretation of the exception currently followed by the federal courts. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3609, at 662.

[56] 280 U.S. 379 (1930).

[57] *Id.* at 379. The petitioner's wife had originally brought the action in federal court,

federal courts exclusive jurisdiction over all suits and proceedings against vice consuls, the divorce could be maintained only in a United States court.[58] The Supreme Court held that the state court could grant the divorce and denied the writ.[59] In doing so, the Court reasoned that the "suits against consuls and vice consuls" referred to in the federal jurisdictional statute[60] encompassed only "ordinary civil proceedings," and not matters formerly heard by the ecclesiastical courts.[61]

In summary, the Supreme Court, through its dicta in *Barber* and *Burrus,* and later in *Popovici,* laid the foundation for a domestic relations exception to diversity jurisdiction of the federal courts. While the Court's decisions in *Simms* and *De La Rama* limited the broad disclaimer promulgated in *Barber* and *Burrus* by recognizing jurisdiction in non-diversity cases, the disclaimer nevertheless remained applicable to domestic controversies based on diversity jurisdiction. The failure of the Supreme Court to explain fully the disclaimer, however, left an opportunity for the lower courts to supply a convincing rationale for applying the exception to cases presumably meeting the requirements of diversity jurisdiction. Thus, the next phase in the evolution of the domestic relations exception involved the development of justifications for the exception by the lower federal courts.

B. *Justifications for the Domestic Relations Exception*

In neither *Barber* nor *Burrus* did the Supreme Court give any reasons why federal courts may not hear domestic controversies.[62] Justifications for the ex-

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but this suit was dismissed for lack of jurisdiction. Popovici v. Popovici, 30 F.2d 185 (N.D. Ohio 1927).

[58] *Id.* at 382. The petitioner relied on the statutory and constitutional grants of power to the federal courts: "The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls;. . ." U.S. CONST. art. III, § 2; "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 . . . Of all suits and proceedings against . . . consuls or vice consuls." Act of March 3, 1911, ch. 231, § 256, 36 Stat. 1160-61.

[59] Ohio *ex. rel.* Popovici v. Agler, 280 U.S. 379, 384 (1930).

[60] See the relevant language of the statute noted *supra* note 58.

[61] Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 384 (1930). In construing the statute granting to the federal courts exclusive authority to hear suits against vice consuls, the Court, relying on the dicta in *Barber* and *Burrus*, considered the assumptions operative at the time the statute was passed. *Id.* at 383. The Court noted that when the Constitution was adopted, domestic matters were commonly understood as reserved for regulation by the states. *Id.* at 383-84. This is so, the Court implied, because the power to hear divorce and other domestic matters, originally vested in English ecclesiastical courts, had passed to the states. *Id.* at 384. *See* CLARK, *supra* note 29, § 2.2, at 35. *See also* Spindel v. Spindel, 283 F. Supp. 797, 806-10 (E.D.N.Y. 1968) (discussing ecclesiastical power over domestic matters). Thus, the Court determined, the term "suits against consuls and vice consuls" incorporated in the statute defining the federal courts' jurisdiction was meant to encompass only "ordinary civil proceedings" and not matters formerly belonging to the ecclesiastical courts. Ohio *ex rel.* Popovici v. Agler, 280 U.S. at 384.

[62] That the Supreme Court's dicta is unsupported by authority is, in fact, a primary focus of the doctrine's critics. *See supra* note 11 and accompanying text.

ception, however, have subsequently been offered by the federal courts. These justifications may be classified as either jurisdictional or policy-based in nature.

Generally stated, the jurisdictional justifications for the domestic relations exception are premised on a notion that "constitutional or statutory infirmities" restrict a federal court's power to decide matters involving domestic relations.[63] Federal courts focusing on the constitutional infirmities have reasoned that the power to grant divorces or determine collateral matters such as child custody and support—originally existing in the English sovereign[64] or the ecclesiastical courts[65]—did not pass to the federal government at the time of its creation.[66] Specifically, these courts hold that because the federal government is one of limited, enumerated powers, and because the power to regulate the dissolution of marriage is not specifically conferred on the federal government in the Constitution,[67] only the state courts may decide such matters.[68]

In other cases, federal courts have justified application of the domestic relations exception on statutory grounds.[69] First, some courts have suggested that the Supreme Court's broad disclaimer of jurisdiction over divorce in *Barber* was based on the fact that the Judiciary Code at the time granted to the federal courts jurisdiction over "all suits of a civil nature at *common law* or in *equity*."[70] Because divorce and alimony historically did not fall within either category,[71] there could be no federal court jurisdiction over such matters. Second, the Supreme Court itself noted that historically, husbands and wives could not establish the diverse citizenship required by the federal diversity statute, thus precluding diversity jurisdiction in suits between spouses.[72] Third, several

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[63] Vestal & Foster, *supra* note 30, at 27.

[64] *See* Hoadly v. Chase, 126 F. 818, 821 (C.C.D. Ind. 1904) (citing Fontain v. Ravenal, 58 U.S. (17 How.) 369, 393 (1854)); CLARK, *supra* note 29, § 11.2, at 286.

[65] *See* Ohio *ex rel* Popovici v. Agler, 280 U.S. 379, 384 (1930); Spindel v. Spindel, 283 F. Supp. 797, 802 (E.D.N.Y. 1968).

[66] De La Rama v. De La Rama, 201 U.S. 303, 304 (1906).

[67] "The Constitution of the United States confers no power whatever upon the government of the United States to regulate marriage in the States or its dissolution. . . ." Andrews v. Andrews, 188 U.S. 14, 32 (1903). *See also In re* Wilson, 314 F. Supp. 271, 272 (E.D. Tenn. 1970) (federal courts have no jurisdiction over divorce because Constitution grants no power to national government to regulate dissolution of marriage).

[68] "The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse. This power belongs exclusively to the particular communities of which these families form parts. . . ." Barber v. Barber, 62 U.S. (21 How.) 582, 602 (1858) (Daniel, J., dissenting). *See also* Williamson v. Williamson, 306 F. Supp. 516, 518 (W.D. Okla. 1969) (domestic relations matters reserved to the states).

[69] *See* Hernstadt v. Hernstadt, 373 F.2d 316, 318 (2d Cir. 1967); Clifford v. Williams, 131 F. 100, 102 (C.C.D. Wash. 1904).

[70] Spindel v. Spindel, 283 F. Supp. 797, 802 (E.D.N.Y. 1968) (emphasis added); C. WRIGHT, *supra* note 2, § 25, at 97. The relevant language of the statute is noted *supra* note 2.

[71] Rather, such actions were part of the jurisdiction of the ecclesiastical courts. C. WRIGHT, *supra* note 2, § 25 at 97. *But cf.* Spindel v. Spindel, 283 F. Supp. at 806-09 (critiquing historical basis of such a distinction by arguing that temporal courts as well as ecclesiastical courts in England had jurisdiction over divorce and alimony).

[72] De La Rama v. De La Rama, 201 U.S. 303, 307 (1906).

courts have held that domestic matters are incapable of meeting the requirements of the federal diversity statute because they cannot be assigned a pecuniary value.[73] Without such value they cannot satisfy the requisite $10,000 amount in controversy.[74] For example, in a habeas corpus proceeding to gain custody of a child, where no amount in controversy has been alleged, one court held that the custody of a child cannot be assigned a monetary value and that without such assignable value no federal diversity jurisdiction existed.[75]

In addition to these constitutional and statutory bases, policy reasons have been offered to justify the domestic relations exception. First, several courts have focused on the competence of the state courts in family law matters.[76] These courts have exhibited great deference to state court expertise in the area of domestic relations, based on the fact that state courts have had years of experience in dealing with domestic relations matters on a daily basis.[77] Second, the exception has been upheld as a way to keep domestic relations matters under a uniform system of state regulation and control.[78] Support for such uniformity is found in a perceived strong state interest in such matters.[79] And finally other courts have advanced the argument that because of overcrowded dockets in the federal courts, matters of domestic relations ought to be relegated to state court forums.[80] Under this rationale, purely practical considerations of the effects of allowing federal courts to hear domestic law matters are offered to justify the exception.

In summary, federal courts have offered constitutional, statutory and policy reasons for the domestic relations exception. Both the Constitution's grant of limited powers to the federal government and the apparent inability of domestic relations cases to meet the requirements of the diversity statute have been relied on to uphold the exception. In addition, the exception has been supported by policy concerns such as the state courts' special expertise in domestic relations matters, the states' seemingly stronger interest in these matters, and the effect on already crowded federal dockets of granting a federal forum to domestic relations cases.

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[73] *See id.*.

[74] *See* Clifford v. Williams, 131 F. at 102.

[75] *Id.*

[76] Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978); Magaziner v. Montemoro, 468 F.2d 782, 787 (3rd Cir. 1972); Buechold v. Ortiz 401 F.2d 371, 373 (9th Cir. 1968); C. WRIGHT, *supra* note 2, § 25, at 97.

[77] Buechold v. Ortiz, 401 F.2d at 373; Bacon v. Bacon, 365 F. Supp. 1019, 1021 (D. Or. 1973); C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3609, at 663. *But cf.* Crouch v. Crouch, 566 F.2d at 488 (suggesting that state competence always present in diversity suits, not merely in domestic matters).

[78] *See* Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 509 (1954).

[79] Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968); Bacon v. Bacon, 365 F. Supp. 1019, 1020-21 (D. Or. 1973).

[80] *Rosenstiel*, 490 F.2d at 514; Cherry v. Cherry, 438 F. Supp. 88, 90 (D. Md. 1977); Thrower v. Cox, 425 F. Supp. 570, 573 (D.S.C. 1976).

C. *Application of the Domestic Relations Exception*

Development in the reasoning behind the domestic relations exception has been accompanied by changes in application of the exception. This evolution is due in part to the vagueness of the Supreme Court's dicta. While in *Barber,* only federal court jurisdiction over divorce and alimony was denied,[81] the scope of the disclaimer was extended to the general category of domestic matters between family members in *Burrus.*[82] The development of the exception has, consequently, been marked with attempts of the federal courts to deal with the difficult question of what controversies fall within this broad disclaimer of domestic matters. Such attempts have resulted in the development of divergent and sometimes inconsistent approaches for applying the exception.

While the federal courts agree that federal diversity jurisdiction does not extend to domestic controversies, the most difficult problem in dealing with the exception has been determining what constitutes a domestic matter embraced by the exception.[83] Some courts, for example, view suits to void agreements between spouses,[84] suits to divide marital assets,[85] and suits to recover for torts committed during the marriage[86] or the divorce[87] as falling within the domestic relations exception.[88] Other courts, however, have determined that suits re-

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[81] Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1858).

[82] *In re* Burrus, 136 U.S. 586, 593-94 (1890).

[83] The exact scope of the doctrine is unclear. Some federal courts have adopted a narrow interpretation of the exception. *See, e.g., Cole,* 633 F.2d at 1088 ("A district court may not simply avoid all diversity cases having intrafamilial aspects. Rather, it must consider the exact nature of the rights asserted or of the breaches alleged."); Spindel v. Spindel, 283 F. Supp. 797, 812 (E.D.N.Y. 1968) ("A federal court is not deprived of competence merely because the parties involved are husband and wife or the controversy might be termed a "marital dispute."). Other federal courts, however, have adopted a broader view, abstaining from hearing claims closely related to, though not technically within, the exception. *See, e.g.*, Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir. 1981) ("[A]lthough the exception has been narrowly confined, we, and other courts of appeals, have held that federal courts should abstain from adjudicating claims that are closely related to, though not within, the jurisdictional exception."); Bossom v. Bossom, 551 F.2d 474, 475 (2d Cir. 1976) ("[A] federal court may still decline jurisdiction if the action is 'on the verge' of the exception. . . .").

[84] *See* Linscott v. Linscott, 98 F. Supp. 802, 802 (S.D. Iowa 1951) (action to have property settlement set aside on grounds of fraud and duress).

[85] *See* Williamson v. Williamson, 306 F. Supp. 516, 516 (W.D. Okla. 1969).

[86] *See* Bacon v. Bacon, 365 F. Supp. 1019, 1019 (D. Or. 1973) (intentional infliction of emotional distress).

[87] *See* Gargallo v. Gargallo, 487 F.2d 914, 914 (6th Cir. 1973) (perjury, conversion and malicious prosecution).

[88] Jurisdiction has been denied as well in other cases involving domestic matters. *See* Sutter v. Pitts, 639 F.2d 842, 842 (1st Cir. 1981) (action to obtain custody and visitation rights); Buechold v. Ortiz, 401 F.2d 371, 371 (9th Cir. 1968) (action seeking child support); Ostrom v. Ostrom, 231 F.2d 193 (9th Cir. 1955) (divorce action); *Carqueville,* 153 F.2d at 1011 (habeas corpus proceedings); Walpert v. Walpert, 329 F. Supp. 25 (D. Md. 1971) (action to establish marital status); *In re* Freiberg, 262 F. Supp. 482, 482 (E.D. La. 1967) (adoption proceedings); Druen v. Druen, 247 F. Supp. 754, 754 (D. Colo. 1965) (action seeking to enforce the provisions of a divorce decree); Garberson v. Garberson, 82 F. Supp. 706, 706 (N.D. Iowa 1949) (action to establish alimony).

questing enforcement of a defaulting spouse's obligation under a valid state divorce decree,[89] suits requesting action on separation contracts between spouses,[90] and tort actions involving family members,[91] are not domestic relations matters.[92] In an effort to make distinctions between what does and does not fall within the exception, courts and commentators have implicitly or explicitly suggested several approaches.[93]

One approach suggested by the courts might be referred to as a "nature of the case" approach. The Court of Appeals for the Fourth Circuit's decision in *Cole v. Cole*[94] adopts this approach. *Cole* involved a suit against the plaintiff's former wife, a deputy sheriff, and a policeman.[95] The complaint alleged causes of action for malicious prosecution, abuse of process, conspiracy, conversion, arson, and assault and battery.[96] On appeal, the Fourth Circuit reversed the district court's dismissal of the complaint, a dismissal based in part on the domestic relations exception.[97] The *Cole* court recognized the need for federal courts to distinguish between matters which are genuinely matters of divorce, alimony or custody and thus belong within the exception, and those which are not.[98] The court noted that all "family feuds" do not fall within the "specialized category of true domestic relations cases" and that, therefore, a federal district court may not avoid all diversity cases with "intrafamily aspects."[99] Rather, a federal court must consider the "exact nature" of the wrong asserted to determine whether the case may be heard in federal court.[100] Finding that

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[89] C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3609, at 670. *See, e.g.*, Barber v. Barber, 62 U.S. (21 How.) 582, 590 (1858).

[90] *See* Jones v. Jones, 242 F. Supp. 979 (S.D.N.Y. 1965); Richie v. Richie, 186 F. Supp. 592 (E.D.N.Y. 1960).

[91] *See* Daily v. Parker, 152 F.2d 174 (7th Cir. 1945) (suit by children against father's paramour for damages resulting from alienation of affection); Spindel v. Spindel, 283 F. Supp. 797, 797 (E.D.N.Y. 1968) (suit seeking damages for fraud in inducing marriage and in procuring Mexican divorce).

[92] Federal courts will, as well, enforce state decrees under the full faith and credit clause of the Constitution, and invalidate state divorce decrees obtained by fraud or unsupported by subject matter or personal jurisdiction. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3609, at 671. *See* Williams v. North Carolina, 325 U.S. 226 (1945); Haddock v. Haddock, 201 U.S. 567 (1906); Andrews v. Andrews, 188 U.S. 14 (1903); Southard v. Southard, 305 F.2d 730 (2d Cir. 1962).

[93] The names of these approaches discussed *infra* notes 94-130 and accompanying text are labels used by the author for purposes of discussion only. These labels have been derived from the discussions of the domestic relations exception by various courts and commentators.

[94] 633 F.2d 1083 (4th Cir. 1980).

[95] *Id.* at 1084.

[96] *Id.* at 1085-87.

[97] *Id.* at 1092. Specifically, the count for malicious prosecution and abuse of process, and the count for arson, conspiracy and conversion were dismissed by the district court for lack of subject matter jurisdiction, due to the operation of the domestic relations exception. *Id.* at 1087. A third count was dismissed on the merits, and summary judgment for the defendants was granted as to the assault and battery count. *Id.*

[98] *Id.* at 1088.

[99] *Id.*

[100] *Id.*

none of the counts presented any true domestic claims, the *Cole* court remanded the case for further proceedings.[101]

The nature of the case approach[102] involves looking closely at the *actual dispute* involved and considering the relation of the subject matter to domestic concerns.[103] Using such an approach, courts have tried to decide whether the rights involved ought to be brought witin federal diversity jurisdiction despite the fact that such rights arise out of domestic relations settings.[104] This approach allows for the grant of jurisdiction to suits for fraud[105] and other torts,[106] and suits in contract,[107] because such suits involve rights normally existing outside the marital relationship. Likewise, the nature of the case approach allows denial of jurisdiction to actions involving divorce, custody rights, and support.[108]

Federal courts, however, have been unwilling to determine the family status of parties.[109] This unwillingness has suggested to commentators a second approach for applying the domestic relations exception: the "property-status" distinction.[110] Under the property-status approach, cases involving a determination of status should not be heard by the federal courts, while those cases involving property rights where no question of status is involved should be heard.[111] This analysis explains the lack of jurisdiction in suits for divorce,[112] suits involving habeas corpus petitions for custody,[113] adoption proceedings,[114] and actions to establish parental[115] or marital[116] status. In such cases, a federal court is asked primarily to determine what the relationship between the parties should be. Because such status matters are not conducive to pecuniary settle-

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[101] *Id.* at 1092.

[102] For cases adopting this approach *see, e.g., id.* at 1088; Richie v. Richie, 186 F. Supp. 592, 594 (E.D.N.Y. 1960); Linscott v. Linscott, 98 F. Supp. 802, 805 (S.D. Iowa 1951).

[103] *See, e.g.*, Linscott v. Linscott, 98 F. Supp. at 805.

[104] *See, e.g.*, Richie v. Richie, 186 F. Supp. 592, 594 (E.D.N.Y. 1960).

[105] *See, e.g.*, Spindel v. Spindel, 283 F. Supp. 797, 797 (E.D.N.Y. 1968).

[106] *See* Dailey v. Parker, 152 F.2d 174, 174 (7th Cir. 1945).

[107] *See* Crouch v. Crouch, 566 F.2d 486, 486 (5th Cir. 1978); Richie v. Richie, 186 F. Supp. 592, 592 (E.D.N.Y. 1960).

[108] *See* cases cited *supra* at note 88. Denial of jurisdiction in these cases is proper because the rights involved exist only within a familial context.

[109] "Federal courts will accept jurisdiction to a very limited extent in the domestic area . . . but they have consistently refused to hear any action seeking a determination of marital and parental status." *In re* Freiberg, 262 F. Supp. 482, 484 (E.D. La. 1967). *See also* Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968) (arguing no federal court jurisdiction in cases involving status of husband and wife or parent and child).

[110] *See* Vestal & Foster, *supra* note 30, at 23-31.

[111] *Id.* at 31. *But see* Brandscheit v. Britton, 239 F. Supp. 652, 654 (N.D. Cal. 1965) (rejecting property-status approach and adopting policy approach); Note, *Federal Jurisdiction of "Domestic Relations" Cases*, 7 J. OF FAM. L. 309, 314-15 (1967) (discussing policy approach advocated in *Brandscheit*).

[112] *See In re* Wilson, 314 F. Supp. 271, 271 (E.D. Tenn. 1970).

[113] *See* Carqueville v. Woodruff, 153 F.2d 1011, 1011 (6th Cir. 1946).

[114] *See In re* Freiberg, 262 F. Supp. 482, 482 (E.D. La. 1967).

[115] *See* Buechold v. Ortiz, 401 F.2d 371, 371 (9th Cir. 1968).

[116] *See Walpert*, 329 F. Supp. at 25.

ment, this approach suggests that they fail to meet the $10,000 minimum amount in controversy statutory jurisdictional requirement.[117]

On the other hand, the property-status approach suggests that federal courts should decide conflicts between family members involving property rights, where such conflicts are separate from status determinations.[118] Under this approach, cases upholding jurisdiction in actions to enforce alimony payments in divorce or separation decrees,[119] and actions to collect damages for a breach of a separation agreement[120] were correctly decided, despite the relationship of these suits to the marital relationship, because only property questions were involved. In the view of commentators, this approach suggests also that suits to establish maintenance[121] and support,[122] brought outside the context of a divorce action, should be heard; such cases involve property and not status questions.[123] According to the property-status approach, allowing federal courts to decide property questions is appropriate because the Supreme Court, despite its promulgation of the domestic relations exception, has recognized that property and status matters are distinct.[124] They should, therefore, be treated separately.[125] Thus, assuming correctly or incorrectly that states have the exclusive right to determine status matters, as suggested by the federal courts' consistent application of the domestic relations exception to such matters, such exclusive jurisdiction ought not be afforded over property questions merely because they arise out of the same factual situation as do status questions.[126]

A third approach for applying the domestic relations exception might be labeled the "determine-enforce" approach. This approach was first suggested by the Supreme Court itself in *Barber v. Barber.*[127] In *Barber,* while disclaiming jurisdiction over divorces and alimony, the Supreme Court nevertheless upheld the federal courts' equity jurisdiction to enforce a state divorce decree, to the extent of the amount due under the state decree.[128] This is the case, the

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[117] Rapoport v. Rapoport, 416 F.2d 41, 43 (9th Cir. 1969); *Walpert,* 329 F. Supp. at 26.

[118] Vestal & Foster, *supra* note 30, at 31.

[119] *See* Barber v. Barber, 62 U.S. (21 How.) 582, 583 (1858).

[120] *See* Richie v. Richie, 186 F. Supp. 592 (E.D.N.Y. 1960).

[121] *Cf.* Garberson v. Garberson, 82 F. Supp. 706, 706 (N.D. Iowa 1949) (no jurisdiction over suit to establish maintenance).

[122] *Cf.* Albanese v. Richter, 161 F.2d 688, 688 (3d Cir.), *cert. denied,* 332 U.S. 782 (1947) (no jurisdiction over support action).

[123] Vestal & Foster, *supra* note 30 at 29.

[124] In Maynard v. Hill, 125 U.S. 190, 206 (1888), the Supreme Court noted that while state legislatures have an interest in regulating the end of the marital relationship, any legislative action declaring a divorce which interfered with property rights would present a "different question." This language had been interpreted as suggesting that any exclusive state control over status matters does not automatically extend to property rights. *See* Vestal & Foster, *supra* note 30, at 29.

[125] *Id.*

[126] *Id.*

[127] *See supra* notes 21-30 and accompanying text.

[128] Barber v. Barber, 62 U.S. (21 How.) 582, 590-91 (1858).

Court noted, where alimony has been awarded and where no appeal is pending.[129] Federal courts have followed the Court's determine-enforce approach in suits to enforce alimony payments due under state decrees, where such decrees have been rendered by competent state courts.[130]

The differing approaches in applying the domestic relations exception are indicative of the confusion among federal courts about the exception's scope and purpose. The efforts of the courts to define what matters are properly excluded from diversity jurisdiction under the exception has led to the development of three different approaches. While all three approaches are established in federal court precedent as guidelines for applying the domestic relations exception, their varying concerns raise the possibility of inconsistent results, depending on the particular approach employed. The problems inherent in using these approaches, as well as the problems with the exception's justifications and basic premise, will be explored in the following analysis.

II. Analysis of the Exception's Continuing Viability

Despite its long tenure in federal court jurisprudence, there are problems with the domestic relations exception. These problems are three-fold. First, the approaches developed by the courts to apply the doctrine are not satisfactory. These approaches establish bright-line tests for determining what matters should and should not be excluded from federal diversity jurisdiction. Yet, the three approaches may not be applied consistently with one another and may yield irrational results. The first part of this analysis will present two cases which illustrate the potential for inconsistent and irrational results when these approaches are applied to one area of domestic law. Second, the potential for unsatisfactory outcomes under the exception suggests that the exception itself needs to be re-evaluated. In the second part of this analysis, the justifications for the domestic relations exception will be explored. It will be argued that the justifications for the exception are no longer compelling. Finally, the third part of this dicussion will analyze the basic premise underlying the domestic relations exception. It will be suggested that the domestic relations exception originated prior to a recent trend recognizing federal constitutional rights pervading state laws which directly or indirectly regulate the family. This trend in the role of federal courts in family law is inconsistent with the basic tenet of the domestic relations exception: that family law matters belong solely to the states. It will be argued, therefore, that to maintain a consistency in approaching family law, federal courts should no longer decline jurisdiction based on the domestic relations exception, and the exception should be abolished.

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[129] *Id.* at 591.

[130] *See, e.g.*, Gonzales v. Gonzales, 74 F. Supp. 883, 883 (E.D. Pa. 1947). *See also* Bennett v. Bennett, 682 F.2d 1039, 1045 (D.C. Cir. 1982) (Edwards, J., dissenting) (applying determine-enforce approach to child custody decree). For a more complete discussion of both this case and the determine-enforce approach, see *infra* notes 160-209 and accompanying text.

A. *Critique of the Application of the Domestic Relations Exception*

Two recent federal court cases have addressed the domestic relations exception in the context of a tort suit brought to redress a child snatching. These cases, *Wasserman v. Wasserman*[131] and *Bennett v. Bennett*[132] illustrate both the three approaches used to determine the exception's scope and the problems with the approaches.

Wasserman is the earlier of the two cases. The plaintiff, Sylvia Wasserman, was the former wife of the defendant, Irwin Wasserman.[133] The plaintiff had been granted custody of the couple's four children by the Circuit Court for Montgomery County, Maryland in 1976.[134] Shortly thereafter, the defendant removed the couple's children from the plaintiff's custody and took them outside the state of Maryland.[135] The plaintiff brought suit against the defendant, his present wife, his parents and his attorneys, alleging that the defendants' action gave rise to causes of action for child enticement, intentional infliction of emotional distress and civil conspiracy.[136] The district court dismissed the suit on grounds that it lacked subject matter jurisdiction because of the domestic relations exception.[137]

On appeal, the Fourth Circuit Court of Appeals reversed and remanded the case for further proceedings.[138] In an opinion written by Judge Ingraham, the *Wasserman* court recognized the existence of federal diversity jurisdiction in a tort suit arising out of an abduction by one parent of a child in the custody of the other.[139] Specifically, the *Wasserman* court held that the domestic relations exception does not preclude jurisdiction over a claim for damages in a tort action to redress a child snatching.[140] The court's reasoning rested on two grounds. First, the court adhered to the "nature of the case" approach to application of the domestic relations exception announced in the court's earlier *Cole v. Cole* decision.[141] Second, the court focused on whether resolution of the case involved an adjustment of family status, implicitly conducting a "property-status" inquiry into the exception's scope.[142]

In *Cole,* the Fourth Circuit had alluded to a two-part inquiry in applying the nature of the case approach. The first element of the *Cole* analysis centers

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[131] 671 F.2d 832 (4th Cir. 1982).

[132] 682 F.2d 1039 (D.C. Cir. 1982).

[133] Wasserman v. Wasserman, 671 F.2d 832, 833 (4th Cir.), *cert. denied,* 103 S. Ct. 372 (1982).

[134] *Id.*

[135] *Id.*

[136] *Id.*

[137] *Id.* at 834.

[138] *Id.* at 835.

[139] *Id.* at 834.

[140] *Id.*

[141] 633 F.2d 1083 (4th Cir. 1980). *See also supra* notes 94-101 and accompanying text.

[142] Wasserman v. Wasserman, 671 F.2d 832, 835 (4th Cir.), *cert. denied,* 103 S. Ct. 372 (1982). The property-status approach is discussed *supra* notes 109-126 and accompanying text.

on the parties to the action. The focus of the inquiry is whether the claims could only be brought between family members, or whether the claims could have arisen between strangers.[143] Using this line of inquiry, the *Wasserman* court noted that actions for child enticement and intentional infliction of emotional distress could be brought—and actually were brought in the case of the defendants other than the plaintiff's husband—against those with no familial relationship to the plaintiff.[144] Thus, in the court's view, jurisdiction ought not be excluded.[145] The *Wasserman* court's reasoning is consistent with *Cole,* which had also involved causes of action against both a spouse and non-family members.[146]

The second element of the *Cole* analyis centers on the nature of the action itself. The focus of the inquiry is whether a particular action requires for its resolution the existence of any rule of law particularly marital in nature.[147] Conducting this inquiry on the facts before it, the *Wasserman* court noted that outside the law of domestic relations, a tort action for child snatching would be cognizable under claims for child enticement or intentional infliction of emotional distress.[148] According to the court, these claims are in no way dependent on a present or prior family relationship.[149] While it did not so state directly, the *Wasserman* court implied that because federal courts generally may and do hear tort suits, the tortious nature of the claim itself entitled the parties to litigate in federal court.[150] Its decision to uphold jurisdiction over the action before it is thus consistent with *Cole,* which had upheld jurisdiction over other tortious actions.[151]

Having established that jurisdiction would lie under the "nature of the case" analysis suggested in *Cole,* the *Wasserman* court went on to discuss a second—possibly more compelling—ground for granting jurisdiction in child snatching cases. The court noted that in granting jurisdiction for damages caused by a child snatching, it was not being asked to make a "determination of entitlement to custody or any other adjustment of family status."[152] The

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

[144] Wasserman v. Wasserman, 671 F.2d 832, 835 (4th Cir.), *cert. denied,* 103 S. Ct. 372 (1982).

[145] *Id.*

[146] Cole v. Cole, 633 F.2d 1083, 1084 (4th Cir. 1980).

[147] *Id.* at 1088.

[148] Wasserman v. Wasserman, 671 F.2d 832, 834 n.2 (4th Cir.), *cert. denied,* 103 S. Ct. 372 (1982) (citing Kajtazi v. Kajtazi, 488 F. Supp. 15 (E.D.N.Y. 1978); Harris v. Jones, 281 Md. 560, 380 A.2d 611 (1979)).

[149] Wasserman v. Wasserman 671 F.2d at 835.

[150] *See id.* at 834. The *Wasserman* court cited Kajtazi v. Kajtazi, 488 F. Supp. 15, 18-21 (E.D.N.Y. 1978), as authority for the proposition that actions in tort lie for child enticement and intentional infliction of emotional distress to redress a child snatching. *Id.* at 834 n.2. In *Kajtazi,* a federal district court granted damages to both parent and child as a result of a child snatching, without any discussion of the domestic relations exception. Kajtazi v. Kajtazi, 488 F. Supp. at 21.

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

[152] Wasserman v. Wasserman, 671 F.2d 832, 835 (4th Cir.), *cert. denied,* 103 S. Ct. 372 (1982).

court thus distinguished the case before it from cases in which the result would be a declaration of present or future rights as to custody or visitation.[153] Whether Mrs. Wasserman was entitled to custody for the period relevant to the complaint, the court observed, had already been decided by a state court.[154] Furthermore, according to the court, custody for the relevant period was not subject to challenge by the parties, because the suit dealt with custody during a period already passed, and not with future custody rights.[155] The *Wasserman* court noted further that *Cole* had recognized the power of federal courts to determine both the validity of a state court decree and duties established by such a decree.[156] Because such action did not require an intrusive inquiry into the domestic relations of the parties, the *Wasserman* court upheld jurisdiction to determine damages caused by Irwin Wasserman's having disobeyed the custody order in the state decree.[157]

The *Wasserman* court was careful to distinguish between determining the status of the parties in a dispute and simply giving effect to a previously determined status. In *Wasserman,* the court upheld jurisdiction because no status determination was involved. While the court did not explicitly purport to follow the property-status approach, the decision to hear this non-status matter can be explained by this approach. In distinguishing the case before it from other cases concerning status,[158] the *Wasserman* court analogized the case before it to actions to collect money due under divorce decrees.[159] These latter cases clearly involve property questions, and the *Wasserman* suit as well involved a request for property in the form of damages incurred from a child snatching. Thus, while the court did not explicitly apply the property-status approach, it did so implicitly by stating that what it faced was not a status matter, and by characterizing the action as one redressing the breached rights of one party through a property settlement with the other. The *Wasserman* court therefore reached its decision to uphold jurisdiction on two alternative but harmonious grounds, based on the "nature of the case" and "property-status approaches."

Shortly after *Wasserman* was decided, another Circuit Court of Appeals faced a similar case involving a child snatching tort in *Bennett v. Bennett.*[160] The plaintiff, Thomas Bennett, and the defendant, Patricia Bennett, were parents of three children.[161] Upon their divorce, the defendant was granted custody of

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[153] *Id.*

[154] *Id.*

[155] *Id.*

[156] *Id.* (citing Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir. 1980)).

[157] *Id.* at 835.

[158] *Id. citing* Doe v. Doe, 660 F.2d 101 (4th Cir. 1981); Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.), *cert. denied,* 414 U.S. 805 (1973); Hernstadt v. Hernstadt, 373 F.2d 316, 316 (2d Cir. 1967).

[159] 671 F.2d at 835 *citing* Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981); Crouch v. Crouch, 566 F.2d 486, 486 (5th Cir. 1978); Keating v. Keating, 542 F.2d 910 (4th Cir. 1976).

[160] 682 F.2d 1039 (D.C. Cir. 1982).

[161] *Id.* at 1041.

the children by an Ohio state court.[162] Four years later, the defendant turned over custody of two of the children to the plaintiff, who brought the children to his home in the District of Columbia.[163] The plaintiff brought suit in Superior Court for the District of Columbia, and was granted formal custody of the two children.[164] Subsequently, the defendant abducted the two children from the plaintiff's home.[165] While the plaintiff was successful in retaking one of the two snatched children, he was unable to recover the other.[166]

The plaintiff thereafter sought legal redress against the defendant. In addition to a contempt proceeding in the District of Columbia Superior Court,[167] the plaintiff sued the defendant in federal district court in the District of Columbia.[168] In this suit, the plaintiff alleged that the defendant's taking of the children constituted a tort, and that he was entitled to monetary damages in the amount of $525,000.[169] The plaintiff also asked for an injunction "directing and enjoining the defendant from any interference with the custody rights of the plaintiff."[170] The plaintiff's complaint, however, failed to state the basis for personal jurisdiction over the defendant.[171] The district court noted this "jurisdictional flaw" and dismissed the complaint, refusing thereafter to consider the plaintiff's amended complaint.[172]

On appeal, the Court of Appeals for the District of Columbia Circuit reversed the lower court on the issue of personal jurisdiction.[173] The Court, however, first considered an issue that neither the lower court nor the parties had addressed: whether the suit could be heard under the court's diversity jurisdiction, due to the operation of the domestic relations exception.[174] Judge Bazelon, writing for the District of Columbia Circuit, subdivided this issue into a discussion of jurisdiction over the monetary damages requested and the injunctive relief sought. The court held that a district court does have jurisdiction to grant a plaintiff monetary relief from a child snatching.[175] The court held further, however, that a federal district court does not have jurisdiction to provide injunctive relief in such a case.[176] The *Bennett* court remanded the case for further action regarding the cause of action for damages, and affirmed the

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[162] *Id.*
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] *Id.*
[167] The plaintiff may also have begun proceedings in the state court of Ohio where the defendant lived. *Id.*
[168] *Id.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] *Id.* at 1044.
[174] *Id.*
[175] *Id.*
[176] *Id.*

denial of jurisdiction over the request for injunctive relief.[177]

In its decision to uphold jurisdiction over the claim for monetary damages, the *Bennett* court specifically adopted the reasoning of the Fourth Circuit as set forth in *Wasserman*.[178] The court thus accepted the nature of the case and property-status approaches as applied in the *Wasserman* decision. In expounding upon the nature of the case approach, the *Bennett* court reasoned that federal courts do not exceed their competence by hearing suits whose essence is in *tort* or *contract*.[179] In particular, the *Bennett* court noted, the determination of traditional tort issues, such as duty, breach of duty, and damages, has always been within the federal courts' competence.[180] Noting that the task of determining the validity and effect of state decrees is also within a federal court's competence, the *Bennett* court upheld jurisdiction to redress breach of such duties even where they are enumerated in a state decree.[181]

The *Bennett* court faced no difficulty in applying the *Wasserman* approach to the claim for monetary damages. According to the Court, this claim is the type of action that federal courts do hear and can, therefore, be deemed to fall outside the scope of the domestic relations exception.[182] On the question of injunctive relief, however, the *Bennett* court found the *Wasserman* decision to be inconclusive, because *Wasserman* involved only retrospective relief.[183] In fact, Judge Bazelon noted, the *Wasserman* court specifically relied on the fact that the action for damages was not one "in which the parties actually seek a declaration of present or future rights as to custody or visitation."[184] Injunctive relief, the *Bennett* court noted, is prospective and thus necessitates inquiries which a federal court may not have the power to make.[185] The court observed that an injunction does not involve addressing past wrongs through a grant of monetary (property) damages.[186] Rather, the court reasoned, deciding whether to grant an injunction necessitates an inquiry into the present interests of the children.[187] Recognizing that such determinations are peculiarly within the province of state courts,[188] and recognizing that allowing federal courts to make such determinations would undermine the domestic relations exception,[189] the

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[177] *Id.*

[178] *Id.* at 1042.

[179] *Id.*

[180] *Id.*

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *Id.* (quoting Wasserman v. Wasserman, 671 F.2d 832, 835 (4th Cir.), *cert. denied,* 103 S. Ct. 372 (1982)).

[185] *Id.* at 1042.

[186] *Id.*

[187] *Id.* Such an inquiry is necessary when a court issues equitable relief, because the interests of third parties must be considered in deciding whether to grant an injunction. RESTATEMENT (SECOND) OF TORTS § 942 (1979).

[188] Bennett v. Bennett, 682 F.2d at 1042-43.

[189] *Id.* at 1043.

court declined to grant jurisdiction over the claim for injunctive relief.[190]

Close analysis of the reasoning behind the decision to deny jurisdiction over injunctive relief in *Bennett* reveals a shift away from the dual approach conducted in *Wasserman* and adopted by the *Bennett* court in its decision to uphold jurisdiction over monetary damages. The shift is towards an analysis relying solely on the property-status approach. The *Bennett* court did not address the issue of injunctive relief in terms of the inquiries characterizing the nature of the case approach. Had the court done so, it would have first considered the need for a family relationship between the parties.[191] A claim for injunctive relief from a child snatching could have been brought between non-family members as well as between family members. Next, the court would have addressed the rule of law involved in the case.[192] The court would have determined that the rules of law governing relief from a child enticement and intentional infliction of emotional distress are derived from tort law, and not domestic law. Thus, under these two inquiries, the *Bennett* court would have upheld jurisdiction. The *Bennett* court's inquiry into whether diversity jurisdiction exists over the requested injunctive relief lacks any consideration of these issues. Rather, the court's decision to *deny* such jurisdiction is based solely on the fact that injunctions mandate determinations of the interests of the parties involved.[193] Such determinations are status determinations. The court based its decision to deny jurisdiction on the reasoning that these status determinations are outside the competence of the federal courts.[194]

The failure of the court to use the nature of the case approach may be explained in two ways. First, the nature of the case approach would not have been helpful in deciding whether both types of relief could be properly granted by a federal court. In considering whether jurisdiction existed over the claim for monetary damages, the *Bennett* court had already decided that the tort suit before it is the *type* of case that may be heard in federal court. The inquiries mandated by the approach did not change, nor did the answers to them, in considering the issue of injunctive relief. Thus, the nature of the case approach did not address the more difficult question of whether the *type of relief* requested is consistent with the domestic relations exception. The *Bennett* court, however, found differences in retrospective and prospective relief, and a need to consider them.

Secondly, use of the nature of the case approach would have given a result clearly inconsistent with that under the property-status approach. Had the court applied the nature of the case inquiries to the issue of injunctive relief, it would have concluded that jurisdiction was proper, because the approach does

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[190] *Id.* at 1044.

[191] *See* Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.), *cert. denied,* 103 S. Ct. 372 (1982); Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980).

[192] *See id.*

[193] Bennett v. Bennett, 682 F.2d at 1042.

[194] *Id.*

not distinguish between the types of relief possible in a lawsuit. The property-status approach does, however, recognize the inherent differences between retrospective and prospective relief. This approach labels monetary damages as property questions and retrospective relief as status questions, and deems federal courts competent to answer only the former. Because the *Bennett* court realized the need to address the inherent differences in prospective and retrospective relief, and because only the property-status approach addressed this need, the *Bennett* court ignored the nature of the case approach.

The decision in *Bennett* is important in two respects. First, it demonstrates that the different approaches for applying the domestic relations exception are not as easily reconciled as *Wasserman* suggests. Unlike the *Bennett* court, the *Wasserman* court did not face a problem in using both approaches to reach its decision because the result was the same under each approach. *Wasserman* is representative of an easy case, in which the approaches established in precedent may be applied harmoniously. *Bennett,* on the other hand, though factually similar to *Wasserman,* represents a harder case, in which the approaches cannot be consistently applied, and in which a court must ignore one line of precedent in order to decide the case. *Bennett* illustrates the problems that a federal court may face in having to manipulate the approaches in order to reach a result which the court believes best follows precedent. This potential for difficulty in applying the approaches is a major drawback of the domestic relations exception.

More important than the problem of reconciling possibly conflicting approaches, however, is the potential for irrational results under the exception as illustrated in *Bennett.* The plaintiff in *Bennett* met the requirements of diversity jurisdiction. Yet, he could not seek all the relief he was, in theory, entitled to seek.[195] As noted in the dissenting opinion in *Bennett,* the court's decision will allow the *Bennett* plaintiff only to sue repeatedly for damages, without getting his child back.[196] This situation, in effect, allows the defendant to rent her child, at a cost equal to the successive awards of damages.[197] Such a result would be impossible if the suit had been brought against someone other than a family member. Moreover, if such a suit had been brought in a state court, jurisdiction would lie over both claims for relief. By upholding jurisdiction over only one of the claims for relief, the *Bennett* court ensured that a person will obtain different results depending on whether he files in state or federal courts. This follows from the fact that had the claim been brought in state court, both claims could have been heard. Because the suit was brought in federal court only a damage claim could be heard in that suit; a separate claim for injunctive relief would have to have been brought in state court. While the relief finally given the plaintiff may be the same in both cases, considerations of the addi-

[195] Additionally, injunctive relief may have been the only relief available to the plaintiff, because the record suggested that the defendant was judgment-proof. *Id.* at 1045 n.2.

[196] *Id.* at 1045.

[197] *Id.*

tional time and expense involved in bringing two suits rather than one renders the results different.[198]

A third approach to the *Bennett* situation was advocated in the *Bennett* dissent. In his dissent, Judge Edwards relied on the determine-enforce approach[199] to argue that jurisdiction ought to have been upheld over the claims for both the monetary and injunctive relief.[200] The dissent noted that federal courts have historically exercised their equitable powers to enforce alimony payments due under already determined state divorce decrees.[201] In applying this same approach to state child custody awards, Judge Edwards reasoned that the majority correctly noted that a federal court may not *determine* the custody of children.[202] He argued, however, that it does not follow that a federal court is powerless to *enforce* an otherwise valid custody decree.[203] Judge Edwards reasoned that enforcement of a state decree does not require inquiry in the best interests of the children—a status determination.[204] Rather, "a federal court need only give effect to the finding decision of a state court."[205] Under the dissent's reasoning, jurisdiction should have been extended to both claims for relief, as both involved only enforcement, and not determination, of domestic rights.[206]

The dissent's reliance on the determine-enforce approach is misplaced. The application of the approach generally had been limited by the federal courts to cases where retrospective relief in the form of money owed the plain-

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[198] This difference in result is unsatisfactory for two reasons. First, it runs counter to the nature of diversity jurisdiction as established by the Supreme Court in Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). Under 28 U.S.C. § 1652 (1976 & Supp. III 1979) the federal courts must apply state law in all diversity actions. In *Erie*, the Supreme Court disapproved its earlier interpretation in Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) that the term "state law" encompasses only state statutes and not general common law. Erie R.R. Co. v. Tompkins, 304 U.S. at 79-80. The purpose behind the *Erie* doctrine, as set out in Guaranty Trust Co. of New York v. York, 326 U.S. 99 (1943) is to ensure that in all cases where a federal court exercises diversity jurisdiction, the outcome of the litigation will be the same as if the case had been tried in a state court. *Id.* at 109. The *Bennett* outcome frustrates this purpose. Second, the necessity of bringing two suits in the case of a federal court litigant seeking both damages and an injunction runs counter to the "considerations of judicial economy, convenience and fairness to litigants" lying behind the federal court doctrine of pendent jurisdiction. United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). *See generally* C. WRIGHT, *supra* note 2, § 19, at 73-77 (discussing pendent jurisdiction). While the doctrine of pendent jurisdiction — which allows state claims arising out of the same factual situation as federal claims to be joined with the federal claim under federal question jurisdiction — does not apply directly to the *Bennett* situation, the theory behind the doctrine — to avoid unnecessary litigation by hearing all related claims in one lawsuit — is equally applicable to *Bennett* situations involving diversity jurisdiction.

[199] *See supra* notes 127-30 and accompanying text.

[200] Bennett v. Bennett, 682 F.2d 1039, 1045 (D.C. Cir. 1982).

[201] *Id.* at 1045 n.2 (citing Keating v. Keating, 542 F.2d 910, 911-12 (4th Cir. 1976); Harrison v. Harrison, 214 F.2d 571, 573-74 (4th Cir.), *cert. denied*, 348 U.S. 896 (1954)).

[202] *Id.* at 1045.

[203] *Id.*

[204] *Id.*

[205] *Id.*

[206] *Id.*

tiff has been requested.[207] The Supreme Court, which first recognized this approach in *Barber,* specifically limited the approach to cases where alimony has accrued, and only to the extent of the amount due.[208] Such a limitation of the approach is needed because of the difference between prospective and retrospective relief. As the *Bennett* majority noted, before a court may grant prospective injunctive relief, the equities of the situation must be considered.[209] The need to consider the interests of all the affected parties is therefore inherent in the granting of injunctive relief. Consequently, no injunction could have issued in *Bennett* without the court's having first made a determination of the interests of both the parties and the children. Such a determination exceeds the scope of the enforce branch of the determine-enforce approach as it has been developed by the federal courts. Thus, while the dissent's approach yields a logical result, it is nevertheless wrong because it does not take into account the inherent differences between retrospective and prospective relief.

The *Bennett* decision illustrates the unsatisfactory state of the domestic relations exception. The nature of the case and property-status approaches offer tests for determining when the exception is applicable and are both established in precedent. Yet, in some cases they lead to consistent results and in others they do not. Additionally, the approaches may lead to unfairness by depriving litigants of the right to seek relief they would otherwise have been able to seek in state court. The illogical and unsatisfactory result in *Bennett* reflects the inherent drawbacks in the domestic relations exception, and suggests the need to re-evaluate the doctrine. The remainder of this analysis will offer such a re-evaluation of the exception, focusing on its justifications and basic premise.

B. *A Critique of the Justifications for the Domestic Relations Exception*

The domestic relations exception has its source in dicta.[210] No authority was cited in either *Barber* or *Burrus* for the proposition that federal courts may not hear family law matters.[211] Various justifications for the doctrine, however, have been offered by the federal courts over the years since *Barber* and *Burrus* were decided.

1. Constitutional Justifications

Some courts have offered constitutional justifications for the exception. The constitutional justifications may be broken down into two categories: the

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[207] *See, e.g.*, Gonzales v. Gonzales, 74 F. Supp. 883, 885 (E.D. Pa. 1947).

[208] Barber v. Barber, 62 U.S. (21 How.) 582, 590-91 (1858).

[209] Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982). *See also* RESTATEMENT (SECOND) OF TORTS § 942 (1979) (interests of third parties must be considered in granting injunctive relief).

[210] Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.), *cert. denied,* 103 S. Ct. 372 (1982).

[211] Spindel v. Spindel, 283 F. Supp. 797, 802 (E.D.N.Y. 1968).

separation of powers justification and the federalism justification. Courts offering the separation of powers justification have reasoned that domestic controversies fall outside the power granted to federal judiciary by the Constitution.[212] This argument holds that the power to grant divorces and to decide other domestic matters existed in England in the ecclesiastical courts,[213] Parliament,[214] or in the sovereign as parens patriae.[215] Thus, at the time of the creation of the Constitution, it was understood that such power did not belong to the secular courts.[216] Consequently, when the federal judiciary was created, its grant of power did not include the power to hear such matters.[217] Because this power never passed to the federal judiciary, this argument suggests, any judicial power over such matters consequently developed lies solely in the state courts.[218]

The separation of powers justification is seriously flawed. It suggests that the federal judiciary is constitutionally precluded from deciding domestic matters. Yet, the Supreme Court in both *Simms* and *De La Rama* upheld the power of the federal courts to hear divorce suits in the territories.[219] Also, in these same cases, the Court upheld its own power to hear appeals from divorce actions brought in the federal territorial courts.[220] Similarly, the Court of Appeals for the District of Columbia has exercised jurisdiction over appeals from divorce actions.[221] The fact that federal courts may enforce policy on matrimonial status when laid down by a territorial legislature or Congress indicates that there is no constitutional bar grounded in separation of powers to

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[212] *See, e.g.*, Hoadly v. Chase, 126 F. 818, 821 (C.C.D. Ind. 1904); U.S. CONST. art. III, §§ 1-2. Relevant portions are set out *supra* note 2.

[213] *See, e.g.*, Ohio *ex rel.* Popovici v. Agler, 280 U.S. 379, 384 (1930); Barber v. Barber, 62 U.S. (21 How.) 582, 604 (1858) (Daniel, J., dissenting).

[214] When this country was settled, the power to grant a divorce from the bonds of matrimony was exercised by the Parliament of England. The ecclesiastical courts . . . were limited to the granting of divorce from bed and board. Naturally, the legislative assemblies of the colonies followed the example of Parliament and treated the subject as one within their province.

Maynard, 125 U.S. at 206. Some of the colonies maintained the tradition of legislative divorces in their assemblies. *See* CLARK, *supra* note 29, § 11.1, at 283.

[215] *See, e.g.*, Fontain v. Ravenal, 58 U.S. (17 How.) 369, 393 (1854) (Taney, C.J., concurring); Hoadly v. Chase, 126 F. 818, 820-21 (C.C.D. Ind. 1904). Parens patriae — literally "parent of the country" — was the Crown's prerogative to protect its subjects who were unable to protect themselves. CLARK, *supra* note 29, § 17.1, at 572. For a general discussion of the parens patriae power see Curtis, *The Checkered Career of Parens Patriae: The State as Parent or Tyrant?*, 25 DE PAUL L. REV. 895 (1976).

[216] Spindel v. Spindel, 283 F. Supp. 797, 802-03 (E.D.N.Y. 1968).

[217] Hoadly v. Chase, 126 F. 818, 821 (C.C.D. Ind. 1904) (quoting Fontain v. Ravenal, 58 U.S. (17 How.) 369, 393 (1854)); CLARK, *supra* note 29, § 11.1, at 286.

[218] Hoadly v. Chase, 126 F. at 821.

[219] De La Rama v. De La Rama, 201 U.S. 303, 307-08 (1906); Simms v. Simms, 175 U.S. 162, 167-68 (1899).

[220] De La Rama v. De La Rama, 201 U.S. at 308; Simms v. Simms, 175 U.S. at 167-68.

[221] *See, e.g.*, Bottomley v. Bottomley, 104 U.S. App. D.C. 311, 262 F.2d 23 (1958); Moncure v. Moncure, 51 U.S. App. D.C. 292, 278 F. 1005 (1922).

the involvement of the federal courts in domestic controversies.[222] It follows that there is no constitutional bar to the courts' applying state law in diversity cases.[223]

The federalism branch of the constitutional justifications does not focus solely on the power of the federal judiciary to hear domestic cases. Instead, the focus is on the allocation of power between state and federal governments. Courts proferring this justification have argued that the power to regulate domestic matters lies in the state governments, and their concomitant branches, and not in the federal government.[224] This argument is based on the premise that the federal government is one of enumerated and limited powers.[225] Courts have noted that the power to regulate domestic matters is not specifically granted to the federal government by the Constitution.[226] Thus, these courts argue, the power to regulate domestic matters is reserved to the states, and the federal courts, as part of the federal government, can have no jurisdiction over domestic controversies.[227]

The federalism justification fares no better than the separation of powers justification as convincing support for the domestic relations exception. It is true that the federal government has no power to directly regulate domestic matters. Thus, for example, Congress could not pass a law regulating marriage, divorce, alimony or support.[228] That power lies in the states, because such power is not specifically delegated to the federal government in the Constitution.[229] While the power to regulate domestic matters as a general rule lies with the states, such a disclaimer refers only to the legislative power of the federal government to lay down substantive rules of law in domestic relations areas and not to the subject matter jurisdiction of the federal courts.[230] The fact

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[222] Spindel v. Spindel, 283 F. Supp. 797, 800 (E.D.N.Y. 1968).

[223] *Id.*

[224] *See, e.g.*, Blank v. Blank, 320 F. Supp. 1389, 1390 (W.D. Pa. 1971); Williamson v. Williamson, 306 F. Supp. 516, 518 (W.D. Okla. 1969); *Wilson*, 314 F. Supp. at 272.

[225] NOWAK, CONSTITUTIONAL LAW 112 (1978).

[226] Blank v. Blank, 320 F. Supp. 1389, 1390-91 (W.D. Pa. 1971); Williamson v. Williamson, 306 F. Supp. 516, 518 (W.D. Okla. 1969). *Wilson*, 314 F. Supp. at 272.

[227] Blank v. Blank, 320 F. Supp. at 1390; Williamson v. Williamson, 306 F. Supp. at 518.

[228] This is so because the federal government is one of limited powers. NOWAK, *supra* note 225, at 112. No action may be taken by Congress unless it is within one of its enumerated powers. *Id.* Because the power to regulate domestic matters is not specifically delegated to Congress in the Constitution, it presumably has no power to legislate such matters.

[229] The Constitution reserves power not delegated to the federal government to the states and the people. U.S. CONST. amend. X. Consequently, state governments are not creatures of limited powers, but rather possess inherent general powers. NOWAK, *supra* note 225, at 112. Among the states' inherent power is the police power to protect and regulate its citizens. *Id.* The power to regulate domestic matters is included in the police power. *See Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198 (1980) [hereinafter referred to as *Developments*].

[230] Spindel v. Spindel, 283 F. Supp. 797, 804 (E.D.N.Y. 1968). Moreover, it is not entirely clear that the authority to legislate family matters is beyond the powers granted to Congress. The fourteenth amendment grants to Congress the power to enforce by legislation the pro-

that federal courts are, in diversity cases, compelled to apply state law,[231] whether based in statute or common law, suggests that federal courts may hear domestic matters. To argue otherwise would render unconstitutional the whole area of diversity jurisdiction, because federal courts exercising their diversity jurisdiction are asked to decide matters over which the federal government has no power to make law.

2. Statutory Justifications

In addition to the constitutional justifications, statutory justifications for the domestic relations exception have been offered by the courts. The earliest of the statutory justifications focused on the language of the Congressional grant of power to the inferior federal courts, as it existed at the time of *Barber*. The Judiciary Code of 1789 granted to the federal courts the power to hear "suits of a civil nature at common law or in equity."[232] It has been suggested that the power to grant divorces or alimony did not fall within either common law or equity jurisdiction, thereby precluding the exercise of such power by the federal courts.[233]

The validity of this justification was questionable, even at the time *Barber* was decided. One court has noted that the temporal courts in England did have power over domestic matters to some degree.[234] Consequently, this same power passed to the federal courts under its common law and equity jurisdiction.[235] In addition to the historical inaccuracy of the statutory justification, this justification no longer has any force as the equity and law diversity jurisdiction of the federal courts were merged into jurisdiction over "civil actions" in 1948.[236]

A second statutory justification offered by the courts focuses on the problem of establishing diversity jurisdiction. Historically, husbands and wives could not be citizens of different states so long as the marriage relation continued.[237] Thus, there could be no diversity jurisdiction between spouses. This

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visions of the fourteenth amendment. U.S. CONST. amend. XIV, § 5. The recent recognition of family related rights under the aegis of due process and equal protection suggest that such legislative authority may not be beyond the power of Congress. *See infra* notes 260-93 and accompanying text.

[231] 28 U.S.C. § 1652 (1976 & Supp. III 1979); Erie R. R. Co. v. Tompkins, 304 U.S. 64, 64 (1938).

[232] Act of Sept. 24, 1789, § 11, 1 Stat. 78. Relevant portions of the statute are set out *supra* at note 2.

[233] Barber v. Barber, 62 U.S. (21 How.) 582, 605 (1858); Spindel v. Spindel, 283 F. Supp. 797, 802 (E.D.N.Y. 1968); C. WRIGHT, *supra* note 2, § 25, at 97.

[234] *See* Spindel v. Spindel, 283 F. Supp. at 806-09.

[235] *Id.* at 806.

[236] C. WRIGHT, *supra* note 2, § 25, at 97. Thus, whether or not divorce and other domestic matters were encompassed in law or in equity jurisdiction is no longer an important consideration. The change in the statutory language renders invalid this statutory justification for the exception. C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3609, at 663.

[237] De La Rama v. De La Rama, 201 U.S. 303, 307 (1906).

historical doctrine no longer exists. It is now recognized that a person may sue his or her spouse in federal court under diversity jurisdiction so long as he establishes citizenship different from that of the spouse.[238]

The only currently valid statutory justification for the domestic relations exception involves the amount in controversy requirement. Federal courts have suggested that most domestic matters in themselves involve no pecuniary value, thus implying that the requisite $10,000 amount in controversy cannot be satisfied in domestic controversies.[239] This argument applies in cases such as child custody actions, where no monetary amount has been alleged; valuing in monetary terms the custody of a child, arguably, is impossible.[240] Yet, by its own terms this argument would not apply in domestic cases where an amount in controversy greater than $10,000 is alleged. Further, such an argument is only a limitation on which domestic controversies may be heard—equally applicable to all cases brought in diversity jurisdiction—and is not, therefore, a justification for the domestic relations exception in general.

3. Policy Justifications

More compelling than the constitutional or statutory justifications are the policy considerations supporting the domestic relations exception. Several courts have argued that the domestic relations exception exists because state courts are more competent to decide such matters.[241] This argument emphasizes that state courts have had years of experience in determining domestic law matters,[242] and are more familiar with the criteria to be considered in determining them.[243] Accordingly, the argument concludes, domestic relations matters are more peculiarly suited to state regulation and control, and ought not be heard in federal courts.[244] A second argument supporting the domestic relations exception is that the exception is necessary to maintain a unitary system of regulation over domestic matters.[245] Such a unitary system is needed, according to this argument, because of a strong state interest in maintaining control over family law matters.[246]

The state competence justification is the less convincing of these policy arguments. While state courts do have more experience in dealing with domestic relations matters, this is probably more a statement about the result of years of application of the domestic relations exception than a justification for

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[238] *Id.*; *Clifford*, 131 F. at 102.

[239] *See, e.g., Clifford*, 131 F. at 102.

[240] *Id.*

[241] *See* Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968); *In re* Freiberg, 262 F. Supp. 482, 484 (E.D. La. 1967); *Brandtscheit*, 239 F. Supp. at 654.

[242] C. WRIGHT, *supra* note 2, § 25, at 97.

[243] Buechold v. Ortiz, 401 F.2d 371, 373 (9th Cir. 1968).

[244] *Id.*

[245] Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 509 (1954).

[246] C. WRIGHT, A. MILLER & E. COOPER, *supra* note 6, § 3609, at 663.

its existence. Having had exclusive jurisdiction over matters of divorce and related matters for over a century might well enable the state courts to deal more competently with domestic relations matters than can federal courts. This does not, however, justify the refusal to take jurisdiction otherwise granted to the federal courts. Moreover, at least one court has noted that this competence is true of all diversity cases, and not just domestic relations matters.[247] This disparity in competence does not justify the refusal to take jurisdiction in domestic matters any more than it would in tort or contract actions.

As to the argument that the exception is necesssary to maintain a unitary system of control over domestic matters because of a strong state interest in such matters, it is likely that federal judges will not apply state domestic law any more divergently than will different state judges.[248] Thus, the system would be no less uniform if domestic matters were heard under diversity jurisdiction.[249] In addition, the presence of a strong state interest in family law matters appears to have declined. The development of no-fault divorce in a majority of states[250] and the general relaxation of restrictions on who may marry[251] suggest that the state interest in regulating marriage and divorce is no longer as strong as it once was, thereby weakening that justification for the domestic relations exception.

An alternative policy consideration offered by the courts is based on more practical reasons for maintaining the domestic relations exception. Several courts have suggested that the doctrice is justified by the fact that federal dockets are overcrowded, and allowing domestic relations matters into the federal forum would only aggravate the problem.[252] Removing an entire area of law from the consideration of federal courts is clearly an effective way to avoid adding to the caseload of an already overburdened federal court system. Lower federal courts have recognized a doctrine of abstention solely for the purpose of serving the convenience of the federal courts.[253]

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[247] Crouch v. Crouch, 566 F.2d 486, 488 (5th Cir. 1978).

[248] Spindel v. Spindel, 283 F. Supp. 797, 812 (E.D.N.Y. 1968).

[249] *Id.*

[250] In nearly all American jurisdictions, marriage breakdown and incompatibility are grounds for divorce. CLARK, CASES AND PROBLEMS ON DOMESTIC RELATIONS 12 (3d ed. 1980). Thus, fault has largely been eliminated from the question of whether a divorce will be granted. *Id.*

[251] In recent years, marriage laws have loosened, thus reducing to "levels of gesture" the requirements for marriage. KRAUSE, CASES AND MATERIALS ON FAMILY LAW 804 (1976). Entry into marriage is now, as a result, virtually unlimited. *Id.*

[252] *See, e.g.*, Cherry v. Cherry, 438 F. Supp. 88, 90 (D. Md. 1977). The overcrowded federal court dockets have been noted by the federal courts in contexts other than the domestic relations exception. *See* Reiter v. Sonotone, 442 U.S. 330, 334 (1979) (class action suit by retail consumers); Chism v. National Heritage Life Ins. Co., 637 F.2d 1328, 1332 (9th Cir. 1981) (suit against insurance company regarding disability insurance contract); Kroger v. Owen Equip. & Erection Co., 558 F.2d 417, 424-25 n.25 (8th Cir. 1977) (ancillary jurisdiction).

[253] C. WRIGHT, *supra* note 2, § 52, at 227-28. *See, e.g.*, Klein v. Walston & Co., Inc., 432 F.2d 936, 937 (2d Cir. 1970) (suit for damages incurred in fraudulent securities transaction); Aetna State Bank v. Altheimer, 430 F.2d 750, 755 (7th Cir. 1970) (suit for damages from violation of Securities Exchange Act).

The validity of the overcrowded dockets justification for the exception is currently in question. As recently as 1976, the Supreme Court emphasized the impropriety of a federal courts' refusing to hear cases that could otherwise be brought in state courts solely because the federal courts are "too busy" to try them in the context of a dismissal of an action to a state court.[254] While there is a difference between a dismissal and a refusal to take initial jurisdiction,[255] the Court's language casts doubt on the acceptability of the overcrowded dockets justification. Moreover, careful consideration of this justification for the domestic relations exception reveals that it is not as convincing a justification as it may appear to be. Perhaps if *all* domestic matters were brought under diversity jurisdiction, a significant impact would be made on the federal court dockets. The very nature of domestic controversies, however, limits which controversies may be brought in federal courts under their diversity jurisdiction. First, the nature of the parties involved in domestic controversies indicates that a number of domestic controversies are kept out of the federal courts because of a lack of diverse citizenship. This is so because in many cases, family members reside in the same state. In addition, the amount in controversy requirement severely limits which cases can be brought in federal court. Many matters pertaining to domestic affairs are not conducive to pecuniary valuation. Thus, divorce actions in which neither property nor support is in dispute, and actions in which only child custody is in dispute, among others, are eliminated from federal diversity jurisdiction because of the inability to meet the requirement of $10,000 in controversy, regardless of the existence of the domestic relations exception. Because the percentage of divorce cases in which support is actually disputed is relatively small,[256] and because federal courts currently enforce accrued alimony payments[257] it appears that the domestic relations exception itself does not exclude from diversity jurisdiction as large a number of cases as the overcrowded dockets argument suggests. Eliminating the exception would not, therefore, result in the further overcrowding of the federal courts which this justification portends.[258]

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[254] Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 344 (1976) (removal action).

[255] C. WRIGHT, *supra* note 2, § 52, at 227.

[256] While specific data do not exist on the subject, estimates indicate that alimony is not involved in about 90% or more of all divorces. KRAUSE, *supra* note 251, at 935. Available estimates suggest further that less than 10% of all divorces are contested in court. Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 950, 951 n.3 (1979). In most cases of divorce, matters such as property, custody, and the like are worked out ahead of time by the parties, and the court merely rubber stamps the parties' agreement. Friedman & Percival, *A Tale of Two Courts: Litigation in Alameda and San Benito Counties*, 10 LAW & SOC'Y REV. 267, 270 (1976) *quoted in id.* at 951 & n.2. These figures indicate that while the divorce rate in the United States is high, with estimates in 1980 reaching 1.82 million, U.S. Department of Commerce, STATISTICAL ABSTRACT OF THE UNITED STATES 58 (1981), all but about 10% of this number do not involve property disputes. The requirements that the disputed property exceed $10,000 in value and that the disputing parties be of diverse citizenship further limits the number of divorces which could be brought in federal court.

[257] *See supra* note 130 and accompanying text.

[258] Domestic matters are not, of course, limited to divorces and alimony enforcement.

In summary, the domestic relations exception cannot be supported by any constitutional or statutory justifications. Rather, the federal courts have the power to act, but for policy reasons based on perceived state competence, need for a uniform system of regulation and overcrowded federal dockets, choose not to exercise it. Close analysis of the policy reasons, however, indicates that they are not convincing support for the exception. Federal courts could easily apply state domestic law as competently and uniformly as state judges, without significantly overburdening the federal court system. Yet, both the courts and Congress[259] continue to be unwilling to involve the federal courts in domestic matters. Despite this reluctance on the part of the federal judiciary and legislature, a compelling reason exists which calls out for the abolition of the domestic relations exception. The final section of this discussion will suggest that such a reason may be found in the fact that the exception is inconsistent with the recognition of federal constitutional rights pervading the field of family law, and therefore ought to be abolished.

C. *The Domestic Relations Exception and the Recognition of Constitutional Family-based Rights*

The domestic relations exception should be abolished because the principle underlying the exception is no longer valid. This basic principle of the exception is that the area of domestic matters is not a federal concern, but is totally within the realm of state law.[260] While it may have been true in the nine-

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These matters, however, account for many of the possible cases involving disputes in excess of $10,000. Actions for breach of separation agreements, antenuptial agreements and postnuptial agreements could involve $10,000, as could tort actions and child snatchings involving sufficient damages. As to the effect on federal court dockets of extending diversity jurisdiction to such matters, some federal courts already enforce agreements between marital parties, treating them as any other contract action. *See, e.g.*, Jones v. Jones, 242 F. Supp. 979 (S.D.N.Y. 1965). Tort actions between marital parties as well are currently heard in federal court. *See, e.g.*, Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980). As to the number of child snatching cases per year, unofficial estimates place the number at about 100,000. Katz, *Legal Remedies for Child Snatching*, 15 FAM. L. Q. 103, 103 n.2 (1981). The number of such cases which could be brought in federal court would be limited by the fact that in some cases, the abducting parent cannot be located, and by the fact that state remedies, including habeas actions to recover custody of the child, are available to redress child snatchings. *See generally id., passim.*

[259] In 1981, Congress considered a bill which would have extended diversity jurisdiction to enforce child custody orders, without regard to an amount in controversy. H.R. 223, 97th Cong., 1st Sess. (1981). The subcommittee considering the bill did not act on the bill because of the presence of "too many issues," including those advanced in a letter from the Department of Justice advising against passage of the bill. Telephone conversation with Bill Shattuck, Majority Counsel to the House Subcommittee on Administrative Law (Nov. 8, 1982). The Department of Justice letter stated as follows: "In short, constitutional considerations aside, we believe that H.R. 223 would result in an unwarranted expansion of the jurisdiction of the already crowded federal courts to embrace matters that traditionally have been regulated by state laws which can and should be applied by state courts." Letter from Robert A. McConnell, Assistant Attorney General, Office of Legislative Affairs of the Department of Justice, to Peter W. Rodino, Chairman of the House Judiciary Committee (Nov. 17, 1981).

[260] The initial promulgation of the disclaimer of federal jurisdiction in *Barber* was limited to divorce and alimony. 62 U.S. (21 How.) 582, 584 (1858). *Burrus* broadened the disclaimer to

teenth century that domestic matters were *solely* a state concern, a fairly recent trend in Supreme Court decisions has recognized fundamental rights relative to the family which are protected by the Constitution. This recognition of constitutional rights in matters of family life seriously undermines the basis of the domestic relations exception and signals the need to abolish the doctrine.

The beginning of the trend in the constitutionalization of family-based rights can be traced to two cases decided in the 1920's.[261] During this period, the Supreme Court had exhibited a willingness to give substantive content to the notion of due process by recognizing specific rights of the individual, including economic rights, encompassed within the concept of liberty.[262] The two Supreme Court cases, *Meyer v. Nebraska*[263] and *Pierce v. Society of Sisters,*[264] recognized fundamental constitutional rights embodied in the family. In *Meyer,* an Oregon statute requiring all children to attend public schools was found to be an unconstitutional infringement of liberty under the due process clause of the fourteenth amendment.[265] In *Pierce,* the Court struck down a Nebraska statute which made it illegal for a teacher to teach any language other than English in the schools.[266] In these cases, the Supreme Court reasoned that the term "liberty" in the fourteenth amendment[267] encompasses rights other than merely freedom from bodily restraint.[268] Among these rights, according to the Court, are the rights to marry and raise a family.[269] The Supreme Court established in these cases that while a state may regulate its citizens in matters affecting the family unit,[270] it may not do so in a manner which disrupts the "private realm of family life which the state cannot enter" without compelling justification.[271]

The willingness of the Supreme Court to recognize substantive due process rights ceased in the 1930's.[272] The fundamental rights recognized under the

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the general contours of domestic law. 136 U.S. 586, 593-94 (1890). Consequently, the notion that the whole subject of domestic relations belongs to state and not federal law has become the grounds for declining jurisdiction in cases involving many aspects of domestic relations law. *See supra* note 42 and accompanying text.

[261] *Developments, supra* note 229, at 1162.

[262] *Id. See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (invalidating, on due process grounds, a state law setting maximum daily and weekly hours for bakery workers). This era of invalidating statutes on substantive due process grounds has been deemed the "*Lochner* era" by commentators. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 8-2, at 434 (1978).

[263] 262 U.S. 390 (1923).

[264] 268 U.S. 510 (1925).

[265] Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

[266] Pierce v. Society of Sisters, 268 U.S. 510, 536 (1925).

[267] "[N]or shall any state deprive any person of . . . liberty . . . without due process of law. . . ." U.S. CONST. amend. XIV, § 1.

[268] Meyer v. Nebraska, 262 U.S. 390, 400 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

[269] Meyer v. Nebraska, 262 U.S. at 400; Pierce v. Society of Sisters, 268 U.S. at 535. In each case, the Court rested its decision on the fact that the statutes interfered with the "liberty" of parents to educate their children as they choose.

[270] Meyer v. Nebraska, 262 U.S. at 401; Pierce v. Society of Sisters, 268 U.S. at 534-35.

[271] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[272] L. TRIBE, *supra* note 262, § 8-5, at 442.

aegis of liberty in *Meyer* and *Pierce,* however, survived this change in Supreme Court philosophy.[273] Almost twenty years after its decision in *Meyer,* the Supreme Court struck down an Oklahoma statute providing for the sterilization of criminals committing certain crimes of moral turpitude, but not other crimes of a similar nature.[274] In *Skinner v. Oklahoma,*[275] the Court held that such a statute violated the equal protection clause.[276] In doing so, the Court continued to recognize the existence of constitutionally protected rights arising from the family relationship. The *Skinner* Court noted that both marriage and procreation are fundamental rights and, because of the importance of the rights of the persons affected in the statute, reviewed the statute with strict scrutiny.[277] Finding that the law unfairly classified which criminals would be sterilized, the *Skinner* Court declared the statute unconstitutional.[278]

The Supreme Court continued to recognize fundamental rights arising out of family related matters with its decision in *Griswold v. Connecticut.*[279] In *Griswold,* the Court considered the constitutionality of a statute forbidding the dispensing of contraceptive material to married couples.[280] In reviewing the statute, the Court reasoned that the guarantees of individual freedoms specifically enumerated in the Constitution have "penumbras" which form a constitutionally protected right to privacy.[281] According to the court, this right to privacy encompasses activity carried on in the marital relationship,[282] as well as the rights of persons to make choices regarding the upbringing of children as enumerated in *Meyer* and *Pierce.*[283] Finding that the state contraception statute invaded the right of privacy without due process, the Court declared the statute unconstitutional.[284] The decision in *Griswold* suggests that while the source of fundamental rights to decide matters of family life had changed from the concept of liberty to the concept of the individual's right of privacy, the Court's willingness to recognize and protect these personal rights had, nevertheless, remained unaltered.

Later Supreme Court decisions have developed further the fundamental right to privacy and autonony in matters of family life, as established in the *Meyer-Skinner-Griswold* line of cases. Thus, the right of an individual to marry,[285] to decide when and if one will procreate,[286] and to divorce[287] have

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[273] *Developments, supra* note 229, at 1162-63.
[274] Skinner v. Oklahoma, 316 U.S. 535 (1942).
[275] *Id.*
[276] *Id.* at 541.
[277] *Id.*
[278] *Id.*
[279] 381 U.S. 479 (1965).
[280] *Id.* at 485.
[281] *Id.* at 484-85.
[282] *Id.* at 485.
[283] *Id.* at 482-83.
[284] *Id.* at 485.
[285] Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).
[286] Roe v. Wade, 410 U.S. 113 (1973).
[287] Boddie v. Connecticut, 401 U.S. 371 (1971).

been recognized as rights subsumed within the right to privacy, which may not be infringed without compelling justification. Likewise, other areas of domestic law have assumed constitutional magnitude. The Supreme Court has recognized constitutional implications in the granting of alimony,[288] the terminating of parental rights,[289] defining the family unit,[290] and the granting or denying of custody,[291] under both the equal protection and due process clauses. This line of cases suggests that the state is no longer free to regulate domestic matters in an unfettered manner, because domestic relations law is *not* solely a state concern. Rather, there is a collection of fundamental rights in matters of family life, the recognition of which postdates the birth of the domestic relations exception, which are implicitly guaranteed by the Constitution and which pervade the field of family law, thereby limiting the state's power over such matters.[292] While this line of constitutional cases does not suggest that there is a constitutional right to litigate domestic controversies under diversity jurisdiction, it does indicate the notion that family law is solely a state concern—the cornerstone of the domestic exception—is no longer true. Rather, family law is now a field occupied by both state and federal law. The domestic exception, which is based on this fallacious notion, is therefore inconsistent with the trend recognizing constitutional rights in matters of family law.[293]

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[288] Orr v. Orr, 440 U.S. 268 (1979).

[289] Santosky v. Kramer, 455 U.S. 745 (1982).

[290] Moore v. City of East Cleveland, 431 U.S. 494 (1977).

[291] Stanley v. Illinois, 405 U.S. 645 (1972).

[292] The states do have the power to regulate the family. This power derives from two sources: the police power and the parens patriae power. *Developments, supra* note 229, at 1198. *See supra* notes 215 & 229. There appears to be some controversy, however, regarding the nature of the constitutional rights recognized in the *Meyer-Griswold-Skinner* line of cases. One school of thought suggests that it is the *family* which has been granted constitutional protection pursuant to these cases. *See* Strickman, *Marriage, Divorce and the Constitution*, 22 B.C. L. REV. 935 (1981). Another school of thought suggests that while the Supreme Court's earlier cases suggest this interpretation, later cases have de-emphasized the constitutional protection of the family unit. *See* L. TRIBE, *supra* note 262, § 15-21, at 987 *citing* Planned Parenthood v. Danforth, 428 U.S. 53 (1976) (rejecting absolute parental veto over minor's abortion); Runyon v. McCrary, 427 U.S. 160 (1976) (no privacy right violated by statute outlawing segregated private academies); Baker v. Owen, 423 U.S. 907 (1976) *aff'g* 395 F. Supp. 294 (M.D.N.C. 1975) (parental approval of corporal punishment in school not constitutionally required). This view suggests that *Meyer* and its progeny have created *individual* powers in matters of family life which restrict the power of the state to regulate the family. L. TRIBE, *supra* note 262, § 15-21, at 987. The particular approach adopted does not affect this analysis of the domestic relations exception. In both schools of thought, family-based rights — whether belonging to the family unit or the individual — are recognized. Both approaches thus acknowledge the presence of federal law in matters of family law.

[293] The Supreme Court has recently affirmed its willingness to continue the trend establishing constitutional aspects of family law. In Santosky v. Kramer, 455 U.S. 745 (1982), one of the Court's most recent decisions in the area of family law, the Supreme Court reviewed a New York statute which permitted the termination of parental rights upon a showing, by a fair preponderance of the evidence, that the parents had failed to care for their child. *Id.* at 747. Writing for the majority, Justice Blackmun reaffirmed the Court's historical recognition that freedom of choice in matters of family life is a fundamental interest protected by the fourteenth amendment. *Id.* at 753. The Court weighed the fundamental nature of the parents' rights against

In summary, the inconsistency of the domestic relations exception with the more recent constitutionalization of family related rights mandates the abolition of the exception. By maintaining the exception, the federal courts adopt a schizophrenic approach to domestic affairs. On the one hand, they recognize that federal law does, in fact, play a large role in family law matters through the protection of constitutional rights in fundamental matters of family life. On the other hand, they hold fast to a doctrine whose basic premise is that the sole source of law regarding the family is state law, thus abstaining from hearing family law matters in diversity cases despite their constitutional and statutory power to do so. Because the trend in the federalization of family law is of constitutional magnitude, as opposed to the policy-based concerns relative to the domestic relations exception, the exception should not stand to frustrate the spirit of this trend.

D. *Effects of Abolishing the Domestic Relations Exception*

Abolition of the domestic relations exception would effect the law of federal courts in two ways. The most important effect of abandoning the doctrine would be the establishment of a uniform approach to matters of family law on the part of federal courts. By extending diversity jurisdiction to domestic controvesies, federal courts would give credence to the fact that federal law *does* play a part in domestic affairs, contrary to the law existing when the Supreme Court decided *Barber* and *Burrus*.

Second, the practical effects of abolishing the domestic relations exception would not be as great as proponents of the exception might suggest. Some domestic controversies would be excluded from diversity jurisdiction. For example, those matters involving family members residing in the same state would be excluded as would cases not meeting the $10,000 amount in con-

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the risk of error under the evidentiary standard and the state's interest in maintaining the standard, and concluded that due process demanded more than a showing of a preponderance of the evidence before parental rights may be terminated. *Id.* at 768. Four Justices dissented. Writing for the dissent, Justice Rehnquist argued that the majority's decision invited further federal court intrusion into state family law. *Id.* at 770. Fearing that such a trend in federal intervention would stifle the states' abilities to creatively deal with family law matters, the dissent argued that the statute should have been upheld. *Id.* at 791. *Santosky* lends further support to the argument to abolish the domestic relations exception. By establishing yet another area of federal intervention in the area of family law, *Santosky* is more proof that the exception is no longer based on a valid premise. Moreover, the very reasons why the dissent rejected federal court intervention in *Santosky* do not argue against abolition of the exception. Allowing federal courts to hear domestic matters would not, as Justice Rehnquist feared, stifle the creativity of state legislatures to deal with domestic matters. Because federal courts must apply state law in diversity cases, federal judges would merely apply the solutions developed in the state legislature and courts, as would any state judge. Such action would not result in any encroachment upon the states' power over family law matters.

In addition, federal involvement in family law has occurred through statutory as well as constitutional avenues. Thus, for example, the AFDC program and special provisions in the tax law have had an influence on the family. *See generally* KRAUSE, *supra* note 251, at 230-46; Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389 (1978).

troversy requirement. This necessity of meeting both requirements of diversity and sufficient amount in controversy simultaneously would serve to limit severely which domestic controversies would be brought under federal court jurisdiction were the domestic relations exception abolished.

While the requirements of diversity jurisdiction would act as a limit on the number and type of domestic disputes heard in federal court, it is not disputed that abolition of the exception would broaden the range of cases now heard in federal court. The requirements in turn make it impossible to estimate the exact effect of abolishing the doctrine.[294] Whether great or small, however, the effect would be a necessary and inevitable one to maintain a logical and uniform approach by the federal courts to domestic relations matters.

CONCLUSION

The domestic relations exception has enjoyed a long tenure in the law of federal courts. Despite its dubious origins in dicta, the doctrine has developed into a well-established rule to which the federal courts adhere with remarkable tenacity. The effect of the exception is to preclude from constitutionally and statutorily granted diversity jurisdiction a host of litigants involved in domestic controversies. Concerns of consistency and fairness, however, must override any practical reasons for maintaining the domestic relations exception. The premise of the doctrine has been undermined by the recognition of constitutional rights relative to the family. Consequently, maintenance of the exception results in the federal courts approaching matters of family law in an inconsistent manner. Given the importance of family based rights to society and its members, a harmonious approach on the part of the federal courts is needed. The domestic relations exception, therefore, ought to be abolished, and diversity jurisdiction extended to domestic controversies.

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[294] For a discussion of the possible impact on the federal courts of the abolition of the doctrine, see *supra* notes 256 & 258.