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Sharon Elizabeth Rush

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> 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.[1]

Commonly known as the domestic relations exception, the United States Supreme Court's broad disclaimer of federal power over family law matters symbolizes the inherent division of power fundamental to a dual sovereignty. Although the Court announced the disclaimer only in dicta, and no authoritative analysis of its validity exists, federal courts have adamantly declared that the domestic relations exception divests them of jurisdiction over divorce, alimony, and child custody. Within the last twenty years, however, a growing number of federal courts have questioned the validity and contours of the domestic relations exception. This questioning indicates a basic misunderstanding of the role of federal courts in domestic relations law.

A reexamination of the domestic relations exception will help to clarify this recent confusion. This investigation necessarily considers the allocation of power between the federal and state governments. Such questions are especially timely in light of the Burger Court's concern with federalism and state sovereignty.[2]

After examining the historical development and gradual expansion of the domestic relations exception, this article then explores its validity. Three theories support the exception by suggesting that federal courts historically lacked power to grant divorces, award alimony, and determine child custody because: (1) diversity jurisdic-

* Assistant Professor, DePaul University College of Law; B.A. 1974, J.D. 1980, Cornell University.

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

2 *See generally, Civil Rights and Federalism*, 59 NOTRE DAME L. REV. 1063 (1984); *see also* notes 78-84 *infra* and accompanying text.

tion originally did not extend to these suits; (2) the jurisdiction of article III courts was never intended to extend to these matters; and (3) such issues are reserved to the states through the tenth amendment.

This article posits that, outside of granting divorces, awarding alimony, and determining child custody, federal jurisdiction is not a question of power, but of abstention. A brief look at sanctioned abstention doctrines demonstrates that some domestic relations cases warrant judicial restraint. Moreover, abstention is appropriate in other limited circumstances outside of these sanctioned abstention doctrines because of the principles of comity and federalism. This article concludes with a suggested framework for analyzing the domestic relations exception. The framework is designed to avoid confusion in the courts, to increase consistency in the application of the exception, and to reach results consistent with the development of the domestic relations exception and principles of comity and federalism.

I. The Domestic Relations Exception: Historical Development and Gradual Expansion

During the nineteenth and twentieth centuries, the United States Supreme Court and the lower federal courts recognized and expanded the scope of the domestic relations exception to federal jurisdiction. In divorce, alimony, and child custody cases, the courts solidified the principle of the domestic relations exception, thereby effectively removing those cases from the federal courts.

A. *Divorce and Alimony*

In 1859, the Supreme Court first proclaimed the principle that federal jurisdiction does not extend to divorce and alimony suits in the dicta of *Barber v. Barber*.[3] Mrs. Barber, represented by her next friend,[4] a New York citizen, brought suit in federal district court in Wisconsin requesting enforcement of a New York state court decree awarding her a divorce from bed and board[5] and alimony. Mr. Bar-

3 62 U.S. (21 How.) 582 (1859).

4 Under English common law, a wife could not maintain a suit in her own name. If she wished to sue her husband for divorce, or to enforce an alimony award, she could do so only by way of representation. In England, a married woman (*feme covert*) could sue in her own right, as a single woman (*feme sole*), only if her husband was in exile or had "abjured the realm." 1 W. BLACKSTONE, COMMENTARIES *443.

5 A divorce from bed and board, or *a mensa et thoro*, was granted in England by the ecclesiastical courts. It was only a partial divorce and did not terminate the marriage. In

ber, a Wisconsin citizen, fraudulently attempted to defeat the New York decree. Mrs. Barber succeeded and, on appeal, Mr. Barber challenged the jurisdiction of the district court to hear the case.

At that time, the district court had the power to entertain a case, if the dispute exceeded $500[6] and the suit was "of a civil nature at common law or in equity . . . between a citizen of the State where the suit was brought, and a citizen of another State."[7] In *Barber*, the Supreme Court upheld federal jurisdiction, finding that the parties were diverse citizens and that the subject matter was proper for a federal court of equity.[8]

To reach that decision, the *Barber* Court first "disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony. . . ."[9] Turning to the diversity issue, it then found that Mrs. Barber could establish a domicile separate from that of her husband because of her legal separation.[10] Thus, diversity of citizenship existed between the parties.

Relying on English history, the *Barber* Court then found that Mrs. Barber's suit was an appropriate subject for the equity jurisdiction of the federal courts. Although only English ecclesiastical courts could grant divorces and award alimony, English chancery courts were empowered to enforce the ecclesiastical decrees. By analogy, a federal district court could enforce a valid state alimony decree.[11]

The *Barber* opinion, however, implied that state tribunals should decide ecclesiastical matters, such as divorce and alimony. This implication provides the basic rationale for the domestic relations ex-

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America, the divorce from bed and board was considered a legal separation, terminable at the will of the parties. J. SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS § 222, at 343 (5th ed. 1895). A divorce from the bonds of matrimony, or *a vinculo matrimonii*, was a total divorce granted in England only by act of Parliament. It presupposed that the marriage was void *ab initio*. 1 W. BLACKSTONE, COMMENTARIES *440-41.

6 Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78.

7 *Id.* The statute admitting Wisconsin to the Union also established a federal district court and gave it the same jurisdiction and powers which were given to the district court of Kentucky by the 1789 Act. Act of Aug. 6, 1846, ch 89, § 4, 9 Stat. 56, 57. The 1789 Act gave the Kentucky district court the same powers as those held by circuit courts, which were granted jurisdiction over "suits of a civil nature at common law or in equity" between citizens of different states. Judiciary Act of 1789, *supra*, §§ 10-11.

8 62 U.S. at 599.

9 *Id.* at 584.

10 *Id.* at 597-98. As a general rule, a wife's domicile followed that of her husband. The *Barber* Court, however, stated the exception that "if the husband, as is the fact in this case, abandons their domicil and his wife, . . . and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicil hers . . . ." *Id.* at 595.

11 *Id.* at 590-91.

ception to federal jurisdiction. The question of diverse citizenship between spouses became a secondary issue which was never completely confronted in *Barber*. Later courts denied federal diversity jurisdiction over divorce actions on the ground that divorce could not be reduced to a pecuniary value, so such actions failed to satisfy the statutory amounts required for jurisdiction.[12]

The *Barber* dicta that divorce and alimony suits are beyond federal jurisdiction guided federal courts until the Supreme Court expressly addressed the issue forty years later in *Simms v. Simms*.[13] Unlike *Barber*, the *Simms* case originated in a federal territorial court. The question presented to the Supreme Court was whether it had appellate jurisdiction to review a divorce and alimony decree granted by Arizona's territorial court. Fundamental to the question of the Supreme Court's appellate jurisdiction was an inquiry into the original jurisdiction of the territorial court.[14] The *Simms* Court held that the territorial courts were not limited by article III of the Constitution since they were legislative courts established under article I of the Constitution.[15] Therefore, the *Barber* dicta did not apply to restrict the jurisdiction of either the territorial courts or the Supreme Court when reviewing them.[16]

The *Simms* decision is significant because it perpetuated the validity of the *Barber* dicta. The decision also included the Supreme Court's clear position that a domestic relations exception to article

12 In Simms v. Simms, 175 U.S. 162 (1899), the Court held that a divorce decree could not be reviewed on appeal "because that was a matter the value of which could not be estimated in money." It thus failed to satisfy the amount in controversy requirement. *Id.* at 168-69. Federal jurisdiction over child custody has been denied on the same basis. *See* notes 46-52 *infra* and accompanying text.

13 175 U.S. 162 (1899).

14 Congress had provided that "[t]he legislative power of every Territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States." *Id.* at 168 (citing the Act of July 30, 1886, ch. 818, 24 Stat. 170) [Supreme Court cite is incorrect, actual language appears at STAT. tit. 23, § 1851 (2d ed. 1873)]. This power included "domestic relations . . . and all other matters which, within the limits of a State, are regulated by the laws of the State only." 175 U.S. at 168 (citing Cope v. Cope, 137 U.S. 682, 684 (1891)).

15 175 U.S. at 167-68. The *Simms* Court stated that the federal circuit courts' lack of jurisdiction over divorce and alimony suits may "be assumed as indubitable. . . . But those considerations have no application to the jurisdiction of the courts of a Territory, or to the appellate jurisdiction of this court over those courts." *Id.*

16 The appellate jurisdiction of the Supreme Court, however, was limited by a jurisdictional amount requirement of $5000. Act of Mar. 3, 1885, ch. 355, 23 Stat. 443 (1883-1885). The alimony charge met this amount, 175 U.S. at 171, but the divorce claim did not. *Id.* at 168-69; *see* note 12 *supra*.

Oddly, the *Simms* Court did not address the fact that the Supreme Court was itself an article III court, even when reviewing a territorial court's alimony award.

III jurisdiction existed. The Supreme Court's belief in the existence of the exception was most emphatically illustrated in *Ohio ex rel. Popovici v. Agler*,[17] decided three decades after *Simms*.

In *Popovici*, a vice-consul challenged the validity of an Ohio divorce decree and alimony award obtained by his wife and affirmed by the state supreme court. He sought review in the United States Supreme Court, contending that the state decree was void because Congress and the Constitution granted the federal courts exclusive jurisdiction over suits involving foreign officers.[18] The Court, in rejecting this argument, held unanimously that nothing in federal law preempted a state's jurisdiction over divorce and alimony.[19] Invoking the "common understanding" that such matters were reserved to the states, Justice Holmes interpreted the congressional and constitutional language to exclude matters which "formerly would have belonged to the ecclesiastical Courts."[20] Thus, the Supreme Court once again affirmed the domestic relations exception to article III jurisdiction.

B. *Child Custody*

The Supreme Court significantly expanded *Barber's* domestic relations exception to include child custody in *In re Burrus*.[21] In the *Burrus* case, a federal district court held a grandfather in contempt and jailed him for violating its writ of habeas corpus. The writ had ordered him to return his grandchild to her father.[22] The grandfather then sought a writ of habeas corpus from the Supreme Court for his own release. He alleged that he was wrongfully detained because the district court had no jurisdiction to issue its writ. The Supreme Court agreed. The Court held that the lower court could not issue the writ unless the child was held in violation of the Constitution or of federal laws.[23] In language reminiscent of *Barber*, the *Burrus* Court concluded that "[t]he whole subject of the domestic relations of husband and wife, *parent and child*, belongs to the laws of the States and not to the laws of the United States."[24] The *Burrus* decision, however,

17 280 U.S. 379 (1930).

18 *Id.* at 382-83.

19 *Id.* at 383. Justice Holmes wrote that "the jurisdiction of the Courts of the United States over divorces and alimony always has been denied." *Id.*

20 *Id.* at 383-84.

21 136 U.S. 586 (1890).

22 *Id.* at 589.

23 *Id.* at 591-92.

24 *Id.* at 593-94 (emphasis added).

expressly held open the question of whether a federal court could determine the right to child custody based on the diverse citizenship of the contestants.[25]

C. *Modern Application of the Domestic Relations Exception*

With one possible exception,[26] the Supreme Court has remained

25 *Id.* at 596. The early cases did not address whether federal diversity jurisdiction extended to child custody determinations. Although subject matter jurisdiction was asserted on other bases, jurisdiction was almost uniformly denied over child custody determinations. Two reasons emerged: the jurisdictional amount requirement was not met, and the matter was not within federal equity jurisdiction.

Two cases reached the Supreme Court from the District of Columbia Orphan's Court, in which parties were seeking to be named guardians over infants. In both cases, the Court held that the pecuniary value of the guardianship failed to satisfy the required amount in controversy. Ritchie v. Mauro, 27 U.S. (2 Pet.) 243, 244 (1829) (Marshall, C.J.) ("The office of guardian is of no value, except so far as it affords a compensation for labor and services thereafter to be earned."); De Krafft v. Barney, 67 U.S. (2 Black) 704, 714 (1862) (no subject matter jurisdiction where guardianship of child is disputed upon considerations other than the pecuniary value of that position).

In a case between two parents, the Court held that the custody of a child was a matter "utterly incapable of being reduced to any pecuniary standard of value." Thus, the Supreme Court's appellate jurisdiction could not be exercised because the case did not meet the $2,000 minimum amount set by statute. Therefore, the decision of the circuit court below remained unchallenged. Barry v. Mercien, 46 U.S. (5 How.) 103, 120 (1847). The lower court had denied the father's habeas corpus petition to obtain custody of the child from her mother, asserting that the common law prerogative to act as *parens patriae* belongs to the sovereign states and not the federal courts. *In re* Barry, 42 F. 113, 118-19 (C.C.S.D.N.Y. 1844). The Supreme Court affirmed the principle that the *parens patriae* power does not belong to the federal courts in Fontain v. Ravenel, 58 U.S. (17 How.) 369 (1855), discussed at note 64 *infra.*

Two federal courts, however, did entertain child custody suits prior to *Burrus.* Neither case was based explicitly on the parties' diversity of citizenship. The question of federal subject matter jurisdiction was not raised in United States v. Green, 26 F. Cas. 30 (C.C.D.R.I. 1824) (Story, Circuit Justice). In that case, a father had sought a writ of habeas corpus in the Rhode Island federal circuit court to regain custody of his daughter from her maternal grandparents. Justice Story apparently believed a best interests analysis was appropriate. He stated that "[w]hen . . . the court is asked to lend its aid to put the infant into the custody of the father, . . . it will look into all the circumstances, and ascertain whether it will be for the real, permanent interests of the infant." *Id.* at 31. The case was continued until the next day, when an agreement was reached between the parties. *Id.* at 32. Thus, no decision was made on the merits. *But see In re* Barry, 42 F. 113, 125-26 (C.C.S.D.N.Y. 1844) (suggesting that a decision on the merits was made in favor of the father).

The best interests approach was applied by a federal territorial court to deny a mother's habeas corpus petition for the son's release from a missionary school. *In re* Can-ah-couqua, 29 F. 687 (D. Ala. 1887). Without addressing the basis of its jurisdiction, the court stated that "when sound morals, the good order and protection of civilized society, unmistakably demand it, the court has no alternative" but to keep the child from the parent. *Id.* at 690.

26 *See* Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982). In *Lehman,* a natural mother sought a federal writ of habeas corpus to regain custody of her children from a state sponsored foster home after her parental rights were terminated by the state. *Id.* at 505-06. Although it did not refer explicitly to the domestic relations exception,

silent for over fifty years on the subject of the domestic relations exception.[27] The lower federal courts, however, have considered the exception in a number of contexts. Some courts have interpreted the exception narrowly, while other courts have seen it as a broad exception to federal jurisdiction.[28]

Courts which narrowly construe the exception[29] have entertained family related cases based both in contract, such as suits for back alimony,[30] and in tort, such as suits arising from parental kidnapping.[31] Other courts, taking a broader view of the exception, have refused to hear similar cases.[32] In addition, some courts have

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the *Lehman* Court held that federal subject matter jurisdiction did not exist to consider a collateral attack on a state court's termination of parental rights.

27 The Supreme Court's last explicit reference to the domestic relations exception was made by Justice Holmes, writing for a unanimous Court, in Ohio *ex rel* Popovici v. Alger, 280 U.S. 379 (1930).

28 For other general discussions of the subject *see* Atwood, *Domestic Relations in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571 (1984); Note, *Federal Jurisdiction and the Domestic Relations Exception: A Search for Parameters*, 31 UCLA L. REV. 843 (1984); Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 B.C.L. REV. 661 (1983).

29 *See, e.g.*, Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980) (federal courts lack original diversity jurisdiction to grant divorce, award alimony, determine child custody, or decree visitation, but domestic relations exception does not extend to all cases of a domestic relations nature); Spindel v. Spindel, 283 F. Supp. 797, 806 (E.D.N.Y. 1968) (broad interpretation of domestic relations, based on expansive reading of Supreme Court dicta, is unwarranted). *Accord*, Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982) (diversity suit with intrafamily aspects should be heard by federal court if essence of suit is in tort or contract and if federal court need not exceed its competence).

30 *See, e.g.*, Crouch v. Crouch, 566 F.2d 486 (5th Cir. 1978) (federal court has jurisdiction to enforce separation agreement between ex-spouses who have lived apart for several years); Zimmerman v. Zimmerman, 395 F. Supp. 719, 721 (E.D. Pa. 1975) (maintenance and support contract).

31 *See, e.g.*, Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir. 1982) (suit against ex-spouse and her parents for tortious interference with child custody is not barred by domestic relations exception; resolution of suit does not require special competence of state domestic relations courts); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982) (district court has jurisdiction to grant monetary relief to father who is legal custodian of children allegedly abducted by mother); Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.), *cert. denied*, 459 U.S. 1014 (1982) (suit against ex-spouse for generally cognizable torts of child enticement and intentional infliction of emotional distress is within federal court jurisdiction). *Cf.* Fenslage v. Dawkins, 629 F.2d 1107, 1110 (5th Cir. 1980) (without discussing domestic relations exception, court held that plaintiff in diversity suit may recover damages from ex-spouse and his relatives for intentional infliction of emotional distress resulting from wrongful taking of child from plaintiff's legal custody). Torts other than those arising from a parental kidnapping have also been litigated in federal court. *See, e.g.*, Cole v. Cole, 633 F.2d 1083 (4th Cir. 1980) (permitting suit against ex-spouse and others for malicious prosecution, arson, conversion, and conspiracy).

32 *See, e.g.*, Jagiella v. Jagiella, 647 F.2d 561, 565 (5th Cir. 1981) (ex-spouse's counterclaim alleging alienation of child's affection and infliction of mental anguish grew out of parties' "stormy relationship" and was therefore properly dismissed as within domestic rela-

used the domestic relations exception to bar suits which seek a declaration of marital or parental status.[33]

Courts have taken a different approach when they address the question of subject matter jurisdiction within the context of abstention. These courts consider not whether jurisdiction exists, but whether it should be exercised.[34] Thus, even though the technical requirements of subject matter jurisdiction may exist, federal courts may decline to exercise jurisdiction over domestic relations cases. Reasons for this abstention include the competence and expertise of state courts in settling family disputes, the strong interests of the state in domestic relations matters, the risk of inconsistent federal and state court rulings in cases of continuing state court jurisdiction, and

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tions exception); Walker v. Walker, 509 F. Supp. 853, 855 (E.D. Va. 1981) (suit for back alimony dismissed as within domestic relations exception); Nouse v. Nouse, 450 F. Supp. 97, 100 (D. Md. 1978) (plaintiff's claim that ex-spouse interfered with his communication with their children falls within domestic relations exception because it relates to child custody and visitation); Bates v. Bushey, 407 F. Supp. 163, 164 (D. Me. 1976) (domestic relations exception denies federal diversity jurisdiction over "controversies involving virtually all aspects of domestic relations law"); Bacon v. Bacon, 365 F. Supp. 1019, 1020 (D. Or. 1973) (domestic relations exception applies to "intrafamily feuds").

33 *See, e.g.*, Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (federal courts have no jurisdiction to establish paternity even though diversity of citizenship and sufficient amount in controversy exist); Bates v. Bushey, 407 F. Supp. 163, 164 (D. Me. 1976) (paternity action barred; determination of child's legal status is at core of state's domestic relations jurisdiction and therefore is beyond jurisdiction of federal courts); Brandscheit v. Britton, 239 F. Supp. 652, 655 (N.D. Cal. 1965) (no federal subject matter jurisdiction over paternity suit, absent showing that state remedy is unavailable); *see also* Csibi v. Fustos, 670 F.2d 134, 138 (9th Cir. 1982) (because of domestic relations exception, federal court lacked subject matter jurisdiction to hear suit to establish rights in decedent's estate, when recovery hinged on determination of plaintiff's marital status); Welker v. Metropolitan Life Ins. Co., 502 F. Supp. 268, 270 (C.D. Cal. 1980) (suit to recover life insurance proceeds barred by domestic relations exception, when plaintiff's relief was "subsidiary to and dependent upon" determination of her status as decedent's putative spouse). *But see* Rocker v. Celebrezze, 358 F.2d 119, 123-24 (2d Cir. 1966) (district court may determine who is "wife" for purpose of Social Security benefits); Estate of Borax v. Commissioner, 349 F.2d 666, 670 (2d Cir. 1965), *cert. denied*, 383 U.S. 935 (1966) (ruling on validity of Mexican divorce for federal income tax purposes); Oxley v. Sweetland, 94 F.2d 33, 35 (4th Cir. 1938) (federal court may decide plaintiff's marital status; suit's purpose was determining property rights, not marital status).

It has been suggested that, if an action is grounded in contract or tort, a federal court should refuse to exercise jurisdiction in domestic relations cases *only* where a question of status, as opposed to property, arises. Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 31 (1956).

34 The rationale for abstention in the domestic relations area begins with the premise that neither the Constitution nor federal statutes deny power to federal courts to hear domestic relations cases. Cherry v. Cherry, 438 F. Supp. 88, 89 (D. Md. 1977). *See also* Zimmerman v. Zimmerman, 395 F. Supp. 719, 721 (E.D. Pa. 1975) (tradition of domestic relations exception reflects deference to federalist system, not question of inherent power).

congested federal dockets.[35]

Abstention has been based on various doctrines recognized by the Supreme Court, as well as on more general principles of comity and federalism. The results of these approaches have been far from uniform.[36] In fact, whether the jurisdiction of federal courts over do-

35 Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978); Cherry v. Cherry, 438 F. Supp. 88, 90 (D. Md. 1977). *See also* notes 85-115 *infra* and accompanying text.

36 A number of federal courts have held that abstention is appropriate in cases that "verge" on the domestic relations exception, although not falling precisely within the exception. *See* Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215-16 (6th Cir. 1981) (abstention appropriate in suit against trustee, in which plaintiff's alleged property rights are based on ex-spouse's support obligation under divorce decree); Bossom v. Bossom, 551 F.2d 474, 475 (2d Cir. 1976) (abstention proper in ex-spouse's suit to modify divorce decree, where full relief was available from state court having expertise and familiarity with matrimonial disputes that federal courts lack); Kamhi v. Cohen, 512 F.2d 1051, 1056 (2d Cir. 1975) (dismissal of ex-spouse's action to set aside seizure of his property, seized for non-support, by state-appointed receiver was proper because circuit court's policy is "to keep our federal hands off actions which verge on the matrimonial, or impinge upon the matrimonial jurisdiction of the state courts"); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974) (comity and common sense dictate abstaining from ex-husband's suit to enjoin ex-wife's foreclosure on mortgage made pursuant to divorce decree); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosentiel, 490 F.2d 509, 515-16 (2d Cir. 1973) (district court should have stayed action by law firm to recover from husband for legal services rendered to wife in matrimonial dispute).

In addition, federal courts have refused to hear civil rights suits that involve domestic relations. *See* Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981) (district court properly abstained from suit that, although clothed in garb of state civil rights action, amounted to demand for child's custody); Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972) (abstention proper in federal civil rights action brought by children alleging unconstitutional deprivation of their right to counsel in parents' custody dispute).

For other examples of federal court abstention in domestic relations cases, see Huynh Thi Anh v. Levi, 586 F.2d 625, 632 (6th Cir. 1978) (for reasons of comity and deference to state court expertise, district court should not have asserted jurisdiction over aliens' habeas corpus action, seeking custody of their children, while state remedies had not been exhausted); Zaubi v. Hoejme, 530 F. Supp. 831, 836 (W.D. Pa. 1980) (abstention proper in action by children claiming constitutional right to stay in U.S. with father, contrary to custody decree, where children had opportunity to raise claim in state custody proceedings and where rendering decision would disrupt establishment of coherent state policy); Brenhouse v. Bloch, 418 F. Supp. 412, 413 (S.D.N.Y. 1976) (court abstains in action by ex-spouse for breach of separation agreement, because court should not become involved in question of child custody and visitation rights).

Other courts, however, have refused to abstain, asserting jurisdiction over cases in the domestic relations area. *See* Erspan v. Badgett, 647 F.2d 550, 553 n.1 (5th Cir. 1981), *cert. denied*, 455 U.S. 945 (1982) (abstention inappropriate in action to enforce divorce decree when suit primarily involves interpretation of federal bankruptcy laws); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir. 1978) (district court properly exercised jurisdiction over case for breach of separation agreement, where case involved "little more than a private contract to pay money between persons long since divorced"); Korby v. Erickson, 550 F. Supp. 136, 138-39 (S.D.N.Y. 1982) (abstention inappropriate in suit between unmarried couple for breach of contract to share ownership of home).

In a related area, federal courts have abstained from hearing parents' constitutional challenges to state procedures for protecting victims of child abuse. *See* Moore v. Simms, 442 U.S.

mestic relations matters is addressed in terms of power or abstention, a clear standard for determining when a case should be heard has failed to emerge.

II. Legal Authority for the Domestic Relations Exception

A variety of reasons for the domestic relations exception have been advanced. One theory relied on by the Supreme Court to support the absence of power to hear domestic relations suits is the lack of diversity jurisdiction. It has been asserted that not only is diversity of citizenship lacking between a wife and husband, but a divorce cannot be reduced to a pecuniary value and it therefore fails to meet any jurisdictional amount requirement. It also has been argued that the article III jurisdiction of federal courts was never intended historically to encompass divorce, alimony, and child custody. Finally, federal courts have intimated that domestic relations matters are beyond their power because they are reserved to the states by the tenth amendment.

A. *Absence of Diversity Jurisdiction*

The position that federal courts lack diversity jurisdiction over divorce and alimony suits was originally based on two premises: the domicile of a wife followed that of her husband, and a divorce action could not be reduced to a monetary value. At English common law, a wife could not establish a legally recognized domicile separate from her husband's as long as the marriage continued.[37] This general rule was followed by American courts,[38] thereby preventing spouses from establishing diversity of citizenship.[39] An exception, however, was recognized in this country: if a wife left her husband for cause or he abandoned her, then she was permitted to establish a separate domi-

415 (1979) (federal court should abstain where temporary removal of child in abuse context is closely related to criminal statutes, parents could have raised constitutional claims in pending state proceedings, state showed no bad faith, and statute was not patently unconstitutional). For termination of parental rights, see Williams v. Williams, 532 F.2d 120, 122 (8th Cir. 1976) (principles of comity bar federal suit challenging state decree terminating plaintiff's parental rights without notice to him); *see also* notes 85-115 *infra* and accompanying text.

37 1 W. BLACKSTONE, COMMENTARIES *442-43.

38 *See* RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS § 21 (1971); Anderson v. Watt, 138 U.S. 694, 706 (1891) (husband's domicile is wife's domicile, even if she is living apart from him without cause); Bowman v. Bowman, 30 F. 849, 849 (N.D. Ill. 1887) (wife's citizenship is that of her husband).

39 For purposes of federal jurisdiction, the test for state citizenship is a person's domicile. Chicago & N.W.R. Co. v. Ohle, 117 U.S. 123 (1886); C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS § 26, at 146 (4th ed. 1983).

cile for the limited purpose of suing him for divorce or maintenance.[40] Apparently, the wife retained the husband's domicile for other purposes.[41]

In *Barber v. Barber*,[42] the divided Supreme Court implicitly equated a wife's limited separate domicile with diverse citizenship. The strong dissenting opinion, however, asserted that a married woman could not "become a *citizen* of any State or community different from that of which her husband is a member."[43] A woman apparently was able to establish citizenship diverse from that of her husband, at least for the purpose of suing for divorce or alimony, after acquiring a judicial separation in a state court. Constitutional and statutory guarantees have now bestowed legal personhood upon married women in the United States, and make it clear that spouses may be legal citizens of different states.[44] Nevertheless, some later cases continued to follow the general rule that marriage confers upon a wife the citizenship of her husband.[45]

A stronger argument for lack of diversity jurisdiction is that the statutory amount in controversy requirement is not met in domestic relations cases.[46] Federal courts, including the Supreme Court, have

40 2 J. BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 125, at 115 (6th ed. 1881) (wife who has acquired a judicial separation or divorce from bed and board, or who needs own domicile to sue for divorce, may acquire separate domicile to establish jurisdiction for divorce suit); Barber v. Barber, 62 U.S. (21 How.) 582, 595 (1859) (if husband abandons wife, "he yields up that power and authority over her which alone makes his domicil hers"). *But see* Barber v. Barber, 62 U.S. (21 How.) 582, 601-02 (1859) (Daniels, J., dissenting) (a married woman, even though legally separated from her husband, cannot be a citizen of a state different from him).

41 *See, e.g.*, 2 BISHOP, *supra* note 40, § 125, at 116 ("It would not be necessary to regard the wife's separate domicil complete for every purpose; but it is a *quasi* domicil, for the special purpose of divorce."); *Id.* § 126, at 116 (if wife commits offense causing husband to sue her for divorce, she does not have separate domicile).

42 62 U.S. (21 How.) 582 (1859); *see* notes 3-11 *supra* and accompanying text.

43 *Id.* at 602 (Daniels, J., dissenting) (emphasis in original).

44 The issue of a wife's separate domicile was addressed in Spindel v. Spindel, where the court asserted that "[w]hatever the ancient doctrine, a wife is capable of acquiring a domicile separate from that of her husband; at least to the extent legal equality of the sexes is embodied in the Fourteenth and Nineteenth Amendments." 283 F. Supp. 797, 813 (E.D.N.Y. 1968). The Supreme Court approached this position several years earlier, recognizing a wife's separate domicile for the purpose of suing her husband's mistress in federal court based on diversity of citizenship. Williamson v. Osenton, 232 U.S. 619 (1914).

45 Campbell v. Oliva, 295 F. Supp. 616, 618 (E.D. Tenn. 1968); Seideman v. Hamilton, 173 F. Supp. 641, 643 (E.D. Pa. 1959), *aff'd*, 275 F.2d 224 (3d Cir.), *cert. denied*, 363 U.S. 820 (1960). *But see* Spindel v. Spindel, 283 F. Supp. 797, 813 (E.D.N.Y. 1968) (fourteeth and nineteenth amendments allow wife to acquire separate domicile); Druen v. Druen, 247 F. Supp. 754, 755 (D. Colo. 1965) ("citizenship of husband and wife are no longer necessarily identical").

46 The amount in controversy requirement has been increased several times since its in-

held that divorce,[47] marital status,[48] and child custody[49] are matters that cannot be measured by a pecuniary standard. Back alimony claims, however, may satisfy the requirement.[50] The rationale that value cannot be placed on such relationships, however, is weakened by the fact that wrongful death actions have placed a monetary value on the company of a child.[51] Furthermore, because monetary claims are such an integral part of any contested divorce action, it is unlikely that such an action could not satisfy the amount in controversy requirement.[52] Significantly, that requirement is a purely statutory limitation, and so avoids an examination of the constitutional basis for the domestic relations exception.

B. *Article III Courts Were Not Established to Hear Divorce, Alimony, and Child Custody Cases*

American courts have recognized that the equity jurisdiction of the federal courts is the same as that of the English chancery courts at the time of the Revolution.[53] At that time, in England, divorce

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ception in the Judiciary Act of 1789. Diversity cases now require an amount in excess of $10,000. 28 U.S.C. § 1331 (1982). Federal question cases have not required any amount in controversy since 1980. 28 U.S.C. § 1331 (1982).

47 De La Rama v. De La Rama, 201 U.S. 303, 307 (1906); Simms v. Simms, 175 U.S. 162, 168-69 (1899).

48 Rapoport v. Rapoport, 416 F.2d 41, 43 (9th Cir. 1969); Walpert v. Walpert, 329 F. Supp. 25, 26 (D.N.J. 1971).

49 De Krafft v. Barney, 67 U.S. (2 Black) 704, 714 (1863); Barry v. Mercien, 46 U.S. (5 How.) 103, 120 (1847); Ritchie v. Mauro, 27 U.S. (2 Pet.) 243, 244 (1829); Hernstadt v. Hernstadt, 373 F.2d 316, 318 (2d Cir. 1967).

50 Barber v. Barber, 62 U.S. (21 How.) 582 (1859).

51 *See, e.g.*, Jones v. Carvell, 641 P.2d 105 (Utah 1982) (mother entitled to damages for loss of son's love, companionship, protection, and affection caused by defendant's negligence); Ahrenholz v. Hennepin County, 295 N.W.2d 645, 648 (Minn. 1980) ("The parents may be compensated for loss of advice, comfort, assistance, and protection which they could reasonably have expected if the child had lived."); Caradori v. Fitch, 200 Neb. 186, 263 N.W.2d 649 (1978) (parents and siblings allowed recovery for loss of security, comfort, and companionship of the child).

52 This suggestion appears in the seminal article on the domestic relations exception, Vestal & Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 28 (1956).

53 Matthews v. Rodgers, 284 U.S. 521, 529 (1932); Waterman v. Canal-Louisiana Bank Co., 215 U.S. 33, 43 (1909); Jackson v. United States Nat'l Bank, 153 F. Supp. 104, 109 (D. Or. 1957); Albanese v. Richter, 67 F. Supp. 771, 773 (D.N.J. 1946), *aff'd*, 161 F.2d 688 (3d Cir.), *cert. denied*, 332 U.S. 782 (1947); Loring v. Marsh, 15 F. Cas. 905, 914 (C.C.D. Mass. 1865) (No. 8,515), *aff'd*, 73 U.S. (6 Wall.) 337 (1867); Baker v. Biddle, 2 F. Cas. 439, 447 (C.C.E.D. Pa. 1831) (No. 764).

The original language of the Judiciary Act extended jurisdiction to "all suits of a civil nature at common law or in equity." Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78. With the promulgation of the Federal Rules of Civil Procedure in 1948, this language was changed

and alimony were within the exclusive province of the ecclesiastical courts.[54] Chancery courts were not authorized to grant initial divorce or alimony decrees until 1858,[55] although they did enforce ecclesiastical decrees before that time.[56] Chancery courts also determined marital status when it was incidental to the matters being tried,[57] and entertained suits against trustees for the maintenance of women whose husbands were beyond the jurisdiction of the ecclesiastical courts.[58]

American courts have held that matters formerly dealt with by the ecclesiastical courts belong to the states rather than to the federal government.[59] Federal courts, however, like their English chancery counterparts, have acknowledged the distinction between granting and enforcing divorce and alimony decrees.[60] In addition, federal courts have ruled on marital status questions arising in property disputes.[61]

As with divorce and alimony, the federal courts have stated that

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to "all civil actions." Act of June 25, 1948, 62 Stat. 930 § 1, 28 U.S.C. § 1332. No substantive change in federal jurisdiction was intended; the language of the statute was merely brought into conformity with Rule 2 of the Federal Rules of Civil Procedure. 28 U.S.C. § 1332 (1982) (Reviser's note).

54 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 621-24 (3d ed. 1922).

55 The ecclesiastical courts were stripped of most of their jurisdiction by a statute creating in the chancery division a new Divorce Court, which was given jurisdiction over divorce, anullment, alimony, and other marital matters. Matrimonial Causes Act, 1857, 20 & 21 Vict., ch. 85.

56 *See, e.g.*, Dawson v. Dawson, 32 Eng. Rep. 71 (Ch. 1803) (alimony arrearages are enforceable as equitable debt); Shaftoe v. Shaftoe, 32 Eng. Rep. 70 (Ch. 1802); Mildmay v. Mildmay, 23 Eng. Rep. 305 (Ch. 1682) (chancery will enforce ecclesiastical alimony decrees); Read v. Read, 22 Eng. Rep. 720 (Ch. 1668) (chancery may prevent husband from leaving country to avoid compliance with ecclesiastical alimony decree).

57 SHELFORD, THE LAW OF MARRIAGE AND DIVORCE 260 (1841); *see* cases cited in Spindel v. Spindel, 283 F. Supp. 797, 807-08 (E.D.N.Y. 1968).

58 *See* Watkyns v. Watkyns, 26 Eng. Rep. 460, 461 (Ch. 1740) (interest from trust to be paid to wife while husband remains out of country); Colmer v. Colmer, 25 Eng. Rep. 310, 304 (Ch. 1729) (wife entitled to maintenance from husband's estate held in trust to pay his debts); Nicholls v. Danvers, 23 Eng. Rep. 1037 (Ch. 1711) (trust income of husband, who forced wife to leave him, to be used for wife's maintenance); *see also* cases and authorities cited in Spindel v. Spindel, 283 F. Supp. 797, 808-09 (E.D.N.Y. 1968).

59 *See, e.g.*, Ohio *ex rel.* Popovici v. Alger, 280 U.S. 379, 383-84 (1930) (Federal courts do not have jurisdiction over matters that "formerly would have belonged to the ecclesiastical Courts."). *Id.* at 384.

60 *See* Barber v. Barber, 62 U.S. (21 How.) 582, 590-91 (1859).

61 *See* Rocker v. Celebrezze, 358 F.2d 119, 123-24 (2d Cir. 1966) (federal income tax); Oxley v. Sweetland, 94 F.2d 33, 35 (4th Cir. 1938) (property rights). *But see* Csibi v. Fustos, 670 F.2d 134, 138 (9th Cir. 1982) (refusing to hear suit that necessitated determination of plaintiff's marital status to establish property rights in decedent's estate); Welker v. Metropolitan Life Ins. Co., 502 F. Supp. 268, 270 (C.D. Cal. 1980) (same; life insurance proceeds).

only state courts can determine child custody issues.[62] This principle also derives from English chancery practice. In addition to its equity jurisdiction, the English chancery court exercised the prerogatives of the crown. The most notable of these was the *parens patriae* doctrine, where the court decided what was best for a child by substituting its own judgment for that of the parents.[63] It has been argued that the nonjudicial prerogatives of the crown, such as the *parens patriae* doctrine, devolved upon the sovereign states and not upon the federal government.[64] The federal courts thus assumed only that jurisdiction which the chancery court had exercised "in its judicial character as a

62 *See In re* Burrus, 136 U.S. 586, 593-94 (1890); Barry v. Mercein, 46 U.S. (5 How.) 103, 120 (1847).

63 Literally "parent of the country," BLACK'S LAW DICTIONARY 1003 (5th ed. 1979), the *parens patriae* doctrine derived from the King's royal prerogative as guardian to infants, lunatics, and others with legal disabilities. *See also* SCHOULER, *supra* note 5, § 288, at 463 ("[T]he jurisdiction exercised by the court of chancery over infants flows from its general authority, as delegated by the crown. . . . [T]he State must place somewhere a superintending power over those who cannot take care of themselves; and hence chancery necessarily acts representing the sovereign as *parens patriae*."). *See generally* Custer, *The Origins of the Doctrine of Parens Patriae*, 27 EMORY L.J. 195 (1978).

64 Prior to *Barber*, a federal court stated that the writ of habeas corpus "is purely one of prerogative." *In re* Barry, 42 F. 113, 118 (C.C.S.D.N.Y. 1844), *appeal dismissed for lack of jurisdiction sub nom.* Barry v. Mercein, 46 U.S. (5 How.) 103 (1847). The sovereign, in regard to children, acts as *parens patriae* "upon the assumption that its parentage supersedes all authority conferred by birth on the natural parents, tak[ing] upon itself the power and right to dispose of the custody of children as it shall judge best for their welfare." *Id.* at 119. Because all of the attributes of sovereignty do not "devolve upon the national government," there is "no sure foundation for the assumption that the federal government possesses common-law prerogatives, inherent in the sovereign, which can be exercised without authority of positive law." *Id.* at 119.

In Fontain v. Ravenel, 58 U.S. (17 How.) 369 (1854), the Supreme Court distinguished the judicial from the prerogative authority of the English chancery court. In denying the federal jurisdiction of a probate matter, the Court stated that "when this country achieved its independence, the prerogatives of the crown devolved upon the people of the States. . . . The state, as a sovereign, is the *parens patriae*." *Id.* at 384. The chancellor's powers to act "merely as the representative of the sovereign, and by virtue of the king's prerogative as *parens patriae*, are not possessed by the circuit courts." *Id.* at 384. Chief Justice Taney, in a separate opinion, agreed:

> These words [U.S. CONST. art. III, § 2] obviously confer judicial power, and nothing more; and cannot on any fair construction, be held to embrace the prerogative powers, which the king, as *parens patriae*, in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the constitution, extends only to cases over which the court of chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants . . . has not been conferred.
>
> These prerogative powers . . . remain with the States.

Id. at 393 (Taney, C.J., concurring). *But see* Solomon v. Solomon, 516 F.2d 1018, 1033 (3d Cir. 1975) (Gibbons, J., dissenting) (criticizing Justice Taney's opinion).

court of equity."[65]

The historic evidence seems to support a very narrow domestic relations exception, limited to suits for divorce, alimony, or child custody.[66] Critics have asserted, however, that history does not support a domestic relations exception because English chancery courts did hear domestic relations cases before the federal court system was established.[67] Yet, this position cannot be supported. The cases cited are generally either historic anomalies or those that would not fall within a narrow jurisdictional exception.[68] In general, English chancery courts only assisted the ecclesiastical courts in enforcing and supporting ecclesiastical decrees. Similarly, federal courts have given, and should continue to give, assistance to the state courts in enforcing and supporting similar state decrees.

C. *Domestic Relations Matters Are Reserved to the States under the Tenth Amendment*

The tenth amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively,

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65 Fontain v. Ravenel, 58 U.S. (17 How.) 369, 393 (1854) (Taney, C.J., concurring).

66 *But see, e.g.*, Solomon v. Solomon, 516 F.2d 1018, 1030 (3d Cir. 1975) (Gibbons, J., dissenting) (domestic relations exception is "collection of misstatements of ancient holdings and of ill-considered dicta").

67 *See* Spindel v. Spindel, 283 F. Supp. 797 (E.D.N.Y. 1968); Comment, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824, 1835 (1983).

68 During Cromwell's interregnum in the mid-seventeenth century, the jurisdiction of the ecclesiastical courts was temporarily suspended. Chancery, therefore, was the only avenue of relief for plaintiffs who would have brought ecclesiastical suits. As a result, chancery courts granted alimony decrees during this time. *See, e.g.*, Whorwood v. Whorwood, 21 Eng. Rep. 556 (Ch. 1662-1663) (affirming alimony decree granted by chancery court "in the late Times"); Russel v. Bodvil, 21 Eng. Rep. 545 (Ch. 1660-1661).

The English case of Terrell v. Terrell, 21 Eng. Rep. 123 (Ch. 1581), has been cited as proof that the chancery courts granted divorces. Spindel v. Spindel, 283 F. Supp. 797, 802 (E.D.N.Y. 1968); Comment, *supra*, note 67, at 1836 n.81. That case, in its entirety, is reported as follows: "and in the same roll, two decrees for divorce. Terrell and his wife, Jeffery and Jenny." 21 Eng. Rep. 123. The original reporter is described as "virtually little else than a rough index, never intended to be published." 21 Eng. Rep. 5. (prefatory note dated 1902). Thus, it is hardly persuasive authority for the critics' position.

Chancery decrees granting spousal support did so not by issuing alimony decrees, but by exercising the chancery's equitable powers to reform a trust. The suits generally were brought against trustees by women whose husbands were beyond the reach of the ecclesiastical court. *See, e.g.*, Watkyns v. Watkyns, 26 Eng. Rep. 460 (Ch. 1740) (decreeing husband's trust income to wife until his return to the kingdom); Colmer v. Colmer, 25 Eng. Rep. 301 (Ch. 1729) (decreeing abandoned wife's maintenance to be paid out of husband's personal estate, held in trust to pay his debts).

or to the people."[69] The Supreme Court has never expressly held that the federal judiciary is limited by the tenth amendment. It did so implicitly, however, in *Erie Railroad v. Tompkins*.[70] *Erie* examined whether federal courts are bound to apply state court decisions in diversity suits. The Court held that the federal courts had unconstitutionally usurped state power by establishing a federal general common law.[71] Although the Court did not name a specific constitutional provision, it implicitly invoked the tenth amendment.

The Court drew upon an earlier opinion which stated that the tenth amendment forbids the federal courts from creating a "general law of the country" because the Constitution "recognizes and preserves the autonomy and independence of the States—independence in their legislative and independence in their judicial departments."[72] Further, the *Erie* Court's reasoning paralleled the tenth amendment when it held that a continued, unfettered establishment of federal general common law "invaded rights which . . . are reserved by the Constitution to the several States."[73] As other cases have interpreted the tenth amendment as a limit on the federal legislature, *Erie* stands for the proposition that the tenth amendment also limits the federal judiciary.[74]

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69 U.S. CONST. amend. X.

70 304 U.S. 64 (1938).

71 *Id.* at 80; *see* C. WRIGHT, *supra* note 39, § 55, at 352-59.

72 304 U.S. at 78-79 (quoting from Baltimore & Ohio R. Co. v. Baugh, 149 U.S. 368, 401 (1893) (Field, J., dissenting)). Justice Field also asserted that "[t]he silence of Congress against judicial encroachments upon the authority of the States cannot be held to estop them from asserting the sovereign rights reserved to them by the Tenth Amendment of the Constitution." 149 U.S. at 399 (Field, J., dissenting).

73 304 U.S. at 80. Referring to this language from *Erie*, Professor Wright states that "[p]resumably the reference is to the Tenth Amendment," although no reference is made to any specific constitutional provision. C. WRIGHT, *supra* note 39, § 56, at 360.

74 Judge Friendly and Professor Tribe seem to agree that the federal judiciary is limited outside of the limits mentioned in article III of the Constitution. Judge Friendly perceives the tenth amendment as the outer bound, while Professor Tribe sees federalism acting as the ultimate restraint on federal judicial power. In response to critics who suggest that the constitutional underpinnings of *Erie* are dictum, Judge Friendly posits that Congress would not have the power, for example, to enact a federal statute granting tort immunity to charities. Continuing, Judge Friendly states that "[i]t would be even more unreasonable to suppose that the federal courts have a law-making power which the federal legislature does not. Power to deal with the hypothesized subject and others like it is thus reserved by the Tenth Amendment 'to the States respectively, or to the people.' " Friendly, *In Praise of Erie—And of the New Federal Common Law*, 39 N.Y.U.L. REV. 383, 395 (1964).

Professor Tribe does not specifically refer to the tenth amendment when he states that the Supreme Court's decision in Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590 (1874), is stronger support than *Erie* for the position that the Constitution outside of article III limits federal judicial power, even though a federal court may have jurisdiction over a particular case pursuant to a valid congressional act. In *Murdock*, the Court held that it lacked appellate

This tenth amendment rationale, however, has limitations. The amendment can be interpreted to support one of two theories. The first, a state enclave theory, suggests that some areas of the law belong affirmatively to the states. Under this theory, the federal government lacks power to take away from the states any matters within the enclave.[75] The second theory, that the tenth amendment is but a truism,[76] suggests that the tenth amendment merely reflects the relationship between federal and state powers. This relationship is premised upon the federal government's *power* to control virtually all areas of law, with those areas not chosen to be federally regulated left to the states.

Since the Supreme Court's decision in *National League of Cities v. Usery*,[77] the state enclave theory has gained validity.[78] The Court,

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jurisdiction to review a federal question decided by a state court, even erroneously, if the state court's decision rested on adequate and independent state grounds. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-20, at 301-02 nn.8 & 10 (1978).

According to Professor Tribe, prior to *Erie*, federal courts imposed their opinions of what the state law was without regard to the manner in which state courts would derive the common law. Beyond being unconstitutional, this practice took federal courts beyond their grant of authority in the diversity statute. *Id.* § 3-31, at 119. Professor Tribe continues his analysis:

> [E]ven if Congress could reach as far in its legislation as federal courts had reached in making common law, the judge-made law would nonetheless be unconstitutional in the absence of congressional authorization if it were made outside the confines of the diversity grant. This conclusion . . . follows . . . from the prevailing political theory of federalism.

Id. § 3-31, at 119 n.24.

75 *See* M. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 126-27 (1980); L. TRIBE, *supra* note 74, § 5-20, at 302; Barber, *National League of Cities v. Usery: New Meaning for the Tenth Amendment*, 1976 SUP. CT. REV. 161, 165-66 (1979).

76 United States v. Darby, 312 U.S. 100, 124 (1941).

Today the view that the tenth amendment is but a truism has support from such scholars as Barber, *supra* note 75, at 172, and Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 701-702 (1974), and was reinforced by the Supreme Court in EEOC v. Wyoming, 460 U.S. 266 (1983); *see* note 79 *infra* and accompanying text.

77 426 U.S. 833 (1976).

78 In *National League of Cities*, the Supreme Court struck down an amendment to the Fair Labor Standards Act which set forth minimum wage and maximum hour provisions for state and municipal employees. The Court held that the amendment to the act violated Congress' power under the Commerce Clause because it interfered with the state's ability to function effectively and intruded upon traditional functions of state government. *Id.* at 851-52. Writing for the majority, Justice Rehnquist noted that the tenth amendment "expressly declares the constitutional policy" that the power of Congress is limited vis-à-vis state sovereignty. *Id.* at 842-43.

Justice Rehnquist's reference to the tenth amendment has been given different meanings. Lower federal courts have interpreted *National League of Cities* as a restriction by the tenth amendment on the federal commerce power. Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1083 (5th Cir. 1979); Bleakley v. Jekyll Island-State Park Auth., 536 F. Supp. 236, 238 (S.D. Ga. 1982).

In contrast, Justice Rehnquist's reference to the tenth amendment has also been inter-

however, retreated significantly from the enclave theory in *EEOC v. Wyoming*,[79] so the meaning of the amendment is, at best, still a mystery.[80]

Yet, regardless of its interpretation, the tenth amendment supports a domestic relations exception to federal jurisdiction. Divorce, alimony, and child custody would surely fall within a state enclave, if one exists. A state enclave of reserved powers that does not include these matters is difficult to imagine, given their judicial history in England and their analogous treatment in the United States.

Alternatively, if the tenth amendment merely states a truism, it nonetheless embodies the basic concepts of comity and federalism that support federal judicial restraint in the domestic relations context.[81] Although the concepts of comity and federalism are concep-

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preted as merely an expression of a limitation on Congress, without indicating the limitation's origin. Powell, *The Compleat Jeffersonian: Justice Rehnquist and Federalism*, 91 YALE L.J. 1317, 1329 (1982); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1067 n.17 (1977). As suggested by one scholar, Justice Rehnquist's hesitancy to link "his state sovereignty doctrine too closely to the Tenth Amendment . . . [leaves] the doctrine floating in mid-air, without a visible constitutional foundation other than his theory of federalism." Powell, *supra* at 1329.

79 460 U.S. 226 (1983). In upholding an amendment to the Age Discrimination in Employment Act of 1967 to include state and local governments within the definition of "employer," the Court attempted to clarify its holding in *National League of Cities*. Qualifying its allusion to the tenth amendment in *National League of Cities*, the Court all but rejected an enclave theory, reducing the amendment to a mere expression of federal-state relations:

> The principle of immunity articulated in *National League of Cities* is a functional doctrine, . . . whose ultimate purpose is not to create a sacred province of state autonomy, but to ensure that the unique benefits of a federal system in which the States enjoy a 'separate and independent existence,' . . . not be lost through undue federal interference in certain core state functions.

Id. at 236.

80 The meaning of the tenth amendment may be clarified in the present term of the Supreme Court. In Garcia v. San Antonio Metropolitan Transit Auth., 104 S. Ct. 64 (1983), (probable jurisdiction noted), the Supreme Court asked the parties to reargue "[w]hether or not the principles set forth in National League of Cities v. Usery, 426 U.S. 833 (1976), should be reconsidered?" 104 S. Ct. at 3582. For a summary of the arguments made by the parties, see 53 U.S.L.W. 3255 (1984).

81 The Burger Court, especially Justice Rehnquist, seems adamant about separating the meaning of the tenth amendment and the roles of comity and federalism vis-a-vis their limitations on federal power. *See* Powell, *supra* note 78, at 1329. This position is evidenced by the Court's ostensible reliance on the tenth amendment to limit Congress in *National League of Cities* and its rapid retreat from that decision seven years later in *EEOC v. Wyoming*. It is also illustrated by such decisions as Younger v. Harris, 401 U.S. 37 (1971); Fair Assessment in Real Estae Ass'n v. McNary, 454 U.S. 100 (1981); *see also* note 80 *supra*. In *Younger*, the Court sanctioned abstention in limited circumstances based on the concepts of "Our Federalism." In *McNary*, the Court dismissed a § 1983 action brought by certain taxpayers to challenge a state's taxing scheme on federalism grounds. The Court did not articulate whether the dismissal was based on an absence of power (potentially invoking the tenth amendment), or

tually distinct, they are often used interchangeably or in tandem. Comity is the belief that state courts can protect and enforce federal rights as capably as federal courts.[82] In contrast, federalism requires the federal government "to vindicate and protect federal rights and federal interests . . . in ways that will not unduly interfere with the legitimate activities of the states."[83] Both concepts derive from the basic structure of the Constitution in establishing a dual sovereignty.[84]

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abstention (in keeping with principles of comity and federalism). *See* note 84 *infra* and accompanying text.

Efforts to keep the meaning of the tenth amendment a mystery, however, fail to recognize the origins of comity and federalism. *See* notes 82-84 *infra* and accompanying text. Although the Constitution does not affirmatively express that comity and federalism act to limit federal power, this proposition follows from the theory that the Constitution was structured to accommodate a dual government, i.e., a national government comprised of states that retain their identity and autonomy to function as states. *See* THE FEDERALIST No. 46, at 298-300 (J. Madison) (C. Rossiter ed. 1961); L. TRIBE, *supra* note 74, § 5-20, at 301.

At a minimum then, as Justice Rehnquist intimated in *National League of Cities*, the tenth amendment expresses a historical intent about the appropriate structure of the national and state governments. Under that structure, the state governments were meant to function separately and independently, but within the framework of a national government that was to be supreme. The legislative and judicial branches of the national government cannot act in ways to alter this basic structure. For general discussions that the tenth amendment reflects this structural view of the Constitution, see Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81; Note, *On Reading and Using the Tenth Amendment*, 93 YALE L.J. 723 (1983).

82 *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 151 n.2 (1975).

83 *Id.* Professor McGowan stated that:

> Federalism means many things to many people. In its broadest common meaning, however, it refers to the relations between the states and the general government under our political system. These relations have involved a dual aspect. First, federalism has meant the desirability and necessity of the general government deferring to the states in order to allow them their proper role over issues of state and local concern. But the other side of federalism is the desirability and necessity of the state governments' deferring to the general government in issues of national concern.

McGowan, *Federalism—Old and New—and the Federal Courts*, 70 GEO. L.J. 1421, 1431 (1982).

84 *See* L. TRIBE, *supra* note 74, § 5-20, at 301 and authorities cited therein.

The Burger Court, and especially Justice Rehnquist, is noted for relying on comity and federalism as a basis for judicial restraint. *See* Tribe, *supra* note 78, at 1069 and cases cited therein; Powell, *supra* note 78. For examples of cases relying on comity and federalism see Fair Assessment in Real Estate Ass'n v. McNary, 454 U.S. 100, 106, 109 (1981) (section 1983 action brought by certain taxpayers to challenge state's administration of its tax system dismissed on, *inter alia*, comity and federalism grounds); World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 294 (1980) (due process, "acting as an instrument of interstate federalism," may restrict jurisdictional reach of state court).

Most notable among the Court's "federalism" opinions is its decision in Younger v. Harris, 401 U.S. 37 (1971), from which the term "Our Federalism" was coined. *See* note 91 *infra*.

III. Applying the Abstention Doctrine to Domestic Relations Cases

A. *Distinguishing Power and Abstention*

When litigants bring a domestic relations case in federal court under its federal question jurisdiction, or appeal from a state court to the Supreme Court for review of a federal question, federal judicial power exists, unless otherwise limited by Congress. Federal courts hear many domestic relations cases that raise constitutional questions in the context of divorce, alimony, and child custody. Because of the explicit grant of federal question jurisdiction in article III, and because of the Supreme Court's role as the ultimate guardian of federal constitutional rights, domestic relations cases that raise federal questions should be treated like other federal question cases.[85] Any other approach would be inconsistent with the supremacy clause and our system of dual sovereignty. Additionally, a different approach could create friction and confusion in the area of domestic relations law among the states and between the federal and state judiciaries.

Originally, the reason for a federal interest in hearing diversity suits was to provide a neutral forum for out-of-state litigants who otherwise were forced to sue in state courts that favored citizen parties.[86] Since the Supreme Court's decision in *Erie*, which generally obviated the problem of state court bias against noncitizen litigants, much debate has focused on whether there is any federal interest in retaining diversity jurisdiction.[87] As long as the diversity statute is not repealed, however, federal courts must follow the congressional directive and hear diversity suits.[88]

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85 Treating domestic relations cases which raise federal questions like other federal question cases includes the possibility of applying *Pullman* abstention. *See* note 89 *infra* and accompanying text.

86 Erie R.R. v. Tompkins, 304 U.S. 64 (1938); C. WRIGHT, *supra* note 39, § 23, at 128.

87 Congress has attempted to abolish diversity jurisdiction on a number of occasions. *See, e.g.*, H.R. 3689, 98th Cong., 1st Sess. (1983). The American Law Institute proposed an amendment to the diversity statute that would have excepted, *inter alia*, domestic relations cases from diversity jurisdiction in federal courts. After years of debate, the entire matter was dropped for failure to reach an agreement on the issue of what other areas ought to be specifically excepted from the statute. *See* AMERICAN LAW INSTITUTE: STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1330 (Tent. Draft No. 6, 1968). For authorities on both sides of the debate, see C. WRIGHT, *supra* note 39, § 23.

88 Federal courts, in fact, have a duty to hear diversity suits. This principle was originally announced in dicta in Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821), where the Court stated that:

> It is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitu-

Both federal question and diversity suits occasionally present circumstances where the federal interests in adjudicating them are outweighed by competing interests that favor abstention. The Supreme Court has sanctioned abstention when: (1) a state court decision might obviate the need to decide a federal question (*Pullman* abstention); (2) the area of activity at issue is intimately regulated by a state (*Burford* abstention); or (3) a state court proceeding is pending (*Younger* abstention). Different principles support each of these abstention doctrines.

Pullman abstention is founded on the principle that federal courts should avoid answering federal questions in cases where a decision under state law would settle the dispute.[89] Underlying *Burford* abstention is the principle that federal courts should refrain from interfering with highly regulated and supervised state activities to avoid rendering decisions which might conflict with state court decisions or otherwise contradict state policy.[90] Finally, *Younger* abstention is appropriate when a state court proceeding is pending while a related federal action has not yet reached the merits.[91] Such an abstention is based on principles of comity and federalism.

> tion . . . [w]ith whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the constitution.

Id. at 404. Today the rule has been relaxed by the adoption of various doctrines, perhaps the most important and pervasive of which is abstention. But even the Court has recognized that there is a line beyond which federal courts arguably abrogate their constitutional responsibility when they abstain from cases properly before them. *See, e.g.*, Meredith v. Winter Haven, 320 U.S. 228, 234-35 (1943) (federal courts cannot abdicate their duty to hear a diversity suit merely because state law is difficult or unclear); McNeese v. Board of Educ., 373 U.S. 668, 674 n.6 (1963) (federal courts have no basis to abstain in cases properly brought in federal court merely because they could be heard in state court); *see also* Currie, *The Federal Courts and the American Law Institute* (Part II), 36 U. CHI. L. REV. 268, 317-19 (1969) (advocating that abstention be abolished).

89 Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941). At issue in *Pullman* was whether the Railroad Commission had denied Pullman's constitutional rights in rendering a certain administrative order and whether, in fact, the Railroad Commission had authority under state law to render it. The Supreme Court ordered the lower federal court to abstain from deciding the case. The Court's rationale was that a constitutional question would be avoided if the Railroad Commission lacked authority under state law.

90 Burford v. Sun Oil Co., 319 U.S. 315 (1943). *Burford* involved a challenge to a permit to drill for oil issued by the Railroad Commission of Texas. The Court held that abstention was appropriate in order to avoid interference with the state's scheme for administering its oil industry. Application of this doctrine is limited generally to situations involving state regulation of commerce or natural resources. *See* notes 92-94 *infra* and accompanying text.

91 Younger v. Harris, 401 U.S. 37 (1971). In *Younger*, the district court was asked to enjoin state officials from prosecuting Harris for distributing leaflets in violation of state laws.

B. *Lower Federal Court Practice of Abstaining*

Some federal courts have abstained in domestic relations cases without reference to any of the sanctioned doctrines. Other federal courts in similar cases have abstained, relying expressly on *Burford* or *Younger*. In either situation, the practice of abstaining in domestic relations cases is troublesome. First, express reliance on *Burford* or *Younger* is often improper. Second, federal courts abstain in many cases merely because they touch upon family law or because the litigants are related, and not because the principles underlying the abstention doctrines necessarily warrant judicial restraint.

Although many domestic relations suits have characteristics in common with *Burford* and *Younger*, neither abstention doctrine strictly applies to them. Generally, three characteristics earmark cases in which *Burford* abstention might be appropriate. First, the regulated activity in most cases is unique; generally it involves a natural resource[92] or concerns a regulated commercial activity.[93] Second, as a

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The Supreme Court held that federalism prevented federal courts from enjoining pending state criminal actions.

Younger abstention has been extended to prevent federal injunction of state civil actions as well. Huffman v. Pursue, Ltd., 420 U.S. 592 (1975).

92 *Burford* involved the regulation of oil. *See* note 90 *supra*. In Kaiser Steel Corp. v. W.S. Ranch Co., 391 U.S. 593, 594 (1968), the Court found abstention appropriate in a condemnation proceeding involving water rights. Although no state agency regulated the activity, as in the typical *Burford*-type case, the concurring Justices saw *Kaiser* as a *Burford* abstention case. 391 U.S. at 594-95 (Brennan, J., concurring); *see also* C. WRIGHT, *supra* note 39, § 52, at 308 n. 30; *see also* Louisiana Power and Light Co. v. City of Thibodaux, 360 U.S. 25 (1959) (abstention upheld in eminent domain proceeding). Some commentators have suggested that *Thibodaux* is a separate abstention doctrine in light of the Court's decision in County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959), decided the same day. *See, e.g.*, C. WRIGHT, *supra* note 39, § 52, at 308-09; M. REDISH, *supra* note 75, at 240-43; Field, *Abstention in Constitutional Cases: The Scope of the Pullman Doctrine*, 122 U. PA. L. REV. 1071, 1148-53 (1974); Shapiro, *Abstention and Primary Jurisdiction: Two Chips off the Same Block?—A Comparative Analysis*, 60 CORNELL L. REV. 75, 77, 97 (1974).

Allegheny, like *Thibodaux*, involved an eminent domain proceeding, but the Court held that abstention was inappropriate. Commentators have struggled to distinguish the two decisions. Their general concensus is that abstention is appropriate in eminent domain proceedings if the case also involves an unclear question of state law. C. WRIGHT, *supra* note 39, § 52, at 308-311. M. REDISH, *supra* note 75, at 242; Field, *supra* at 1150.

The Supreme Court, however, treated *Thibodaux* and *Burford* as standing for one type of abstention in Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814-15 (1976). At issue in *Colorado River* were the rights of the United States and certain Indian tribes under Colorado's laws governing the regulation of water. Although the Court noted that *Colorado River* did not fall into any of its sanctioned doctrines, *id.* at 817, it recognized that some of the principles underlying other areas in which it had authorized abstention did apply. *Id.* at 818-19. Commentators and lower federal courts have viewed *Colorado River* as a qualification on *Burford*. *See, e.g.*, C. WRIGHT, *supra* note 39, § 52, at 311 n.39.

93 Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341, 349-50 (1951) (*Bur-*

result of this unique quality, a state will have promulgated sophisticated rules governing the regulation of the activity and will have established agencies to apply such rules in accordance with state policy. Finally, judicial review of an agency's action is usually provided for in one particular state court.[94]

Strong state policies also underlie the laws governing family relationships. Moreover, many states have established family courts or special "family law" departments within their judicial systems.[95] Unlike the regulated activities in *Burford*-type cases, however, domestic relations suits do not involve the regulation of natural resources or commercial activity. Nor have states established administrative agencies to supervise the regulation of family life.[96] In short, domestic relations is not a highly regulated area where a federal decision is likely to impinge on state policy and create a federal-state conflict.[97] *Burford* abstention, therefore, does not apply. Nevertheless, federal courts have invoked this doctrine in a variety of domestic relations cases.[98]

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ford abstention appropriate in federal action challenging constitutionality of state's regulation of certain railroad services); Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C.L. REV. 59, 77 (1981); Bezanson, *Abstention: The Supreme Court and Allocation of Judicial Power*, 27 VAND. L. REV. 1107, 1125 (1974).

94 The Supreme Court views state judicial review of a state administrative order as an integral step in the overall administrative procedure. *Burford*, 319 U.S. at 325-27; *see also* Alabama Pub. Serv. Comm'n v. Southern Ry. Co., 341 U.S. 341, 348 (1951) (*Burford* abstention upheld in action challenging state administrative order where petitioner had not sought review of the agency's order in state court. The Supreme Court held that the state court was "an integral part of the regulatory process.").

95 *See, e.g.*, CAL. CIV. PRO. CODE § 1730-1772 (West 1982) (laws establishing and governing "family conciliation courts" to handle disputes relating generally to divorce and child custody); DEL. CODE ANN. tit. 10, § 901-973 (1974) (laws establishing and governing "family law courts" to handle matters relating generally to the welfare of minors).

96 The threshold for state intervention into family life was stated in Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977), where the Court, noting that family life was a protected liberty where judicial deference to the legislature was inappropriate, stated: "This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." (quoting Cleveland Bd. of Educ. v. LaFleur 414 U.S. 632, 639-40 (1974)).

97 Some federal courts have refused to apply *Burford* abstention to domestic relations cases outside of the domestic relations exception. The courts reason that the cases require no special expertise and federal adjudication does not run the risk of interfering with state policy or rendering conflicting decrees. *See* Kelser v. Anne Arundel Co. Dept. of Soc. Serv., 679 F.2d 1092, 1094 (4th Cir. 1982) (citing *Colorado River*); Korby v. Erickson, 550 F. Supp. 136, 138 (S.D.N.Y. 1982); Spindel v. Spindel, 283 F. Supp. 797, 811 (E.D.N.Y 1968).

98 *See, e.g.*, Diaz v. Diaz, 568 F.2d 1061, 1062 (4th Cir. 1977) (*Burford* abstention appropriate to avoid interference with state policy in action by mother seeking to attach father's salary under federal statute in fulfillment of his child support obligations when child support had not been adjudicated in state court); Zaubi v. Hoejme, 530 F. Supp. 831, 834 (W.D. Pa. 1980) (abstention appropriate under *Colorado River* to avoid interference with state policy in action

The potential for a federal-state conflict also arises when similar federal and state court proceedings are pending concurrently. The *Younger* abstention doctrine holds that a federal court should abstain from hearing a suit for injunctive or declaratory relief regarding a state's action when the state is seeking to enforce its laws or policy against the federal plaintiff. For example, *Younger* abstention has been applied to domestic relations cases concerning child abuse enforcement,[99] involuntary termination of parental rights,[100] and enforcement of child support payments[101] in which parents have attempted unsuccessfully to have the state proceedings halted by the federal court. Outside of these limited areas, however, *Younger* abstention is not relevant. Yet, the doctrine has been cited in other domestic relations contexts where its use is unjustified.[102]

Federal courts also have abstained in domestic relations cases that do not fall within the *Pullman*, *Burford*, or *Younger* doctrines. For example, abstention has been invoked by courts in cases brought to enforce divorce or voluntary separation agreements, and in suits challenging the constitutionality of state custody laws.[103] The various rationales used by federal courts to support their decisions to abstain include such reasons as: (1) a strong state interest[104] and a concomitant weak federal interest in domestic relations,[105] (2) the greater resources available to state courts,[106] (3) the ability of state courts to provide adequate remedies,[107] (4) interference with state

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by children of divorced parents seeking to enjoin their return to Norway with their mother who had custody of them pursuant to decrees in Denmark and Pennsylvania); Bell v. Bell, 411 F. Supp. 716, 718 (W.D. Wash. 1976) (*Burford* abstention appropriate in deference to state interest in domestic relations in action challenging the constitutionality of state divorce law).

99 Moore v. Simms, 442 U.S. 415, 423 (1979); Brown v. Jones, 473 F. Supp. 439, 447-52 (N.D. Tex. 1979).

100 Huynh Thi Anh v. Levi, 586 F.2d 625, 633 (6th Cir. 1978); Williams v. Williams, 532 F.2d 120, 122 (8th Cir. 1976); DeWyse v. Smith, 535 F. Supp. 952, 956 (W.D. Mich. 1982); Brown v. Jones, 473 F. Supp. 439, 447-52 (N.D. Tex. 1979).

101 Parker v. Turner, 626 F.2d 1, 8 (6th Cir. 1980).

102 *See, e.g.*, Merrick v. Merrick, 441 F. Supp. 143, 147 (S.D.N.Y. 1977) (extension of *Younger* questionable in action brought by father of illegitimate child challenging the constitutionality of state statute that presumed mother should have custody).

103 *See* note 36 *supra* and sources cited therein.

104 Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981); Jagiella v. Jagiella, 647 F.2d 561, 564 (5th Cir. 1981); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973); Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972).

105 Bennett v. Bennett, 682 F.2d at 1043. Firestone v. Cleveland Trust Co., 654 F.2d at 1215; Magaziner v. Montemuro, 468 F.2d at 787.

106 Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir. 1982); Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir. 1974).

107 Bossom v. Bossom, 551 F.2d 474, 475-76 (2d Cir. 1976).

court proceedings,[108] (5) the expertise of state courts in domestic relations,[109] (6) comity,[110] (7) the need to avoid inconsistent judgments,[111] (8) the congestion of federal dockets,[112] and (9) the desire to avoid involvement in cases that would require continuing federal court supervision.[113]

This general practice of abstaining in domestic relations cases is an outgrowth of the Supreme Court's broad disclaimer of federal jurisdiction over family matters. Although the rationales relied upon by federal courts in support of their decisions seem meritorious, abstention has become a convenient means for federal courts to avoid addressing the question of federal jurisdiction in close cases. Considering the duty imposed on federal courts by the Constitution and Congress to provide a forum for federal question and diversity suits, federal courts should not be able to abdicate their responsibility by a loose reliance on abstention. Such reliance is particularly inappropriate when the Supreme Court has indicated that federal courts should not abstain in cases merely because they raise family law issues or involve related parties.[114] Federal courts, however, continue to confuse the concepts of jurisdictional power and federal policy in domestic relations cases.

Nevertheless, a situation unique to domestic relations in which abstention is proper, even though *Pullman*, *Burford*, and *Younger* do not apply, arises when a federal court is asked to decide a matter within the domestic relations exception, as well as a closely related issue for which federal jurisdiction clearly exists. Although the court may have power under its ancillary or pendent jurisdiction to entertain the entire suit, comity and federalism compel abstention.[115]

108 Firestone v. Cleveland Trust Co., 654 F.2d at 1217.

109 *Id.* at 1215; Jagiella v. Jagiella, 647 F.2d at 564; Huynh Thi Anh v. Levi, 586 F.2d at 632; Bossom v. Bossom, 551 F.2d at 475; Phillips, Nizer Benjamin, Krim and Ballon v. Rosenstiel, 490 F.2d at 516; Buechold v. Ortiz, 401 F.2d at 373.

110 Huynh Thi Anh v. Levi, 586 F.2d at 632; Armstrong v. Armstrong, 508 F.2d at 350.

111 Lloyd v. Loeffler, 694 F.2d at 492; Jagiella v. Jagiella, 647 F.2d at 564; Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir. 1981).

112 Jagiella v. Jagiella, 647 F.2d at 564; Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir. 1980); Armstrong v. Armstrong, 508 F.2d at 350.

113 Ellis v. Hamilton, 669 F.2d 510, 516 (7th Cir. 1982), *cert. denied*, 103 S. Ct. 488 (1982).

114 Zablocki v. Redhail, 434 U.S. 374, 379-380 n.5 (1978) (in action challenging constitutionality of state law limiting right to marry of men with outstanding child support payments, Court rejected argument that abstention was appropriate "out of 'regard for the independence of state government in carrying out their domestic policy.' ").

115 *See* notes 132-34 *infra* and accompanying text.

IV. Jurisdictional Guidelines

A general framework can be established for analyzing when a federal court should invoke the domestic relations exception. Such a framework can apply to cases involving issues within the exception and also issues outside of the exception.

A. *Establishing Guidelines*

When a domestic relations case is brought in federal district court, the court should go through the following analysis: (1) Does jurisdiction exist? (2) If jurisdiction exists, do any sanctioned abstention doctrines warrant judicial restraint? (3) If not, should the court nevertheless abstain under principles of comity and federalism?

In attempting to answer these questions, it is helpful to categorize a suit as either a domestic relations exception (DRE) case, a non-domestic relations exception (non-DRE) case, or a hybrid case. If a party seeks only an original or modified divorce decree, alimony award, child custody determination, or a combination of these, the suit is a DRE case. If a party seeks none of these, the suit is a non-DRE case. If a party seeks some type of relief within the domestic relations exception and additional relief, the suit is a hybrid case.

The answer to the first question, whether jurisdiction exists, is straightforward in DRE and non-DRE cases. Assuming that the technical requirements of diversity or federal question jurisdiction are met, the district court lacks power to hear the DRE cases and has power to hear the non-DRE cases. Less clear is whether the court has jurisdiction over a hybrid case. If the DRE and non-DRE issues arise out of a common nucleus of operative fact and could be expected to be brought in one action, the court has power to extend its ancillary or pendent jurisdiction to the DRE issues.[116] Alternatively, the hybrid case could be divided into its DRE and non-DRE components. The two could then be treated like a DRE and a non-DRE case,

116 Ancillary and pendent jurisdiction follow judge-made, discretionary rules that allow federal courts to hear issues that ordinarily are beyond their jurisdiction due to a lack of either a federal question or complete diversity of citizenship. A claim is said to be pendent to the main claim when it "derive[s] from a common nucleus of operative fact" and, "assuming substantiality of the federal issue," the party bringing the claim "would ordinarily be expected to try them all in one judicial proceeding." United Mine Workers v. Gibbs, 383 U.S. 715, 725 (1966). Although the question in *Gibbs* was one of pendent jurisdiction, the same standard was applied to ancillary jurisdiction in Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 370 (1978). Pendent and ancillary jurisdiction are, nonetheless, technically distinguishable. *See* C. WRIGHT, *supra* note 39, § 19, at 103 n.1.

respectively. The DRE case would then be dismissed for lack of jurisdiction and the non-DRE case would be heard.

Once jurisdiction is established over the non-DRE or the hybrid case, the court should address the second question in the analysis: Is abstention appropriate to all or part of the case? The court should initially focus on whether the approved abstention doctrines of *Pullman*, *Burford*, or *Younger* apply.[117] In non-DRE cases, if the abstention doctrine of *Pullman*, *Burford*, or *Younger* applies, the court should refrain from hearing the case. If *Pullman*, *Burford*, or *Younger* warrants abstention on the non-DRE part of a hybrid case, the court should also dismiss the DRE portion of the case even if ancillary or pendent jurisdiction would otherwise support jurisdiction. As a matter of comity and federalism, the court should not exercise its discretion to extend jurisdiction in such situations.

The third step in the analysis arises in a hybrid case where the *Pullman*, *Burford*, or *Younger* abstention doctrines do not apply to the non-DRE issues of the case. If the DRE portion of the case fails to meet ancillary or pendent jurisdiction requirements, the court should dismiss only that portion of the hybrid case; it should retain jurisdiction over the non-DRE portion of the case. This result will be rare, however, because of the broad standard governing ancillary and pendent jurisdiction.[118]

Even in hybrid cases satisfying the requirements of pendent or ancillary jurisdiction, the principles of comity and federalism weigh heavily against federal adjudication of the DRE issues. Respect for the states' traditional role in deciding these matters calls for judicial restraint. Thus, the appropriate response in a hybrid case should be to sever the claims and entertain only the non-DRE issues, or to abstain from the entire case if the DRE and non-DRE components derive from a common nucleus of operative fact and could be expected to be heard in only one action.

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117 Specifically, if a decision by a state court on state law grounds would obviate the need to decide a federal question, the district court should abstain under *Pullman*. If the action involves a state agency's administrative scheme, and raises the possibility that a federal decision would interfere with the establishment of a coherent state policy, *Burford* abstention would be appropriate. *Younger* abstention would apply in the very limited situation where a party seeks to enjoin a concurrent state proceeding to which the state, its officer or agent is a party. *See* notes 85-115 *supra* and accompanying text.

118 *See* note 116 *supra*.

B. *Applying the Guidelines*

In three recent cases, *Wasserman v. Wasserman*,[119] *Bennett v. Bennett*,[120] and *Lloyd v. Loeffler*,[121] federal district courts heard actions for the tort of child-snatching. The facts followed a similar pattern:

> Parents (*P1* and *P2*) of child (*C*) sued for custody of *C* in state *X*. State *X* decreed that *P1* was to have custody of *C*, with *P2* to retain visitation rights. *P1* and *C* continued to reside in state *X*; *P2* took up residence in state *Y*. *P2* removed *C* to state *Y* and refused to return *C* upon *P1*'s request. *P1* sued *P2* in district court on the basis of diversity, seeking damages in excess of $10,000 for emotional harm, child enticement, or a similar tort. At the commencement of the suit, if *C* had not been returned, *P1* also sought injunctive relief for *C*'s return.

The jurisdictional question was addressed at the trial level in *Wasserman*[122] and was raised *sua sponte* by the appellate courts in *Bennett*[123] and *Lloyd*.[124] All three appellate courts held that *P1*'s action for damages arising from the child-snatching was within federal jurisdiction.[125] Additionally, the *Bennett* and *Lloyd* courts found that *P1*'s request for equitable relief fell within the domestic relations exception.[126] The courts reasoned that to decide the equitable relief question was to determine child custody.[127] The question whether the

119 671 F.2d 832 (4th Cir.), *cert. denied*, 459 U.S. 1014 (1982).

120 682 F.2d 1039 (D.C. Cir. 1982).

121 694 F.2d 489 (7th Cir. 1982).

122 671 F.2d at 833-34. The district court dismissed the suit for lack of subject matter jurisdiction on the basis of the domestic relations exception.

123 682 F.2d at 1041-42. The suit was dismissed at the trial level apparently on other grounds.

124 694 F.2d at 491-92. At the district court level, the plaintiff was awarded actual damages, as well as punitive damages to accrue on a daily basis until the child was returned.

125 *Lloyd*, 694 F.2d at 493-94; *Bennett*, 682 F.2d at 1042; *Wasserman*, 671 F.2d at 834-35.

126 *Lloyd*, 694 F.2d at 493-94; *Bennett*, 682 F.2d at 1042-44. The *Lloyd* court found accelerating punitive damages to be similar to the injunctive relief sought in *Bennett*. 694 F.2d at 494. Notwithstanding its conclusion that the request for accelerating damages fell within the domestic relations exception, the *Lloyd* court did not vacate the district court's award since it was not contested on appeal. *Id.* at 494. Of course, if the court lacked jurisdiction to grant punitive damages, it was correct to raise that issue on its own. The court, however, also should have dismissed the case on that basis. *See* FED. R. CIV. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

127 The *Bennett* court was incorrect in holding that the district court lacked power to issue injunctive relief for the return of the child. Similarly, the *Lloyd* court erred by suggesting that the district court lacked power to grant punitive damages due to their similarity to an injunction for the child's return. *See* notes 128-29 *infra* and accompanying text. *Lloyd*, however, like *Wasserman*, reached a correct result.

district court should have abstained was not addressed expressly by any of the courts.

Applying the jurisdictional guidelines established above[128] to the fact pattern, *P1*'s entire suit should be heard by the district court. First, *P1*'s suit is within the court's jurisdiction since it is a non-DRE case. *P1* is not seeking a divorce, alimony award, or child custody determination. *P1*'s request for injunctive relief for the return of *C* is merely a request to have the court enforce a prior valid state decree. Second, none of the abstention doctrines apply.[129] Finally, the third analysis question, whether the court should abstain on the basis of comity or federalism, arises only in the hybrid case and so is inapplicable.

A modification of the fact pattern illustrates how the jurisdictional guidelines apply to a hybrid case between private parties. Suppose that *P2* counterclaims against *P1*, seeking a modification of state *X*'s custody decree. The court's power over *P1*'s claim is unaltered. *P2*'s counterclaim satisfies ancillary jurisdiction requirements because the claims arise out of a common nucleus of operative fact and could be expected to be tried in one action.[130] The court, in its discretion, may extend subject matter jurisdiction to the counterclaim. Under the same standard that satisfies ancillary jurisdiction, the counterclaim is compulsory. It must be joined with the plaintiff's claim or the claim will be permanently denied a federal forum.[131]

The court must first decide whether to extend jurisdiction to *P2*'s counterclaim. As in the original fact pattern, the abstention doctrines in *Pullman*, *Burford*, and *Younger* do not apply. Principles of comity and federalism, however, support abstention. First, a federal court determination of *C*'s custody would evidence a lack of respect for the "institutional autonomy" of the state judicial system.[132] The independence of the states to regulate domestic relations, especially child custody, has been recognized for over a century.[133] Additionally, an exercise of federal jurisdiction would unduly interfere with the state's continuing jurisdiction over *C*'s custody, a matter of purely local concern. Federal courts, historically deferential to the

128 *See* notes 116-18 *supra* and accompanying text.

129 For a discussion of the various abstention doctrines see notes 85-115 *supra* and accompanying text.

130 *See* note 116 *supra.*

131 FED. R. CIV. P. 13.

132 L. TRIBE, *supra* note 74, § 3-39, at 147.

133 Barber v. Barber, 62 U.S. (21 How.) 582 (1858); *In re* Burrus, 136 U.S. 586 (1890); *see* notes 1, 21 *supra* and accompanying text.

states in the area of family law, also lack familiarity and experience with certain aspects of family law. Consequently, the chances are greater that a federal court would resolve a child custody dispute differently than the state court that would otherwise decide the question. Finally, the federal court's interest in adjudicating the case, merely because diversity jurisdiction exists, is outweighed by a competing interest in federalism and a desire to avoid a conflict with the state.

After deciding not to extend jurisdiction over the counterclaim, even though the requirements of ancillary jurisdiction are met, the court must then decide whether to entertain the remainder of the case. Given the close relationsip between *P1*'s claim and *P2*'s compulsory counterclaim, the court should abstain from *P1*'s claim as well. Judicial economy and fairness to the parties militate against hearing only part of the case.[134]

V. Conclusion

Federal courts should continue to honor a narrowly defined domestic relations exception. Historically, granting divorces, awarding alimony, and determining child custody were beyond the jurisdiction of article III courts and were reserved to the states in their sovereign capacity. In the interests of comity and federalism, the allocation of power between federal and state courts over such matters should not be altered.

Domestic relations cases that raise issues outside of the exception may be within the realm of federal jurisdiction. Unless abstention principles sanctioned by the Supreme Court warrant judicial restraint, federal courts have a responsibility to entertain those cases.

Finally, federal courts should analyze domestic relations cases containing divorce, alimony, or child custody issues ancillary to other issues to determine whether the cases can be split accordingly. Federal courts should dismiss the divorce, alimony, or child custody issues, if they are severable from the remainder of the case. If not, then the entire case should be dismissed. Comity and federalism support dismissing the divorce, alimony, or child custody issues; fairness and efficiency support abstaining from the remainder of the case.

134 United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966).