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## The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts

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# THE DOMESTIC RELATIONS EXCEPTION, DOMESTIC VIOLENCE, AND EQUAL ACCESS TO FEDERAL COURTS

EMILY J. SACK\*

## ABSTRACT

*This Article examines the classic issue of the allocation of jurisdiction between the state and federal courts, with an untraditional focus on family law, domestic violence, and women's access to federal courts. The piece first explores the domestic relations exception to federal jurisdiction, a longstanding judge-created doctrine under which the federal courts lack jurisdiction to hear divorce, custody, and other family matters traditionally reserved to the states. In the recent case of Marshall v. Marshall, 126 S. Ct. 1735 (2006), the Supreme Court had the opportunity to abandon the domestic relations exception (as well as its relative, the probate exception) but refused to do so, despite acknowledging the weak rationale for maintaining it. This Article critiques the traditional explanations for the exception's existence, and argues that its roots may be traced to the principles of coverture. The "exception" may in fact not be an exception to jurisdiction at all, but rather a recognition that divorce and related cases could not meet federal diversity requirements because married women could not establish citizenship separate from that of their husbands. This explanation reveals both one of the primary causes for the exception's creation and the consequences of maintaining it—the belief that family law is a "women's issue" that is not deserving of the attention of the federal courts.*

*The Article goes on to suggest that the legacy of the exception can be seen in the Court's treatment of domestic violence cases. It focuses primarily on Castle Rock v. Gonzales, 545 U.S. 748 (2005), which held that a domestic violence victim had no constitutionally protected property interest in the enforcement of a protection order, and therefore no claim under 42 U.S.C. § 1983. In so doing, the Court has again restricted federal court review of issues that centrally concern women. The Article*

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*concludes that the domestic relations exception should be abolished as a significant first step. However, the Supreme Court must also recognize that in its denial of federal rights to victims of domestic violence, it is continuing to deny all women full participation and citizenship.*

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## INTRODUCTION

When Anna Nicole Smith's case against E. Pierce Marshall arrived at the Supreme Court, it is safe to say that public attention was not focused on the potential effect that the decision would have on a little known exclusion from federal court jurisdiction, the domestic relations exception.<sup>1</sup> However, the central issue in the case was whether Smith's tort claim, which alleged that Marshall had interfered with her expectancy in the estate of her late husband, could be heard by a federal court.<sup>2</sup> Because Smith's claim was related to the probate of her husband's estate, Marshall claimed that it fell within the probate exception to federal jurisdiction, under which claims concerning the administration of an estate or probate of a will are considered to be the exclusive jurisdiction of the state courts.<sup>3</sup> The probate exception is "kin" to the domestic relations

1. See, e.g., Gina Holland, *Anna Nicole's Case Goes to Supreme Court*, ASSOCIATED PRESS, Sept. 27, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2005/09/27/national/w063657D29.DTL> ("The Supreme Court shed its staid image Tuesday, giving stripper-turned Playboy model Anna Nicole Smith a new chance at a piece of the fortune of her 90-year-old late husband . . . . The case promises to be the sexiest of the nine-month term which begins next week."). After the Court ruled in her favor, a sample headline read, "Anna Nicole Smith wins over justices." See Bill Mears, *Anna Nicole Smith wins over justices*, CNN, May 1, 2006, <http://cnn.com/2006/LAW/05/01/scotus.smith/index.html>. As these examples demonstrate, this depiction of the case was prevalent in mainstream news coverage and was not limited to entertainment or gossip sites.

2. *Marshall v. Marshall*, 126 S. Ct. 1735 (2006). Anna Nicole Smith was also known as Vickie Lynn Marshall ("Vickie"). While her husband's estate was pending in a Texas probate court, Vickie filed for bankruptcy in a federal bankruptcy court in California. E. Pierce Marshall ("Pierce") subsequently filed a proof of claim in the federal bankruptcy proceeding, alleging that Vickie had defamed him and seeking a declaration that the debt was not dischargeable in bankruptcy. Vickie filed a tortious interference counterclaim against Pierce. *Id.* at 1741–42. The bankruptcy court ultimately ruled for Vickie both on Pierce's claim and on her counterclaim. Pierce then filed a post-trial motion in bankruptcy court, arguing that the probate exception prohibited the federal court from hearing Vickie's counterclaim. The bankruptcy court held that the probate exception argument was not timely, but also that this claim would not fall within the exception. *Id.* at 1742. On appeal, the federal district court rejected the time-barred argument but agreed that the probate exception did not apply to Vickie's tort claim and ruled for Vickie on that claim. The Ninth Circuit reversed, finding that the Vickie's claim fell within the probate exception. The Supreme Court reversed. *Id.* at 1743–44.

3. Courts and commentators traditionally trace the origins of the probate exception to the jurisdiction of the English ecclesiastical courts at the time that the Judiciary Act of 1789, defining jurisdiction in the federal courts, was enacted. Because the ecclesiastical courts had exclusive jurisdiction of probate of wills at that time, these issues were not included in the Act's grant of federal jurisdiction to "all suits of a civil nature at common law or equity." *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982) (Posner, J.); see also *Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir. 2002) (Judiciary

exception, in which federal courts lack jurisdiction to hear divorce, custody, and other family matters traditionally reserved for the state courts.<sup>4</sup> In *Marshall*, the Court discussed the domestic relations exception at length for the first time in fourteen years.<sup>5</sup>

The opinion began with Chief Justice Marshall's famous quote from *Cohens v. Virginia*, which asserted the federal courts' responsibility to adjudicate claims within their jurisdiction: "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. . . . We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."<sup>6</sup> The Court in *Marshall* displayed a heavily skeptical view of the probate and domestic relations exceptions to federal jurisdiction, referring to them as "so-called" exceptions, asserting that they were required neither by the Constitution nor federal statute, and stating that they stemmed "in large measure from misty understandings of English legal history."<sup>7</sup> The Court characterized its prior decisions as "rein[ing] in" the exceptions and chastised the Ninth Circuit for giving a broad reading to the probate exception in this case.<sup>8</sup> Nevertheless, despite this strong language, the Court did not take the opportunity to overrule either exception.<sup>9</sup>

This Article focuses on the domestic relations exception to federal jurisdiction and both explores and critiques the traditional explanations for

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Act of 1789's conferral of equity jurisdiction is limited to the scope of jurisdiction of the English Chancery Court at that time, which did not include probate matters.). Judge Posner criticized this rationale both because it may not be historically accurate, and because there is no reason for the Judiciary Act to be interpreted in reference to the jurisdiction of English courts. *Dragan*, 679 F.2d at 713. He termed the probate exception "one of the most mysterious and esoteric branches of the law of federal jurisdiction." *Id.* at 713.

4. *Marshall*, 126 S. Ct. at 1746. This historical rationale is similar to that provided to explain the domestic relations exception. See *infra* text accompanying notes 26–32; see also *Jones v. Brennan*, 465 F.3d 304, 306 (7th Cir. 2006) (discussing the source of authority for both the probate and domestic relations exceptions); *Hayes v. Gulf Oil Corp.*, 821 F.2d 285, 290 (5th Cir. 1987) (discussing the probate and domestic relations exceptions together, as both involving areas in which states and localities have a particular interest and competence).

5. The Court's most recent case directly addressing the domestic relations exception is *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), where the Court narrowly defined the exception to include only direct actions for divorce, alimony, and child custody, but did not overrule it entirely. 504 U.S. at 703–04; see *infra* text accompanying notes 18–58.

6. *Marshall*, 126 S. Ct. at 1741 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

7. *Id.* at 1741.

8. *Id.* (citing *Ankenbrandt v. Richards*, 504 U.S. 689 (1992) (domestic relations exception) and *Markham v. Allen*, 326 U.S. 490 (1946) (probate exception)).

9. The Court construed the probate exception narrowly, and found that because Smith's claim did not involve a purely probate matter, such as probate of a will or administration of an estate, but rather was a tort claim in which she sought an *in personam* judgment, the exception did not apply. *Id.* at 1748. Justice Stevens concurred, arguing against the existence of any probate exception at all. *Id.* at 1750 (Stevens, J., concurring in part and concurring in judgment).

its existence. Through a close analysis of the case law in which the exception was established, I propose an alternative rationale for its creation that is based in the principles of coverture.<sup>10</sup> I argue that the domestic relations “exception” may in fact not be an exception at all, but rather a recognition that divorce and other related cases could not meet the requirements of federal diversity jurisdiction because married women could not establish citizenship separate from that of their husbands. This alternative explanation has been ignored by the Court in intervening years because it reveals the exception’s now-discredited beginnings and exposes one of the primary causes and consequences of the exception—the belief that family law is a “women’s issue” that is not deserving of the attention of the federal courts.

In Part I, I analyze *Ankenbrandt v. Richards*, the Supreme Court’s most recent attempt to define the scope of the domestic relations exception. I critique the rationales suggested by the Court, and conclude that it has not espoused any convincing explanation for this exception to federal court jurisdiction. However, by articulating several policy rationales for maintaining the exception, and by suggesting that abstention may be appropriate in some situations where the exception to jurisdiction does not apply, the *Ankenbrandt* Court sustained, and may have strengthened, the concept that family law cases do not belong in federal court. In this Part, I briefly review lower federal court case law both before and after *Ankenbrandt*, and conclude that the federal courts’ use of the exception has been inconsistent, but remarkably enduring.

In Part II, I examine the Court’s early case law establishing the domestic relations exception and the various rationales provided in these foundational cases. I conclude that the “exception” may be best explained as a description of the inability to establish diversity in divorce and alimony cases, primarily because at the time of these early cases a married woman could not establish a domicile separate from that of her husband, even in order to bring an action for divorce or alimony. However, more modern cases have avoided such an explanation because it is so obviously outdated; an exception to jurisdiction on this basis would have to be abandoned. Instead, the more recent cases have tried, unsuccessfully, to

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10. Under coverture, a woman had no legal existence upon marriage; she and her husband were considered one entity, that being the husband. She had no legal ability to contract or buy or sell property without her husband’s consent. The classic description of coverture is that of William Blackstone: “By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing . . . .” WILLIAM BLACKSTONE, 1 COMMENTARIES \*42.

justify the exception on grounds relating to the jurisdiction of the English courts and the interpretation of the congressional statute conferring diversity jurisdiction on the federal courts.

Left without any convincing rationale for the domestic relations exception, the federal courts have relied upon policy factors in support of maintaining it. In Part III, I review these policies and conclude that none of them offer a persuasive justification for continuing the domestic relations exception. Moreover, many of the policy arguments are circular. Their reasoning is based on the premise that the federal courts should defer to the states in this area of particular state interest and expertise; but the states' interest and expertise have developed simply because the federal courts have not been willing to hear these cases. I argue that by maintaining the exception, the Supreme Court and the lower federal courts have perpetuated the view that domestic relations issues, which they perceive as issues relating to women, are not worthy of national focus. While coverture formally denied women access to the courts, the domestic relations exception continues to limit their access to the federal courts and therefore the full political participation that defines equal citizenship. I conclude this Part by arguing that the exception, as well as the broad use of abstention in domestic relations cases, should be discarded, both because they lack any justification and because of their consequences for women's equality.

In Part IV, I explore how the Court's view of "women's issues" that underlies the domestic relations exception also has implications for its treatment of domestic violence cases, another area viewed primarily as a women's concern. I examine how the Court has equated and intertwined domestic violence with domestic relations as a way of domesticating and localizing this violence. In addition, by studying the Court's analysis in *United States v. Morrison* and *Castle Rock v. Gonzales*, I suggest that in the modern era, domestic violence may carry on the legacy of the outmoded domestic relations exception by revealing the federal courts' continuing desire to keep issues involving women off the federal docket. In the Conclusion to the Article, I argue that we must continue to advocate for the rejection of the domestic relations exception, and must also monitor and critique the Court's continuation of the exception's principles in another guise—its treatment of domestic violence. The Court's traditional handling of domestic relations matters, and its more recent consideration of domestic violence cases, are both rooted in the historical principles of coverture, and both result in the denial of women's equal access to the federal courts.

## I. THE DOMESTIC RELATIONS EXCEPTION: *ANKENBRANDT V. RICHARDS* AND THE LOWER FEDERAL COURTS

It may seem odd that the domestic relations exception remains an issue because, in fact, the federal courts have become involved in numerous domestic relations matters. Congress has utilized its power under the Spending Clause, the Commerce Clause, and the Full Faith and Credit Clause to regulate enormous areas of family law, and the federal courts regularly review and interpret this legislation.<sup>11</sup> A significant amount of federal law is explicitly devoted to issues such as child welfare, custody, and child support.<sup>12</sup> Legislation such as the Family and Medical Leave Act

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11. See Linda Henry Elrod, *Epilogue: Of Families, Federalization, and a Quest for Policy*, 33 *FAM. L.Q.* 843, 846, 848 (1999) (discussing how federal legislation, Supreme Court decisions, and international treaties have federalized and internationalized many areas of family law during the twentieth century); Jill Elaine Hasday, *The Canon of Family Law*, 57 *STAN. L. REV.* 825, 827–29, 870–92 (2004) (analyzing how orthodoxy of family law canon that family law is local has led judges, legislators, and scholars to overlook substantial areas affecting the family that are covered by federal law); Laura W. Morgan, *The Federalization of Child Support—A Shift in the Ruling Paradigm: Child Support as Outside the Contours of “Family Law,”* 16 *J. AM. ACAD. MATRIMONIAL L.* 195 (1999) (Despite the Supreme Court’s stated position that family law is not a subject for federal legislation or federal court jurisdiction, “the federalization of child support continues apace.”); see also *Kansas v. United States*, 24 *F. Supp. 2d* 1192, 1196, 1199 (D. Kan. 1998) (granting federal government’s motion to dismiss State’s claim that federal law on child support collection was unconstitutional under the Spending Clause and the Tenth Amendment and noting Congress’s extensive use of conditional offers of federal funds to regulate state actions). Congress has enacted legislation affecting family social policy since the nineteenth century. See Kristin A. Collins, *Federalism’s Fallacy: The Early Tradition of Federal Family Law and the Invention of States’ Rights*, 26 *CARDOZO L. REV.* 1761, 1782–83, 1801 (2005) (Congress decided which families and family members were pension-eligible, the value of the widow’s service in raising the next generation, and how a widow’s current marital status impacted her ability to receive a pension.).

12. See, e.g., International Parental Kidnapping Crime Act, 18 U.S.C. § 1204 (2006); Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2006); Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2006); Full Faith and Credit for Child Support Orders Act of 1994, 28 U.S.C. § 1738B (2006); Child Abuse Prevention and Treatment and Adoption Reform Opportunities Act of 1978, 42 U.S.C. §§ 701–709 (2006); Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 670 (2006); Adoption and Safe Families Act of 1997, 42 U.S.C. §§ 5101–07 (2006); Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, 98 Stat. 1305 (1984) (codified as amended in scattered sections of Title 42 of the U.S. Code); Family Support Act of 1988, 42 U.S.C. §§ 654, 666–667 (2006); Deadbeat Parents Punishment Act of 1998, Pub. L. No. 105-187, 112 Stat. 618 (1998); Newborns’ and Mothers’ Health Protection Act of 1996, Pub. L. No. 104-204, tit. VI, 110 Stat. 2935, 2936 (1996). These laws are the subject of extensive litigation in the federal courts. See, e.g., *Thompson v. Thompson*, 484 U.S. 174, 179–87 (1988) (considering whether the Parental Kidnapping Prevention Act created an implied right of action in federal court to determine the validity of conflicting state custody orders); *United States v. Kerley*, 416 F.3d 176, 178–81 (2d Cir. 2005) (evaluating whether defendants charged with violating the Deadbeat Parents Punishment Act could collaterally challenge the subject matter jurisdiction of the state court that entered the underlying child support order); *ASW v. Oregon*, 424 F.3d 970, 974–78 (9th Cir. 2005) (considering whether plaintiffs have a right to make a 42 U.S.C. § 1983 claim under the Adoption Assistance and Child Welfare Act); *United States v. Cummings*, 281 F.3d 1046, 1048–51 (9th Cir. 2002) (determining constitutionality of



and the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 has substantially impacted family law issues.<sup>13</sup> Congress also has become involved in the regulation of marriage.<sup>14</sup> Other federal laws governing bankruptcy and pensions affect the rights of family members to property and maintenance at divorce.<sup>15</sup> Moreover, there are a number of constitutional issues that involve family law, and since the Court's decision in *Griswold v. Connecticut*,<sup>16</sup> this area has been among the most rapidly developing fields of constitutional law.<sup>17</sup> However, the domestic relations exception has lived on in federal courts' jurisprudence.

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the International Parental Kidnapping Crime Act as valid exercise of Congress's Commerce Clause power); *United States v. Kramer*, 225 F.3d 847, 850–57 (7th Cir. 2000) (interpreting the Child Support Recovery Act to determine whether a defendant may challenge on collateral attack a state default judgment entered without personal jurisdiction).

13. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (1993) (addressing employment leave for child care and family illness); Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 607(e)(2), (g) (2006) (creating incentives that impact family size, requiring states to adopt various child support enforcement measures in order to receive federal welfare funds, and replacing the AFDC program with Temporary Assistance to Needy Families (TANF) block grants); *see also* Morgan, *supra* note 11, at 210–11.

14. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C). Congress has also considered a Marriage Protection Amendment to the Constitution as recently as the summer of 2006. *See* H.R.J. Res. 88, 109th Cong. (2006); 152 CONG. REC. H5287 (daily ed. July 18, 2006) (debate and vote on Marriage Protection Amendment).

15. Railroad Retirement Act of 1974, 45 U.S.C. § 231 (2006); The Employee Retirement Income Security Act of 1974 Pub. L. 93-406, 88 Stat. 829 (1974); *see* Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 415–16 (2002) [hereinafter *Reconstructing Equality*] (discussing how federal tax law defines household heads, benefits law and bankruptcy law detail family relations and obligations of support, pension law governs marital property rights in pensions, and federal immigration and asylum law defines families for those purposes).

16. 381 U.S. 479 (1965) (holding that right of married couples to use contraception is protected under the Constitution).

17. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that state statute criminalizing homosexual sodomy violated substantive due process required under Constitution); *Troxel v. Granville*, 530 U.S. 57 (2000) (finding state statute on third-party visitation, which gave no priority to the decision of a fit parent, unconstitutional); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (reaffirming *Roe* framework, holding husband notification provision unconstitutional, and upholding other provisions that the Court found did not place an undue burden on the right to seek an abortion); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (holding that statute, which conclusively presumed that the husband of a woman who gives birth to child during marriage is the child's father, did not violate a putative father's due process rights); *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that racial classification cannot be the basis for removing a child from the custody of a parent found to be an appropriate person to have such custody); *Lehr v. Robertson*, 463 U.S. 248 (1983) (holding that natural father's constitutional rights were not violated when he failed to receive notice and opportunity to be heard on adoption of his child, where he had never had any significant relationship with the child); *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that Due Process Clause requires at least a clear and convincing standard of proof in a parental termination proceeding); *Caban v. Mohammed*, 441 U.S. 380 (1979) (holding that state statute permitting unwed mother, but not unwed father, to block adoption of child by withholding consent violated the Equal Protection Clause); *Zablocki v.*

### A. Ankenbrandt v. Richards

The Supreme Court's most recent direct pronouncement on the domestic relations exception was in *Ankenbrandt v. Richards*,<sup>18</sup> in which a mother sued on behalf of the children she shared with her ex-husband, claiming that he and his girlfriend had physically and sexually abused the children.<sup>19</sup> The diversity of citizenship and amount in controversy requirements for federal diversity jurisdiction were satisfied.<sup>20</sup> The federal district court had dismissed the case, holding that it lacked subject matter jurisdiction due to the domestic relations exception, and alternatively, because the case fell within the *Younger* abstention doctrine.<sup>21</sup> The Court of Appeals affirmed in an unpublished opinion.<sup>22</sup>

The Supreme Court reversed, holding that the domestic relations exception did not apply to the case, nor was abstention appropriate. However, the Court reviewed the rationale for the exception, and despite its own skeptical explanation of its origins, did not overrule the doctrine. Rather, it was "unwilling to cast aside an understood rule that has been recognized for nearly a century and a half" and so felt "compelled to

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Redhail, 434 U.S. 374 (1978) (holding that statute which substantially infringed on right to marry violated Equal Protection Clause); *Quilloin v. Walcott*, 434 U.S. 246 (1978) (holding that unwed father's rights were not violated by statute that permitted adoption under a best interests of the child standard, and distinguished between married and unwed fathers); *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (holding housing ordinance which limited occupancy of a dwelling unit to only certain family relations unconstitutional); *Roe v. Wade*, 410 U.S. 113 (1973) (holding that the right to choose abortion is a fundamental right protected under the Due Process Clause); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that state law compelling Amish parents to cause their children to attend school to age sixteen violates the Free Exercise Clause); *Stanley v. Illinois*, 405 U.S. 645 (1972) (holding state presumption that unwed fathers are unfit parents unconstitutional); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding anti-miscegenation statute unconstitutional).

18. 504 U.S. 689 (1992).

19. *Id.* at 691.

20. *Id.* Ankenbrandt alleged that the father's parental rights had already been terminated in state court. *Id.* at 691 n.1.

21. In *Younger v. Harris*, 401 U.S. 37 (1971), the Court held that the federal court was barred from hearing a federal civil rights claim when the plaintiff in that action was currently being prosecuted on a charge relating to that claim in a state criminal proceeding. The doctrine has been extended to situations in which a state civil action is pending that involves a state action to execute a civil fine, or an action for contempt of court. See *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975). In *Middlesex County Ethics Committee*, the Court held that *Younger* abstention required that state proceedings were pending that implicated important state interests, and that provided an adequate opportunity for raising federal constitutional claims. *Middlesex County Ethics Comm.*, 457 U.S. at 432. *Younger* precludes a federal court from enjoining a pending state court proceeding unless plaintiff shows that he is the victim of official bad faith or harassment, or that the state is acting pursuant to a patently unconstitutional state statute. *Younger*, 401 U.S. at 49, 53.

22. *Ankenbrandt*, 504 U.S. at 692.

explain why we will continue to recognize this limitation on federal jurisdiction.”<sup>23</sup>

The Court first made clear that the domestic relations exception was not constitutionally based, and that the three terms used to delineate jurisdiction in Article III, “Cases, in Law and Equity,” “Cases,” and “Controversies,” did not include any exception for domestic relations matters.<sup>24</sup> Moreover, the Court’s prior case law did not rely on the Constitution for the domestic relations limitation. Finally, the fact that the Court heard appeals from territorial courts, and upheld the exercise of original jurisdiction in the federal courts in the District of Columbia in these matters, made clear that the exception was not required by the Constitution.<sup>25</sup>

Therefore, Congress could have limited the lower federal courts’ jurisdiction by statute. This argument was made by the dissent in *Barber v. Barber*,<sup>26</sup> the case whose unsupported dicta provided the “seeming authority” for the domestic relations exception.<sup>27</sup> The *Barber* dissent argued that at the time Congress enacted the Judiciary Act of 1789, which determined the requirements for federal diversity jurisdiction, certain domestic relations matters were within the exclusive jurisdiction of the English ecclesiastical courts and could not be heard in the English chancery courts.<sup>28</sup> When using the language “suits of a civil nature at common law or in equity” to define diversity jurisdiction, the dissent opined, Congress intended to limit American chancery court jurisdiction to that available in the English courts; therefore, these domestic relations

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23. *Id.* at 694–95.

24. *Id.* at 695; U.S. CONST. art. III, § 2, cl. 1. This clause reads:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same state claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

25. *Ankenbrandt*, 504 U.S. at 695–97.

26. 62 U.S. (21 How.) 582 (1858).

27. *Ankenbrandt*, 504 U.S. at 693. In particular:

The domestic relations exception upon which the courts below relied to decline jurisdiction has been invoked often by the lower federal courts. The seeming authority for doing so stemmed from the announcement in *Barber v. Barber* that the federal courts have no jurisdiction over suits for divorce or the allowance of alimony.

*Id.* (citation omitted).

28. *Barber*, 62 U.S. (21 How.) at 605 (Daniel, J., dissenting).

matters would not fall within the language of the Judiciary Act.<sup>29</sup> The *Ankenbrandt* Court acknowledged that this reference by the *Barber* dissenters was only “implicit” and “suggested.”<sup>30</sup>

The *Ankenbrandt* Court then reasoned that the *Barber* majority must have agreed with the dissent’s rationale for the domestic relations exception because it “did not disagree” with this explanation; accordingly, “it may be inferred fairly that the jurisdictional limitation recognized by the Court rested on this statutory basis.”<sup>31</sup> Moreover, though Congress changed the language of the diversity statute in 1948 to remove the law and equity categories, and replace them with the words “all civil actions,” the Court found that there was no evidence that Congress intended to reject the courts’ longstanding interpretation of the statute by eliminating the domestic relations exception.<sup>32</sup>

In making this strained explication of the legal basis for the exception, the Court acknowledged that the underlying argument regarding jurisdiction of the chancery courts in England might not even be historically accurate.<sup>33</sup> Several well-respected judges in the lower federal courts had argued before *Ankenbrandt* that the historical explanation regarding the jurisdiction of the English chancery courts was unsound. In *Spindel v. Spindel*,<sup>34</sup> Judge Weinstein reviewed the jurisdictional history and concluded that “[t]he historical reasons relied upon to explain the

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29. *Ankenbrandt*, 504 U.S. at 698–99; see Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73,78 (1789) (“[T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . an alien is a party, or the suit is between a citizen of the State where the suit is brought, and a citizen of another State.”). In 1875, Congress deleted the requirement that one of the parties must be a citizen of the forum state. See *Spindel v. Spindel*, 283 F. Supp. 797, 801 (E.D.N.Y. 1968).

30. *Ankenbrandt*, 504 U.S. at 698 (“The *Barber* majority itself did not expressly refer to the diversity statute’s use of the limitation on ‘suits of a civil nature at common law or in equity.’ The dissenters in *Barber*, however, implicitly made such a reference, for they suggested that the federal courts had no power over certain domestic relations actions because the court of chancery lacked authority to issue divorce and alimony decrees.”).

31. *Id.* at 699. The Supreme Court here noted that in *Barber* the Court had not referred to the diversity statute’s language to justify the domestic relations exception. *Id.* at 698.

32. *Id.* at 700–01; 1948 Judicial Code and Judiciary Act, 62 Stat. 930 (1948) (current version at 28 U.S.C. § 1332 (2006)). Barbara Atwood points out that, though there is no indication that Congress intended to alter its understanding of the domestic relations exception when it changed this language, with the deletion of the reference to the categories of “law” and “equity,” the historic rationale “lost its literal foundation.” Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 587 (1984). The “all civil actions” language remains in the current diversity statute. 28 U.S.C. § 1332(a) (2006) (“The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs, and is between—(1) Citizens of different states.”).

33. Atwood, *supra* note 32, at 699–700.

34. 283 F. Supp. 797 (E.D.N.Y. 1968) (Weinstein, J.).

federal courts' complete lack of matrimonial jurisdiction are not convincing."<sup>35</sup> He argued that the jurisdiction of the English ecclesiastical courts was only exclusive in theory, and that the temporal courts had always exercised jurisdiction "in a broad range of ancillary matters," such as the determination of marital status, if it was necessary to deciding the matter at hand.<sup>36</sup> The chancery courts would also assist the ecclesiastical courts in matters involving marital status and would enforce various domestic relations orders, including separation agreements.<sup>37</sup> Further, the chancery courts would "restrain the church tribunals from exceeding their jurisdiction."<sup>38</sup>

Moreover, as Judge Posner argued in *Lloyd v. Loeffler*,<sup>39</sup> there is no good reason why "the proper referent is English rather than American practice, though if only because there was no ecclesiastical court in America, American law and equity courts had a broader jurisdiction in family-law matters than their English counterparts had."<sup>40</sup> Judge Posner also noted that "it would be odd if the jurisdiction of England's ecclesiastical courts, theocratic institutions unlikely to be well regarded in America, should have been thought to define the limits of the jurisdiction of the new federal courts."<sup>41</sup>

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35. *Spindel*, 283 F. Supp. at 806. Several commentators also have questioned the accuracy of the historical rationale. See, e.g., Atwood, *supra* note 32, at 584–85 ("[T]he jurisdictional divisions in the English system, viewed as rigid barriers under the historical rationale, were in fact far from absolute."); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1089–90 (1994); Mark Stephen Poker, Comment, *A Proposal for the Abolition of the Domestic Relations Exception*, 71 MARQ. L. REV. 141, 159–60 (1987) (Chancery court had "significant, if limited jurisdiction over domestic matters," such as enforcing separation agreements and deciding validity of marriages.). But see Sharon Elizabeth Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 15 & n.68 (1984) (arguing that the few family relations cases heard in the chancery courts were anomalies due to historical events, such as during Cromwell's rule in the mid-seventeenth century, when the jurisdiction of the ecclesiastical courts was temporarily suspended).

36. *Spindel*, 283 F. Supp. at 807; see also *Lloyd v. Loeffler*, 694 F.2d 489, 491 (7th Cir. 1982) (Posner, J.) (The historical account "exaggerates the nicety with which the jurisdictional distinctions among the English courts were observed."); *Solomon v. Solomon*, 516 F.2d 1018, 1030 (3d Cir. 1975) (Gibbons, J., dissenting) ("The myth of a broad exception to the judicial power of the United States with respect to questions of 'domestic relations' was exposed completely and finally by Judge Weinstein's opinion in *Spindel*.").

37. *Spindel*, 283 F. Supp. at 808. In *Barber*, itself an enforcement case, the Supreme Court had explained that enforcement of domestic relations orders was not outside the jurisdiction of the English chancery courts. *Barber v. Barber*, 62 U.S. 582, 590–91 (1858).

38. *Spindel*, 283 F. Supp. at 809.

39. 694 F.2d 489 (7th Cir. 1982) (Posner, J.).

40. *Lloyd*, 694 F.2d at 492. Commentators have also made this point. See Atwood, *supra* note 32, at 586–87; Cahn, *supra* note 35, at 1090.

41. *Lloyd*, 694 F.2d at 492.

Despite the shaky foundation of the exception, the *Ankenbrandt* Court stated that it was “content to rest our conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justification on which it was seemingly based, but rather on Congress’ apparent acceptance of this construction” of the Judiciary Act.<sup>42</sup> Congress’ long acceptance of the Court’s interpretation, together with considerations of *stare decisis*, led the Court to uphold the exception’s existence. The Court bolstered its support for the exception on the basis of policy considerations, and cited several factors traditionally invoked to justify the exception: state courts’ greater expertise in family law issues, and state courts’ increased ability both to work with local agencies and to undertake the ongoing monitoring that is often required in family law cases.<sup>43</sup>

The Court did stress that the domestic relations exception was limited to the issuance or modification of a divorce, alimony, or child custody decree, and disapproved of some lower federal courts’ broad invocation of the exception.<sup>44</sup> The Court held that the domestic relations exception did not apply in the present case because it was a tort action, which did not seek such a decree.<sup>45</sup> The Court also rejected the lower courts’ reliance on *Younger* abstention in this case as an alternative basis for dismissal.<sup>46</sup> The Court found that *Younger* abstention did not apply when there was no state court proceeding pending and no “assertion of important state interests.”<sup>47</sup>

Yet the Court did not find abstention completely inapplicable in domestic relations cases. It noted that even where the federal courts did not lack jurisdiction due to the domestic relations exception, “it is not inconceivable . . . that in certain circumstances, the abstention principles developed in *Burford v. Sun Oil Co.* might be relevant.”<sup>48</sup> The Court specified that *Burford* abstention might be appropriate if a federal suit were filed prior to the issuance of a divorce, alimony, or child custody decree and the federal suit depended on a determination of the status of the parties, because the case then could present “difficult questions of state

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42. *Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992).

43. *Id.* at 703–04.

44. *Id.* at 701–03. The Court endorsed the Courts of Appeals opinions that had taken a narrow view of the exception. *See id.* at 703 n.6.

45. *Id.* at 704.

46. *Id.* at 705.

47. *Id.*

48. *Id.* (citation omitted); *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943). *Burford* abstention permits a federal court sitting in diversity to abstain when federal court involvement would unduly disrupt state policy in a complex regulatory field. *Id.* at 332–34.

law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.”<sup>49</sup>

Concurring in the judgment, Justice Blackmun disagreed with the Court’s holding on the existence of the domestic relations exception to federal court jurisdiction.<sup>50</sup> He argued at length that both the federal diversity statute and prior Supreme Court case law did not provide a basis for the mandatory limitation on federal subject matter jurisdiction that the majority upheld.<sup>51</sup> Yet Justice Blackmun did not disagree with the idea that the federal courts need not hear domestic relations matters. Instead, Justice Blackmun found the necessary basis for “the federal courts’ longstanding practice of declining to hear certain domestic relations cases” in abstention principles.<sup>52</sup> Though the Court had not yet developed a formal abstention doctrine in its early cases regarding domestic relations, according to Justice Blackmun, its refusal to hear domestic relations matters in prior cases was best explained by abstention-like concerns due to “the virtually exclusive primacy at that time of the States in the regulation of domestic relations.”<sup>53</sup>

Justice Blackmun frankly acknowledged that “[w]hether the interest of States remains a sufficient justification today for abstention is uncertain in view of the expansion in recent years of federal law in the domestic relations area.”<sup>54</sup> Nonetheless, the federal courts’ refusal to hear these cases for so long itself provides the “very rare justification for continuing to do so.”<sup>55</sup> Like the majority, Justice Blackmun provided policy rationales to support this position, focusing on state expertise and the existence of state institutions specialized in these matters. He concluded with a broad call for abstention: “Absent a contrary command of Congress, the federal courts properly should abstain, at least from diversity actions traditionally excluded from the federal courts, such as those seeking divorce, alimony, and child custody.”<sup>56</sup> After his devastating critique of the majority’s justification for maintaining the domestic relations exception, Justice

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49. *Ankenbrandt*, 504 U.S. at 705–06 (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). The Court found that this situation did not exist in the present case, so *Burford* abstention did not apply. *Id.* at 706.

50. *Ankenbrandt*, 504 U.S. at 707 (Blackmun, J., concurring in the judgment).

51. *Id.* at 707–13.

52. *Id.* at 713–14.

53. *Id.*

54. *Id.* at 715.

55. *Id.* Justice Blackmun noted that federal courts have a “disinclination to entertain domestic relations matters.” *Id.* at 716.

56. *Id.* at 715. Justice Blackmun found that abstention was not appropriate in the case at bar, which was only peripherally connected to domestic relations issues. *Id.* at 716.

Blackmun ultimately reached the same result—restricting domestic relations litigants from access to federal courts—through his own thinly justified abstention rationale.<sup>57</sup>

The Court thus gave conflicting signals in *Ankenbrandt* regarding the exception. It claimed to be interpreting the exception narrowly and rejected its use in the tort action before it. It also rejected the use of *Younger* abstention in the case, which had provided a means for the federal courts to use their discretion to dismiss domestic relations cases in certain circumstances. Yet it also explicitly acknowledged the existence of the domestic relations exception and suggested a possible use of *Burford* abstention when the exception did not apply. It stretched to find a rationale for the exception, of which it barely seemed to convince itself, in order to justify its continuance. Most striking, no member of the Court questioned the basic assumptions justifying federal courts' refusal to hear domestic relations cases, whether through the exception or abstention. Nor did any Justice consider the impact that such refusal has had on the litigants in these cases. Moreover, *Ankenbrandt* did nothing to clear up the confusion over the scope and rationale for the domestic relations exception that had existed in the lower federal courts.<sup>58</sup> In the following section, I briefly review the confused state of affairs in the lower federal courts both before and after *Ankenbrandt*.

### *B. The Lower Federal Courts' Use of the Domestic Relations Exception*

The lower federal courts have taken widely divergent positions on the domestic relations exception in a variety of contexts. Without adequate guidance from the Supreme Court, the lower courts' decisions have been inconsistent both within and between circuits.<sup>59</sup> With the exception of

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57. Justice Stevens, also concurring in the judgment, would have preferred for the Court not to consider the existence, origin, or scope of a domestic relations exception at all. He argued that the case at issue did not fall within any exception that might exist, so that no further discussion was necessary and should be left for another day. *Id.* at 718 (Stevens, J., concurring in judgment).

58. See Atwood, *supra* note 32, at 592 (“The ambiguities in Supreme Court precedent on the domestic relations exception have left the lower courts without a sure compass.”); Cahn, *supra* note 35, at 1076 (Even before *Ankenbrandt*, “federal court jurisprudence on the origins and scope of the Exception was muddled.”); Thomas H. Dobbs, *The Domestic Relations Exception is Narrowed After Ankenbrandt v. Richards*, 28 WAKE FOREST L. REV. 1137, 1145 (1993) (Prior to *Ankenbrandt*, “[w]ith no guidance on the interpretation of the ambiguities of Supreme Court precedent, the lower courts struggled to define the parameters of the exception.”); see also Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 671 (1995).

59. For example, some commentators and courts have identified various tests for the domestic relations exception, including: cases involving modifiable orders; claims involving relationship status,



some core domestic relations issues—direct consideration of a divorce, alimony, or custody decree—the courts have not acted with any predictability.<sup>60</sup>

1. *Domestic Relations Cases in the Lower Federal Courts Before Ankenbrandt*

Prior to *Ankenbrandt*, some lower federal courts interpreted the domestic relations exception broadly and dismissed cases involving family relations, even if the claims were based in contract<sup>61</sup> or tort.<sup>62</sup> Some courts

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as opposed to property rights; and “the nature of the case,” an approach in which the court looks behind the label placed on the claim, such as tort or contract, to discern what issue is really in question. *See, e.g.*, Allan D. Vestal & David L. Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 31 (1956); Barbara Freedman Wand, *A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction*, 30 VILL. L. REV. 307, 328–35 (1985); Paker, *supra* note 35, at 151. The argument is that federal courts will not hear cases involving obligations that may be modified, such as future alimony or child support, because they may cause the courts to monitor a domestic relations matter on an ongoing basis. The federal courts could refuse to consider matters that require a determination of status, such as the validity of a marriage or divorce, or a paternity claim. However, they are able to decide a property dispute between family members. In the “nature of the case” approach, the courts look to the actual issue rather than simply to the label of the cause of action. However, not all federal courts apply these approaches and categories, nor are they applied consistently where they are used. *See* Atwood, *supra* note 32, at 594–96 (critiquing various tests and arguing that they are not based in any Supreme Court case law).

60. Writing before *Ankenbrandt*, Barbara Freedman Wand noted that federal courts in one circuit accept jurisdiction in cases involving determinations of status, while courts in another circuit do not. A nonmodifiable property settlement agreement may be enforced in some federal courts, but not in others. A suit between ex-spouses based on tort theories is considered a domestic relations case in one federal court, while another considers the case as cognizable in federal court as any other tort action involving diverse parties. Wand, *supra* note 59, at 335. As Wand has also stated:

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

*Id.*

61. *See, e.g.*, *Anastasi v. Anastasi*, 544 F. Supp. 866 (D.N.J. 1982) (palimony action is within domestic relations exception); *Walker v. Walker*, 509 F. Supp. 853 (E.D. Va. 1981) (claim for post-due alimony dismissed as within exception); *Cherry v. Cherry*, 438 F. Supp. 88, 90 (D. Md. 1977) (dismissing claim for breach of a separation agreement regarding child visitation); *Albanese v. Richter*, 67 F. Supp. 771, 772–74 (D. N.J. 1946), *aff'd*, 161 F.2d 688 (3d Cir. 1947) (dismissing claim brought by child born out of wedlock challenging validity of a contractual agreement concerning paternal responsibilities to her because court had no *parens patriae* authority over children); *see also* Rush, *supra* note 35, at 7 & n.32 (collecting cases).

62. *See, e.g.*, *Goins v. Goins*, 777 F.2d 1059, 1060, 1062–63 (5th Cir. 1985) (dismissing tort claim against former husband and his relatives for unlawfully withholding child from custodial parent, as well as claim for modification of state custody decree, because entire case, including alleged torts, was “so immeshed in [the domestic relations] controversy as to be within the bounds of the domestic relations exception”); *Jagiella v. Jagiella*, 647 F.2d 561 (5th Cir. 1981) (dismissing ex-spouse’s

also refused to entertain claims seeking declaration of marital or parental status.<sup>63</sup> Yet other courts, some within the same circuits, did not dismiss cases in similar situations, where the claims were based in contract<sup>64</sup> or tort.<sup>65</sup> In addition, some of these courts also heard claims relating to the declaration of marital or paternity status.<sup>66</sup>

Despite the fact that the domestic relations exception had arisen in a diversity case,<sup>67</sup> and that its rationales were based on the history of the federal diversity statute, the Supreme Court's inconsistency in this area led some lower courts to apply the exception to federal question cases. Before *Ankenbrandt*, the lower federal courts were divided on whether or not the exception could apply in cases based on federal question jurisdiction.<sup>68</sup>

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counterclaim alleging alienation of child's affection and infliction of mental anguish as within domestic relations exception); *Nouse v. Nouse*, 450 F. Supp. 97 (D.Md. 1978) (claim that ex-spouse interfered with his communication with their children dismissed as within exception); *see also* *Rush*, *supra* note 35, at 7 & n.32 (collecting cases).

63. *See, e.g.*, *Csibi v. Fustos*, 670 F.2d 134, 138 (9th Cir. 1982) (dismissing dispute over husband's estate between spouse and putative spouse under domestic relations exception because it required a determination of the marital status of the parties); *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968) (dismissing claim to establish paternity for lack of jurisdiction); *Bates v. Bushey*, 407 F. Supp. 163 (D.Me. 1976) (dismissing paternity action based on domestic relations exception); *see also* *Rush*, *supra* note 35, at 8 & n.33 (collecting cases).

64. *See, e.g.*, *Crouch v. Crouch*, 566 F.2d 486 (5th Cir. 1978) (enforcing separation agreement between ex-spouses); *Zimmerman v. Zimmerman*, 395 F. Supp. 719 (E.D.Pa. 1975) (enforcing contract for maintenance); *see also* *Rush*, *supra* note 35, at 7 & n.30 (collecting cases).

65. *See, e.g.*, *Drewes v. Ilnicki*, 863 F.2d 469, 472 (6th Cir. 1988) (reversing district court dismissal under domestic relations exception where plaintiff alleged intentional infliction of emotional distress and interference with employment due to ex-spouse's concealment of their children). In *Drewes*, the court of appeals noted that the tort damages action was not a pretense for a determination of custody. *Id.* at 471. The court also found that the ex-wife's counterclaim for past-due child support, alimony, and medical expenses was not within the domestic relations exception. *Id.* at 472; *see also* *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982) (Posner, J.) (domestic relations exception did not apply to suit for tortious interference with child custody against ex-spouse and parents); *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) (no domestic relation exception to claim for monetary relief to father, legal custodian of children, when children were allegedly abducted by mother); *Wasserman v. Wasserman*, 671 F.2d 832, 833-34 (4th Cir. 1982) (domestic relations exception did not apply to tort suit for child enticement, intentional infliction of emotional distress, and civil conspiracy arising from mother's claim that her husband and others took children from her custody while divorce action was pending); *see* *Rush*, *supra* note 35, at 7 & n.31 (collecting cases).

66. *See, e.g.*, *Rocker v. Celebrezze*, 358 F.2d 119 (2d Cir. 1966) (federal court may determine who is "wife" in Social Security benefits case); *Estate of Borax v. Comm'r*, 349 F.2d 666 (2d Cir. 1965) (determining validity of Mexican divorce for purposes of federal income tax claim); *Oxley v. Sweetland*, 94 F.2d 33 (4th Cir. 1938) (where purpose of suit was to determine property rights, federal court may determine plaintiff's marital status); *see also* *Rush*, *supra* note 35, at 8 & n.33 (collecting cases).

67. *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858).

68. *Compare* *Bergstrom v. Bergstrom*, 623 F.2d 517, 520-21 (8th Cir. 1980) (dismissing claim by child that her removal from the United States due to a custody dispute violated her constitutional rights because consideration would cause the federal court to become involved in custody issues), *Zak v. Pilla*, 698 F.2d 800 (6th Cir. 1982) (per curiam) (civil rights suit involving adoption agency falls

Further, when they found that the domestic relations exception did not apply, some federal courts nevertheless utilized abstention doctrines to decline to exercise jurisdiction. For example, *Armstrong v. Armstrong*<sup>69</sup> concerned a financial agreement regarding alimony and child support that had been made between spouses just prior to divorce.<sup>70</sup> Under the agreement, payments by the husband were secured by a mortgage on several properties formerly owned jointly by the couple, but which were transferred to the husband.<sup>71</sup> When he failed to make the required payments, his ex-wife brought foreclosure proceedings on the properties in state court. The ex-husband then brought a suit in state court to enjoin the foreclosure and reform the agreement.<sup>72</sup> When the ex-wife sought to remove the case to federal court, the district court dismissed for lack of jurisdiction because “a federal court . . . has no jurisdiction whatever to modify state court decrees in domestic relations matters.”<sup>73</sup> The First Circuit noted that the case technically might not fall within the domestic relations exception to jurisdiction; without deciding that issue, however, the court held that abstention was appropriate because an evaluation of the right to reform the agreement would be difficult to separate from the issue of the ex-husband’s support obligations, which must be decided in state court.<sup>74</sup> Therefore, abstention would permit resolution of all the issues in one forum.<sup>75</sup> However, several other federal courts rejected this reasoning and refused to use abstention in domestic relations cases based on diversity jurisdiction.<sup>76</sup>

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within domestic relations exception), and *Hernstadt v. Hernstadt*, 373 F.2d 316, 317–18 (2d Cir. 1967) (dismissing constitutional full faith and credit claim arising out of custody dispute because federal court “could become enmeshed in factual disputes”), with *Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 22–23 (1st Cir. 1991) (exception did not apply to constitutional procedural due process claim by ex-husband regarding alimony proceedings because the case was based on federal question jurisdiction and consideration of the constitutional claim would not require determination of the alimony issues).

69. 508 F.2d 348 (1st Cir. 1974).

70. *Id.* at 349.

71. *Id.*

72. *Id.*

73. *Id.* (quoting lower court decision).

74. *Id.* at 350.

75. *Id.*; see also *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1213–17 (6th Cir. 1981) (The court found abstention proper in claim by ex-wife and son against both former husband and trust company for failing to pay financial obligations out of trust proceeds; though the claims were framed as issues involving rights in various trusts, they really centered on the alleged unfulfilled support obligations, and thus were “integrally tied to the domestic relations issue” and could interfere with related state proceedings.).

76. *Ersipan v. Badgett*, 647 F.2d 550 (5th Cir. Unit A June 1981) (in action to enforce divorce decree that involves interpretation of federal bankruptcy laws, abstention improper); *Korby v. Erickson*, 550 F. Supp. 136 (S.D.N.Y. 1982) (abstention improper in claim relating to breach of

This confusion in the lower federal courts echoed the conflicting messages sent by the Supreme Court. In *Zablocki v. Redhail*,<sup>77</sup> the Court considered abstention by federal courts in cases involving family issues.<sup>78</sup> *Zablocki* was a class action suit brought by Wisconsin residents who had been refused a marriage license under a state law that barred non-custodial parents from marrying unless they were in compliance with their support obligations and could demonstrate that the children covered by the support order were not then, and not likely thereafter, to become public charges.<sup>79</sup> Plaintiffs argued that the statute violated both the Equal Protection and Due Process Clauses and sought declaratory and injunctive relief.<sup>80</sup>

The Court found that the lower court had correctly refused to abstain.<sup>81</sup> *Younger* was inapplicable because there was no pending state court proceeding in which the plaintiffs could have challenged the statute.<sup>82</sup> The Court also stated that there were no ambiguities in the statute that required state court interpretation, no issues of state law that might affect the federal constitutional claims, and no requirement that plaintiffs bringing a § 1983 action must bring their federal constitutional claims in state court before filing in a federal forum.<sup>83</sup>

The State also argued that *Burford* abstention applied, and that the federal courts should have deferred to the state in carrying out its domestic policy.<sup>84</sup> The Court distinguished *Burford*, however, noting that the present case “does not involve complex issues of state law, resolution of which would be ‘disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.’”<sup>85</sup> Unlike some general pronouncements of the lower federal courts, here the Supreme Court stated that state regulation and policies relating to domestic relations would not necessarily trump the right of litigants to be heard in federal court, particularly where a federal question was involved.<sup>86</sup>

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contract between unmarried couple to share ownership of home); *see also* Rush, *supra* note 35, at 9 n.36.

77. 434 U.S. 374 (1978). *Zablocki* is best known for the Court’s explicit declaration of a constitutionally protected fundamental right to marry.

78. *Zablocki*, 434 U.S. at 379, 384.

79. *Id.* at 376.

80. *Id.* at 376–77.

81. *Id.* at 379 n.5.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814–15 (1976)).

86. *Zablocki*, 434 U.S. at 379 n.5.

Yet the following year, the Court did find abstention appropriate in a federal question case that related to family matters. Though the Court had previously stated that the involvement of a federal question in the plaintiff's claims would provide a strong argument against abstention,<sup>87</sup> the Court approved the use of *Younger* abstention in *Moore v. Simms*,<sup>88</sup> where parents challenged the constitutionality of a Texas statutory scheme that related to removal and custody of children by the state.<sup>89</sup> The case can be distinguished from the situation in *Zablocki* because in *Moore* there were pending state proceedings involving the custody of the plaintiffs' children, and because the federal constitutional claims could have been raised in that proceeding.<sup>90</sup> However, the case demonstrated that the Court was not attempting to limit the use of abstention in federal question cases when domestic relations issues were involved.

The lower federal courts have not hesitated to deny jurisdiction in federal question cases with some domestic relations involvement on grounds of abstention.<sup>91</sup> In one case, the Sixth Circuit explained how abstention may be more appropriate than invocation of the domestic relations exception: "[W]hile older cases indicate that federal courts are entirely without jurisdiction to grant divorces or award custody of children, more recent decisions hold that strong policies of federal-state comity and deference to state expertise in the area are the theoretical underpinnings of federal courts' refusal to consider such cases."<sup>92</sup> Moreover, though there were federal questions presented, the federal courts can still abstain where those questions are "closely intertwined with issues of strong local interest."<sup>93</sup>

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87. See *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976).

88. 442 U.S. 415 (1979).

89. *Id.* at 418–19.

90. *Id.* at 430–31.

91. See, e.g., *Peterson v. Babbitt*, 708 F.2d 465, 465–66 (9th Cir. 1983) (Though finding that a 42 U.S.C. § 1983 claim brought by a father alleging that a state agency violated his constitutional rights by denying him visitation is not within the domestic relations exception, the court abstained because of a pending state visitation proceeding and the fact that child custody is traditionally a state court matter.); *Sutter v. Pitts*, 639 F.2d 842 (1st Cir. 1981) (abstention proper in case which, though framed as a state civil rights claim, was actually a demand for custody of child); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 627–29 (6th Cir. 1978) (abstention proper in 42 U.S.C. § 1983 and habeas corpus action involving the custody of four children who had participated in "Operation Babylift," an airlift of several thousand South Vietnamese children to the United States just before the fall of the Saigon government in 1975); *Magaziner v. Montemuro*, 468 F.2d 782 (3d Cir. 1972) (abstention proper in federal civil rights claim by children alleging deprivation of their right to counsel in parents' custody case).

92. *Huynh Thi Anh*, 586 F.2d at 632.

93. *Id.* at 633.

## 2. *Domestic Relations Cases in the Lower Federal Courts After Ankenbrandt*

The frustration in the lower federal courts over the Supreme Court's lack of clarity concerning the domestic relations exception continued after *Ankenbrandt*.<sup>94</sup> The lower federal courts continued to diverge widely on the scope and application of the domestic relations exception. Those courts tending to interpret the exception broadly referred to *Ankenbrandt*'s "reaffirmance" of the exception,<sup>95</sup> and continued to dismiss suits in contract<sup>96</sup> or tort.<sup>97</sup> Conversely, the federal courts inclined to interpret the exception narrowly characterized *Ankenbrandt* as substantially limiting its scope and held that various contract claims arising out of a domestic relations dispute did not fall within the exception.<sup>98</sup> These cases often

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94. As the Sixth Circuit stated:

[I]n truth, the domestic relations exception to federal jurisdiction is not the most coherent of doctrines. Such might be expected from the incongruous bases on which it stands: unsupported dictum in the majority opinion, and losing arguments in the dissent, in the case of *Barber v. Barber*. In its sporadic revisitations of the doctrine, the Supreme Court endowed it with varying degrees of force, and justified it with an assortment of rationales, some constitutional, some prudential, and some statutory. Not surprisingly, the lower courts have disagreed on the precise nature of the doctrine.

Catz v. Chalker, 142 F.3d 279, 290–91 (6th Cir. 1998) (citations omitted).

95. See, e.g., *McLaughlin v. Cotner*, 193 F.3d 410, 415 (6th Cir. 1999); *Mitchell-Angel v. Cronin*, No. 95-7937, 1996 U.S. App. LEXIS 4416 (2d Cir. Mar. 8, 1996); *Allen v. Allen*, 48 F.3d 259, 261 (7th Cir. 1995); *Sw. Boston Senior Servs. v. Whatley*, 396 F. Supp. 2d 50, 57 (D. Mass. 2005) (While acknowledging that *Ankenbrandt* narrowed the exception, it "affirmed its existence," so that a lawsuit to authorize protective services for an elderly man due to suspected elder abuse may be subject to the exception.).

96. See, e.g., *McLaughlin*, 193 F.3d at 411, 413 (dismissing claim for breach of a real estate sales agreement that had been incorporated into divorce decree, because, among other reasons, it attempted "to disguise the true nature of the action," which was really a conflict over a divorce order); *Cassens v. Cassens*, 430 F. Supp. 2d 830, 836–37 (S.D. Ill. 2006) (claims involving a separation agreement for breach of contract, fraud, and a dispute over whether certain property was subject to the agreement dismissed under exception because claims "are in the nature of" a request for a decree regarding marital property and alimony).

97. For example, in *McCracken v. Phillips*, No. 96-1164, 1997 U.S. App. LEXIS 61, at \*2 (10th Cir. Jan. 2, 1997), the plaintiff ex-wife brought an action against her former husband and his employer for failure to disclose complete financial information in their divorce action. She alleged that she was entitled to a portion of the actual value of the marital home and her husband's pension benefits. *Id.* The Tenth Circuit dismissed the action because the claims "relate to the reopening of a divorce decree and settlement." *Id.* at \*6.

98. See, e.g., *Lannan v. Maul*, 979 F.2d 627, 630–31 (8th Cir. 1992) (claims for fraud and conversion by daughter relating to property settlement agreement incorporated into her parents' divorce decree "concern[ed] a third-party beneficiary claim based on contract law," a collateral issue to which the exception did not apply).

involved situations extremely similar to those where courts had dismissed for lack of jurisdiction under the exception.<sup>99</sup>

Though the *Ankenbrandt* Court located the rationale for the domestic relations exception in the diversity statute, lower federal courts continued to employ the exception in federal question cases.<sup>100</sup> Some courts did not make clear whether they were relying on the exception or employing abstention principles. For example, after noting that the domestic relations

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99. Writing for the court in *Friedlander v. Friedlander*, 149 F.3d 739, 740 (7th Cir. 1998), Judge Posner held that a claim for intentional infliction of emotional distress involving a threat to reveal to a daughter her father's real identity did not fall within the exception. Judge Posner suggested that the Supreme Court still had not fully explained the scope of the exception in *Ankenbrandt*. He argued that the domestic relations exception "has a core and a penumbra." *Id.* at 740. While the Court had discussed the core of the exception, which involves a direct decree of divorce, child custody, or support, it had not ruled on the scope of ancillary proceedings that make up the exception's penumbra. This was not necessary, because the claim at issue in *Ankenbrandt* was well outside any "plausible conception" of its bounds. *Id.* Judge Posner held that, similarly, the domestic relations exception clearly did not apply to the present tort claim merely because it arose out of a domestic relations dispute. *Id.* at 740-41; *cf.* *Berntson v. Ind. Div. of Family & Children*, No. 98-1024, 1998 U.S. App. LEXIS 20532, at \*2-\*4 (7th Cir. Apr. 10, 1998) (dismissing counts in 42 U.S.C. § 1983 action that, unlike the tort claim in *Friedlander*, allege wrongful interference with plaintiff's custody and visitation rights, and which involve review of those rights). The *Berntson* Court also held that the district court had properly dismissed plaintiff's allegations challenging state court orders regarding custody and visitation because these, under the *Rooker-Feldman* doctrine, improperly attempted to challenge the state court actions through a federal claim. *Id.* at \*4-\*5. This doctrine, derived from *Rooker v. Fid. Trust Co.*, 263 U.S. 413 (1923), and *D.C. Ct. App. v. Feldman*, 460 U.S. 462 (1983), dictates that a federal court should not directly review state court decisions. The Court recently limited the *Rooker-Feldman* doctrine in *Exxon-Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005), to cases "brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments." *Id.* at 284; *see also* *Lance v. Dennis*, 546 U.S. 459 (2006) (per curiam) (holding that lower court had erroneously dismissed case under *Rooker-Feldman*, by conflating preclusion principles with the *Rooker-Feldman* doctrine).

100. *See, e.g.*, *Allen v. Allen*, 48 F.3d 259, 260-61 (7th Cir. 1995) (dismissing under the exception a constitutional challenge by father to visitation proceedings because plaintiff challenged underlying visitation award and sought a declaration vacating the state visitation order). The *Allen* court recognized that the exception was "statutorily carved out from diversity jurisdiction," but "its goal of leaving family disputes to the courts best suited to deal with them is equally strong, if not stronger" in this non-diversity case involving a fight over a child. *Id.* at 262 n.3; *see also* *Mitchell-Angel v. Cronin*, No. 95-7937, 1996 U.S. App. LEXIS 4416 (2d Cir. Mar. 8, 1996) (dismissing federal civil rights action brought by a mother against city officials, alleging a violation of her constitutional rights in the removal of her children from her custody). In *Mitchell-Angel*, the Second Circuit construed *Ankenbrandt* as holding that the domestic relations exception "applies generally to issues relating to the custody of minors." *Id.* at \*4-\*5. The court did note that, unlike *Ankenbrandt*, this was a federal question case; however, citing pre-*Ankenbrandt* cases, the court simply stated that the exception had been applied to federal question jurisdiction, including civil rights actions. *Id.* In *Mandel v. Town of Orleans*, 326 F.3d 267 (1st Cir. 2003), the court raised the issue of whether *Ankenbrandt*'s domestic relations exception should apply to federal question claims. *Id.* at 271 ("[T]he courts are divided as to whether the doctrine is limited to diversity claims and this court has never decided that issue."). Noting that "federal law increasingly affects domestic relations," which made the issue of "potential importance," the court nevertheless did not decide the question, but instead relied on abstention principles to dismiss the case. *Id.*

exception could apply to the case, the Second Circuit in *Mitchell-Angel v. Cronin* stated that some of the claims in the case at bar “either fall within the domestic relations exception or verge on being matrimonial in nature.”<sup>101</sup> The court straddled a rationale for dismissal based on the domestic relations exception and one relying on abstention principles, without making clear the actual grounds for its ruling. While *Ankenbrandt* did not impact the *Mitchell-Angel* result, it may have led the Second Circuit to insert the abstention discussion due to continued uncertainty over the scope of the exception.<sup>102</sup>

In other post-*Ankenbrandt* cases, the lower federal courts interpreted the domestic relations exception narrowly, though the fact that federal question jurisdiction was involved did not necessarily weigh in the decision.<sup>103</sup> Further, some courts explicitly recognized that when the basis of federal jurisdiction was a federal question, rather than diversity, there was no rationale for utilizing the exception.<sup>104</sup>

While some of the lower federal courts may have restrained their use of the domestic relations exception after *Ankenbrandt*, language from both the majority opinion and Justice Blackmun’s concurrence opened the door to broad use of the various abstention doctrines to avoid adjudicating cases

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101. *Mitchell-Angel*, 1996 U.S. App. LEXIS 4416, at \*5.

102. This straddling of the domestic relations exception and abstention was also apparent in a Sixth Circuit case, *United States v. MacPhail*. *United States v. MacPhail*, 149 F. App’x 449, 455–56 (6th Cir. 2005) (referring to the exception, court dismissed tax liability case because proper allocation of refund between ex-spouses involved determination of marital property, and the state courts are “the more appropriate forum” for deciding the dispute); see also *Danforth v. Celebrezze*, 76 F. App’x 615 (6th Cir. 2003) (dismissing a 42 U.S.C. § 1983 claim for denial of due process in state domestic relations litigation both on *Rooker-Feldman* grounds, and because it “lacked” jurisdiction where the constitutional claims were a mere “pretense” to cover what was really a domestic relations suit).

103. In *Loubser v. Thacker*, 440 F.3d 439 (7th Cir. 2006), Judge Posner continued his narrow view of the exception. In a 42 U.S.C. § 1983 suit alleging that several individuals had conspired to defraud the plaintiff by corrupting her divorce proceedings, the court found that the exception was not applicable: “A federal court cannot grant or annul a divorce, but that is not what [the plaintiff] is seeking.” *Id.* at 440, 442; see also *Palmer v. Riverside County*, 149 F. App’x 643, 644–45 (9th Cir. 2005) (reversing district court’s dismissal under the domestic relations exception and the *Rooker-Feldman* doctrine of a 42 U.S.C. § 1983 claim brought by parents alleging that officials violated their constitutional rights during child dependency proceedings).

104. See, e.g., *United States v. Williams*, 121 F.3d 615, 620 (11th Cir. 1997) (rejecting defendant’s constitutional challenge to the Child Support Recovery Act on several grounds and stating that defendant’s attempt to invoke the domestic relations exception was not relevant because the exception applied only in diversity cases); see also *Catz v. Chalker*, 142 F.3d 279, 291 (6th Cir. 1998) (rejecting district court’s use of the domestic relations exception to dismiss a federal due process challenge to state divorce proceedings because the case would not address the merits of the proceedings). The *Catz* court stated that plaintiff “asks the court to examine whether certain judicial proceedings, which happened to involve a divorce, comported with the federal constitutional guarantee of due process. This is a sphere in which the federal courts may claim an expertise at least equal to that of the state courts.” *Id.* at 291–92.



with some connection to domestic relations. Whether or not the Court and Justice Blackmun intended use of abstention in only a specified group of domestic relations cases, the lower federal courts have interpreted *Ankenbrandt*'s words far more generously.<sup>105</sup>

In *Dunn v. Cometa*,<sup>106</sup> for example, a father brought various tort and contract claims against his disabled adult son's ex-wife, relating to her conduct after his son's incapacity, in federal court.<sup>107</sup> The First Circuit rejected the trial court's use of the domestic relations exception to dismiss the case, citing *Ankenbrandt*'s holding that the exception be limited.<sup>108</sup> However, the First Circuit concluded that the claims met the conditions of *Burford* abstention discussed in *Ankenbrandt*.<sup>109</sup> The counts at issue in *Dunn* presented such difficult state law issues because they involved the spousal relationship and "[c]onstructing a proper legal framework for resolving such charges amounts to regulating the marriage itself, a traditional state enterprise."<sup>110</sup> Despite the fact that the claims did not require any resolution of family status under state law, and that the relief sought would not interfere with any state court procedures in divorce, alimony, or custody, the First Circuit found that *Burford* abstention was appropriate, as "it is enough that abstention in this case fits squarely within the above quoted language from *Ankenbrandt*."<sup>111</sup>

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105. Writing shortly after *Ankenbrandt*, Naomi Cahn expressed concern that use of abstention may "simply perpetuate the Domestic Relations Exception under another name." Cahn, *supra* note 35, at 1126. As the following discussion illustrates, this concern was quite accurate. Even before *Ankenbrandt*, commentators noted that the use of abstention principles by the courts may demonstrate the observed weakness of the various rationales for the domestic relations exception. See, e.g., Atwood, *supra* note 32, at 602–03.

106. 238 F.3d 38 (1st Cir. 2001).

107. *Dunn*, 238 F.3d at 40.

108. *Id.* at 41. The court noted that just because some of the claims were based on the same underlying events that were at issue in the divorce and alimony actions, this did not mean that the claims were subject to the exception. *Id.*

109. *Id.* at 42 (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 705–06 (1992) (citation omitted)).

110. *Id.*

111. *Id.* The court also cited several policy reasons for its decision, including minimizing federal-state court tensions, and the fact that the legal framework for these claims was not fully developed under state law. *Id.* at 42–43; see also *Minot v. Eckhard-Minot*, 13 F.3d 590, 592 (2nd Cir. 1994) (finding it proper to remand back to state court, on abstention grounds, a removed tort action that was based on the actions of ex-wife in a custody dispute). The Second Circuit in *Minot* noted that it was "somewhat troubled" by the use of abstention to remand a case that had been properly removed to federal court under diversity jurisdiction. *Id.* at 591, 593. It noted that "the family-law nature of the subject matter would not alone justify abstention in this case," however, the tort claim of custodial interference was not well defined under New York law. Therefore, the case met the *Burford* standard for a difficult issue of state law that is of great public import. *Id.* at 593–94. Moreover, the tort claim involved issues still pending in the state custody action. *Id.* at 594.

However, not all of the lower federal courts have opted for abstention in matters that involve domestic relations post-*Ankenbrandt*.<sup>112</sup> The lower courts have similarly divided on whether abstention is appropriate when a federal question is involved. Despite both the *Ankenbrandt* majority's and Justice Blackmun's focus on diversity cases for possible abstention, several lower courts have proceeded to use abstention principles in federal question cases,<sup>113</sup> whereas other courts were not willing to apply abstention principles in domestic relations cases in these situations.<sup>114</sup>

The murkiness of the lower federal courts' case law in this area both before and after *Ankenbrandt* demonstrates that the rationales and scope identified for the domestic relations exception have never been clear or convincing. In Part II, I trace the history of the domestic relations exception in an effort to determine how the early case law justified its

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112. For example, in *Stone v. Wall*, 135 F.3d 1438, 1439–40 (11th Cir. 1998), a father sued relatives of his ex-wife and their lawyer in diversity for intentional interference with his custody of his daughter. The father argued that his lawsuit was in tort and did not fall within the domestic relations exception. Moreover, *Ankenbrandt*'s statement that abstention may be appropriate did not apply to his case, since it did not require a determination of status, nor of custody law. *Id.* at 1440–41. The district court had acknowledged that the claim did not clearly fall within the domestic relations exception, but held that abstention was appropriate. The Eleventh Circuit reversed, holding that the court should not have abstained because this action did not involve the status of a parent-child relationship or a parental dispute over the child, but instead was a tort action for damages against third parties who had no legal claim of custody. *Id.* at 1441. The court then certified a question to the Florida Supreme Court regarding the existence of this tort under Florida law. *Id.* at 1442–43; see also *McCormick v. Braverman*, 451 F.3d 382, 389, 392–93 (6th Cir. 2006) (reversing lower court's use of the *Rooker-Feldman* doctrine to dismiss a dispute over the receivership of property that was originally part of a reconciliation agreement between spouses; reflecting *Exxon-Mobil*'s limitation on *Rooker-Feldman*, the Court of Appeals held that these were independent claims that are subject to preclusion principles, but not barred under *Rooker-Feldman*).

113. See, e.g., *Cormier v. Green*, 141 F. App'x 808, 810–12 (11th Cir. 2005) (holding *Younger* abstention appropriate where plaintiff brought constitutional challenge to state alimony provisions when state divorce proceeding already pending; state had strong interest in alimony provisions, and plaintiff could raise his constitutional claims in the state action); *Mandel v. Town of Orleans*, 326 F.3d 267, 271–73 (1st Cir. 2003) (holding civil rights claim removed to federal court properly dismissed under both *Rooker-Feldman* and *Younger* because a federal district court injunction prohibiting removal of children conflicted with state custody decree and interfered with pending state proceedings); *Amerson v. Iowa*, 94 F.3d 510, 512 (8th Cir. 1996) (affirming district court's use of *Burford*, *Colorado River*, and *Younger* abstention to dismiss a mother's § 1983 claim against various state entities for interference with her parental rights, because federal court review would disrupt state's efforts to develop a "coherent policy with respect to a matter of substantial public concern" and would interfere with several pending state proceedings) (citation omitted).

114. See, e.g., *United States v. Collins*, 921 F. Supp. 1028, 1032, 1033–34 (W.D.N.Y. 1996) (holding that abstention is not appropriate when, as here, a federal criminal charge was in the exclusive jurisdiction of the federal courts). The court also rejected the defendant's argument for *Burford* abstention in the federal criminal case charging violation of the Child Support Recovery Act, because even if the child support order was modified in a pending state proceeding, the amount owed would still meet that required under federal law. *Id.* at 1033.

creation, and whether any rationale exists that can help to define its current boundaries.

## II. HISTORY OF THE DOMESTIC RELATIONS EXCEPTION

### A. *Can a Wife “Be Regarded as a Citizen or Person?”* Barber v. Barber<sup>115</sup>

The domestic relations exception made its inauspicious debut in dicta from the majority opinion in *Barber v. Barber*, which cited no precedent or other authority.<sup>116</sup> In *Barber*, a wife sought federal court enforcement of an alimony decree imposed by a state court against her husband, as part of a divorce *a mensa et thoro*.<sup>117</sup> The Court began by discussing what it would not be deciding in the case: “We shall not have occasion to comment upon the relations of husband and wife in her uninterrupted coverture, nor will we discuss the general rights, obligations, or disabilities, of either, when they have been separated by a divorce *a mensa et thoro*.”<sup>118</sup> In addition, the Court stressed that this was not a suit to determine alimony, which a state court of competent jurisdiction had already done.<sup>119</sup> It is in this context that the famous dicta appear without explanation:

We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony,

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115. 62 U.S. (21 How.) 582, 600 (1858) (Daniel, J., dissenting) (“In the exercise of this jurisdiction, we are forced to inquire, from the facts disclosed in the cause . . . [w]hether, indeed, by any regular legal deduction consistent with [the marriage] relation, the wife can, as to her civil or political status, be regarded as a citizen or person?”).

116. Several commentators have noted that the *Barber* dicta did not cite to any legal basis for the exception. See, e.g., Stein, *supra* note 58, at 669; Wand, *supra* note 59, at 312; Poker, *supra* note 35, at 142, 144. Wand also points out that of the four cases commonly cited for the foundation of the domestic relations exception—*Barber*, *Burrus*, *Simms*, and *De La Rama*—none involved denial of jurisdiction in a domestic relations case based on diversity. Wand, *supra* note 59, at 319–20.

117. *Barber*, 62 U.S. (21 How.) at 583. An action for divorce *a mensa et thoro* (“from bed and board”) is equivalent to a legal separation in modern terms. Such a divorce entitled the award of alimony, but did not end the marriage, and the parties were not permitted to remarry. This limited type of divorce is distinguished from a divorce *a vinculo matrimonii* (“from the marriage ties”), which is an absolute divorce that severed the relationship and permitted remarriage. The two types of decrees were completely separate actions and originally were determined by separate bodies—a divorce *a mensa et thoro* was under the authority of the ecclesiastical courts and was the only type of divorce they would grant, while a divorce *a vinculo matrimonii* could only be obtained by act of Parliament. See Spindel v. Spindel, 283 F. Supp. 797, 803 (E.D.N.Y. 1968).

118. *Barber*, 62 U.S. (21 How.) at 584.

119. *Id.*

either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.<sup>120</sup>

The lower federal courts, scholars, and the Supreme Court itself have struggled to understand the rationale for these words, which became the basis for what is now known as the domestic relations exception.

Huldah Barber had brought a divorce action through her next friend in New York state court.<sup>121</sup> Her husband, Hiram Barber, opposed the action, but the court granted the application.<sup>122</sup> Though the opinion provides little detail, it appears that Hiram committed some type of physical or psychological abuse against Huldah: “the defendant had been guilty of cruel and inhuman treatment of his wife, and of such conduct towards her as to render it unsafe and improper for her to cohabit with him; and that he had abandoned, neglected, and refused to provide for her.”<sup>123</sup> The court ordered Hiram to pay permanent alimony to Huldah, including alimony due retroactively since Hiram had failed to give her any support while the divorce action was pending.<sup>124</sup>

Shortly after the divorce decree, Hiram, having no intention of paying the alimony, moved to Wisconsin in order to place himself beyond the jurisdiction of the New York court.<sup>125</sup> He subsequently filed a suit for divorce *a vinculo* against his wife in Wisconsin state court, which he obtained, failing to inform that court of the prior New York decree.<sup>126</sup> Huldah filed her action to enforce the New York decree in federal district court in Wisconsin, alleging that her husband had failed to pay any part of the alimony due to her.<sup>127</sup> The court ruled in her favor and issued a decree ordering Hiram to pay almost \$6000 in past-due alimony.<sup>128</sup>

The Supreme Court stated that it was called upon to consider two issues on appeal: first, whether a wife who is divorced *a mensa et thoro* can acquire a domicile in a state separate from her husband in order to entitle her to meet the requirements of federal diversity jurisdiction; and

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120. *Id.*

121. *Id.* at 585.

122. *Id.*

123. *Id.*

124. *Id.* at 585–86.

125. *Id.* at 584, 588.

126. *Id.* at 587, 588. The district court noted that Barber actually alleged that his wife had willfully abandoned him. *Id.* at 588.

127. *Id.* at 586.

128. *Id.* at 587.

second, whether a court sitting in equity is a proper tribunal for an action to enforce the state court's alimony decree.<sup>129</sup>

The Court began with the second question, the scope of a court of equity's jurisdiction, and noted that such a court has a "large jurisdiction . . . to secure the rights of married women."<sup>130</sup> In England, a court of equity had always had jurisdiction to enforce the payment of alimony that had been awarded in the ecclesiastical court. The Court argued that such enforcement powers of an equity court are equally applicable to a validly issued decree from a state court in the United States.<sup>131</sup> This enforcement can be undertaken either in the state or federal courts of equity, assuming the federal diversity requirements are met.<sup>132</sup>

Having decided that the federal courts do have jurisdiction in equity to enforce alimony awards, the Court then considered the first question on appeal: whether a wife divorced *a mensa et thoro* from her husband could establish her own domicile, and thus have citizenship diverse from that of her husband.<sup>133</sup> This was the central issue in the case, and would determine whether the requirements of federal diversity jurisdiction had been met.

The defendant argued that though there had been a legal separation through the divorce *a mensa et thoro*, the marriage relation continued, so that the domicile of the wife must continue to follow that of her husband.<sup>134</sup> However, the Court found that when a husband has abandoned his wife and failed to live up to his requirement of supporting her, he gives up "that power and authority over her which alone makes his domicil hers."<sup>135</sup> In this situation, the wife may sue for a divorce *a mensa et thoro*, and for alimony. When this award has been made, it is a judicial debt of record that is owed full faith and credit by other jurisdictions. Such a debt can therefore be enforced in other jurisdictions as it would be in the issuing state.<sup>136</sup>

"Whatever may have been the doubts in an earlier day," the Court stated, the law is now that a wife legally separated from her husband may

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129. *Id.* at 584.

130. *Id.* at 590.

131. *Id.* at 590–91.

132. *Id.* at 592.

133. *Id.*

134. *Id.* at 592–93.

135. *Id.* at 595.

136. *Id.*

establish a separate domicile.<sup>137</sup> This rests on fundamental fairness, because a legally separated wife is without secure resources:

the alimony commonly allowed is no more than enough to give her a home and a scanty maintenance, almost always necessarily short of that from which her husband has driven her; and that as a consequence she should be permitted to change her domicile, where she may live upon her narrow allowance with most comfort and the least mortification.<sup>138</sup>

A legally separated wife also should be allowed to sue independently of her husband, because the divorce *a mensa et thoro* has given her both rights and responsibilities. She may make contracts and may acquire and keep her own property and earnings, but she also may have custody of her children and be responsible for their support, as well as her own.<sup>139</sup> “If she could not sue and be sued, it would present the anomalous case in which the law recognises a right without affording a remedy for vindicating it, and subjects a party to a duty without lending its aid to enforce it.”<sup>140</sup>

The Court concluded that Huldah had a right to sue her husband, from whom she was divorced *a mensa et thoro*, in a court of equity for enforcement of the New York alimony award. She had also established the requirements for federal diversity jurisdiction. She could have brought her suit in either the state court of equity or in the federal district court, “but she had a right to pursue her remedy in either. She has chosen to do so in a court of the United States, which has jurisdiction over the subject matter of her claim to the same extent that a court of equity of a State has.”<sup>141</sup> As is apparent from the quoted language, the majority opinion is quite progressive on the issues before the Court. On the central question, it holds that a legally separated woman may establish a domicile on her own, thus permitting her to meet the requirements for federal diversity jurisdiction.<sup>142</sup>

The dissent’s primary disagreement with the majority concerned the legal domicile of a wife when divorced *a mensa et thoro* from her husband. In dissent, Justice Daniel argued that this type of divorce “does

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137. *Id.* at 597.

138. *Id.* at 598.

139. *Id.* at 598–99.

140. *Id.* at 599.

141. *Id.*

142. See Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1741–42 (1991) [hereinafter “Naturally” Without Gender] (noting how *Barber*’s actual holding was recast and distorted in later cases).

not sever the matrimonial tie; on the contrary, it recognises and sustains that tie, and the allowance of alimony arises from and depends upon reciprocal duties and obligations involved in that connection.”<sup>143</sup> Therefore, the wife may not establish a domicile separate from that of her husband, and by definition, cannot meet the federal diversity requirement.<sup>144</sup> Justice Daniel noted that the purpose of the legal separation is so the wife “should be freed from the control which had been abused, and should be empowered to select a residence and such associations as would be promotive of her safety and comfort.”<sup>145</sup> However, “such a privilege does not destroy the marriage relation; much less does it remit the parties to the position in which they stood before marriage, and create or revive ante-nuptial, civil, or political rights in the wife.”<sup>146</sup>

Moreover, according to the dissent, the federal courts are not the proper location for alimony enforcement actions. First, the wife’s right to alimony is conditional and dependent upon her “personal merits and conduct,” so that it is not an “absolute debt” which she may enforce against her husband in any jurisdiction.<sup>147</sup> Moreover, judging such private and intimate conduct is not the job of the federal courts.<sup>148</sup> It is to the state courts, which are in the “particular communities of which those families form parts,” that this responsibility falls.<sup>149</sup> Federal government has “its origin in causes and necessities, political, general, and external,”<sup>150</sup> and federal courts should not “with a kind of inquisitorial authority, enter the habitations and even into the chambers and nurseries of private families, and inquire into and pronounce upon the morals and habits and affections or antipathies of the members of every household.”<sup>151</sup> The standards to judge this private morality and behavior are diverse, and should be within the authority of the states and their courts.<sup>152</sup>

At the end of the dissent, Justice Daniel expressed his disagreement with the majority’s view of the jurisdiction of a federal court sitting in

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143. *Barber*, 62 U.S. (21 How.) at 601 (Daniel, J., dissenting).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 603. She would not be entitled to alimony, for example, if she misbehaved or acted criminally. The effect of such misconduct, the dissent says, is retroactive, so that it would affect even alimony already owed and due, as well as future amounts. *Id.*

148. *Id.*

149. *Id.* at 602–03.

150. *Id.* at 602.

151. *Id.*

152. *Id.*

equity. Federal courts in equity derive the scope of their jurisdiction from their English counterparts, and “it is well known that the court of chancery in England does not take cognizance of the subject of alimony, but that this is one of the subjects of the ecclesiastical court, within whose peculiar jurisdiction marriage and divorce are comprised.”<sup>153</sup> The dissent acknowledged the argument that there are no ecclesiastical courts in the United States, so that jurisdiction is by definition differently composed, and that many state courts have taken jurisdiction over divorce and alimony in their courts of equity.<sup>154</sup> The state courts may derive their authority from express legislative grants or may simply have assumed this jurisdiction, noted Justice Daniel; but whatever the explanation, “their example and practice cannot be recognised as sources of authority by the courts of the United States.”<sup>155</sup>

Therefore the dissent raised arguments both about the historical limitations of chancery court jurisdiction and about the need for local involvement in family matters in support of keeping domestic relations cases out of federal court. It is the historical argument that the *Ankenbrandt* majority utilized when searching for a rationale for the domestic relations exception. Notably, however, the *Barber* dissent never linked the historical limitation to the congressional statute establishing federal diversity jurisdiction, though *Ankenbrandt* attempted to make that connection. In fact, the *Barber* dissent did not make clear whether the limitation on federal court jurisdiction derived from the English chancery courts has been integrated into our Constitution, our statutes, or is simply found within our common law tradition.

The *Ankenbrandt* Court argued that by failing to comment at all on the dissent’s rationale for the limitation on federal jurisdiction, the *Barber* majority was accepting the dissent’s historical explanation. However, this is problematic because we know that the *Barber* majority disagreed with at least part of the dissent’s historical justification. The majority took a broader view of equity court jurisdiction than the dissent. The majority, unlike the dissent, argued that these courts historically have always had the power to enforce alimony awards. Moreover, the majority found that

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153. *Id.* at 604. Moreover,

as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States *in chancery* is equally excluded.

*Id.* at 605.

154. *Id.*

155. *Id.*



federal courts in equity have power equal to that of the state equity courts, while the dissent argued that the federal court jurisdiction is more limited.<sup>156</sup> It is true that the majority never stated whether a federal court in equity could decide a divorce or alimony matter directly, and the majority's famous dicta may imply that it could not, thus agreeing with the dissent in this regard. But the majority never said this. And the fact that the majority's only statement on the historical rationale was to differ explicitly with the dissent undermines the argument that the majority based its dicta on the dissent's explanation.

Moreover, because the dissent itself did not identify where the historical limitation is actually located in our system, assuming the majority acquiesced to the dissent, it is still not clear whether *Barber* would stand for the proposition that the domestic relations exception is constitutionally required, required under the federal statute, or simply dictated by common law precedent. In *Ankenbrandt*, the Court explicitly found that the domestic relations exception was not constitutionally based, but rather had as its foundation the Judiciary Act. The *Barber* dissent, however, never discussed this jurisdictional statute. Therefore the historical argument, if gleaned from *Barber*, still offers little guidance on the exception's rationale.

If the historical rationale seems at best to provide only a partial explanation for the *Barber* Court's declaration that the federal courts do not have jurisdiction to hear divorce or alimony actions, is there any other basis for its statement? One explanation may be found in the issue that most deeply divided the Court—the ability of a wife to establish federal diversity jurisdiction. As we have seen, the majority argued that when legally separated from her husband, a woman may establish her own domicile and acquire independent citizenship, while for the dissent, the marital bond and the merging of the wife into the husband's legal identity continued.<sup>157</sup>

However, neither the majority nor the dissent disputed the basic principles of coverture. When a husband and wife are married and there has not yet been legal recognition of a separation or divorce, both the majority and the dissent would agree that the wife's domicile is that of her husband, and that she cannot establish diversity of citizenship.<sup>158</sup> One

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156. *Id.* at 592 (quoting *Livingston v. Story*, 34 U.S. (9 Pet.) 632 (1839)).

157. *Id.* at 595, 601.

158. *Id.* at 594 (discussing how a voluntary informal separation, as opposed to one recognized by the courts, would not destroy marital unity, and the wife's domicile would follow that of her husband in that situation).

possible rationale for the Court's dicta is that it is a statement regarding the inability of a wife to meet the requirements of federal diversity jurisdiction at the time she is bringing an action for divorce and/or alimony—i.e., when she is still married and cannot create a legally recognized domicile separate from her husband. The Court's statement that there is no jurisdiction in the federal courts for divorce and alimony comes in the opinion's initial section where the Court enunciated all of the questions that are not at issue in the present case. Immediately after this statement, the Court noted that the issues in the case included whether a wife who is divorced *a mensa et thoro* "can acquire another domiciliation in a State of this Union different from that of her husband, to entitle her, by her next friend, to sue him in a court of the United States having equity jurisdiction."<sup>159</sup> The feature distinguishing the dicta, which is not at issue, from the question being considered in the case is the marital status of the woman. The Court simply may have meant that there was no disagreement that the federal courts lacked jurisdiction over a married woman in an action against her husband, because there would be no diversity, while the question of whether that reasoning applies to a woman divorced *a mensa et thoro* was debatable and at issue in the case.

In this way, it may be that what has come to be known as the "domestic relations exception" was not really an exception to diversity jurisdiction at all. Rather, it described a situation in which the requirements of diversity jurisdiction could not be met because a married woman could not establish independent citizenship from her husband. Subsequent case law demonstrates that at least at some times, the Court acknowledged that this explanation provided a basis for the refusal of the federal courts to hear domestic relations cases.<sup>160</sup>

#### *B. Federal Habeas and Child Custody: In re Burrus*

*In re Burrus*<sup>161</sup> is often cited as the Court's next building block in establishing the domestic relations exception.<sup>162</sup> However, closer examination reveals that the case did not concern or rule on the exception at all. The case involved a custody dispute over a child, Evelyn Estelle Miller, between her father, Louis Miller, and her maternal grandparents, Thomas and Catherine Burrus. When his wife was terminally ill, Miller

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159. *Id.* at 584.

160. *See infra* text accompanying notes 191, 204–07.

161. 136 U.S. 586 (1890).

162. *See, e.g.,* Dobbs, *supra* note 58, at 1143; Stein, *supra* note 58, at 676.

had voluntarily given custody of Evelyn to the Burrus grandparents.<sup>163</sup> Subsequently, Miller remarried and wanted to regain custody of Evelyn. When the grandparents would not voluntarily return her, Miller applied for, and was granted, a writ of habeas corpus in federal court to recover custody of the child.<sup>164</sup>

When the federal judge ordered the grandparents to produce Evelyn, they obeyed and returned her to Miller in court; however, when Miller was with Evelyn on a train traveling home, the grandparents boarded the train and forcibly stole the child.<sup>165</sup> Thomas Burrus was charged with contempt for disobeying the court order and was imprisoned in a county jail.<sup>166</sup> In the case before the Supreme Court, Burrus sought his own writ of habeas corpus, claiming that he had been unlawfully detained because the federal district court judge had had no jurisdiction to issue the custody order in the underlying case.<sup>167</sup>

The issue presented to the Court was the limit of federal courts' jurisdiction in habeas corpus cases when matters that were not questions of federal law were involved. The Court stated that the federal courts may exercise jurisdiction over a habeas corpus action in such a situation only when "by reason of some other matter or thing in the case, the court has jurisdiction which it can enforce by means of this writ."<sup>168</sup> The Court held that, because "we know of no statute, no provision of law, no authority intended to be conferred upon the District Court of the United States to take cognizance of a case of this kind," the federal court did not have jurisdiction to issue the original writ of habeas corpus against Burrus to produce the child; therefore, both that writ and the order holding him in contempt for failure to comply were void.<sup>169</sup>

At that time, only federal circuit courts and not the district courts had diversity jurisdiction. Therefore, in this case, the federal district court had proper jurisdiction only if the matter fell within the scope of federal jurisdiction in habeas cases.<sup>170</sup> The Court explicitly reserved decision on the question of whether child custody cases where diverse citizenship of

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163. *In re Burrus*, 136 U.S. at 587.

164. *Id.* at 587–88.

165. *Id.* at 588.

166. *Id.* at 588–89.

167. *Id.* at 589.

168. *Id.* at 597.

169. *Id.*

170. *See Spindel v. Spindel*, 283 F. Supp. 797, 804 (E.D.N.Y. 1968) (interpreting *Burrus* as involving only the power of federal courts under the habeas corpus statutes to make a custody award in the absence of diversity jurisdiction); *see also* Atwood, *supra* note 32, at 579 & n.51.

the parties existed can be heard in federal court under diversity jurisdiction.<sup>171</sup>

However, in dicta, the Court declared 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,”<sup>172</sup> a statement that federal courts have relied on to add child custody to divorce and alimony as a subject that cannot be considered by federal courts.<sup>173</sup> Yet a reading of that statement in context demonstrates that the Court was not discussing the allocation of jurisdiction between the state and federal courts, but rather state and federal *laws* and the difference between diversity and federal question jurisdiction. The sentences immediately after the statement quoted above read:

As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction. *Whether the one or the other is entitled to the possession does not depend upon any act of Congress, or any treaty of the United States or its Constitution.*<sup>174</sup>

The Court here is merely making the uncontroversial point that questions of custody are based on state laws, and thus can not be the basis for federal question jurisdiction; therefore, they can not be the basis for jurisdiction in a federal habeas case in district court.<sup>175</sup>

### *C. Appeals from Federal Territories: Simms and De La Rama*

The Court next addressed the domestic relations exception in two cases appealed from federal territorial courts. The Court made clear in both decisions that it would treat the territorial courts differently from state courts. In *Simms v. Simms*,<sup>176</sup> the Court considered a divorce and alimony

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171. *In re Burrus*, 136 U.S. at 596–97. The Court stated that this issue “had never been decided by this court that we are aware of, [n]or is it necessary to decide it in this case,” which involved the federal court’s jurisdiction to issue a writ of habeas corpus, rather than its jurisdiction over child custody matters based on diversity of the parties. *Id.* at 596.

172. *Id.* at 593–94.

173. Dobbs, *supra* note 58, at 1143. Judge Gibbons has noted that “*Burrus* stands for no such proposition, and the occasional reference to it by secondary authorities, and even cases, for that proposition, displays a propensity for reliance on headnotes.” Solomon v. Solomon, 516 F.2d 1018, 1031 (3d Cir. 1975) (Gibbons, J., dissenting).

174. *In re Burrus*, 136 U.S. at 594 (emphasis added).

175. Atwood, *supra* note 32, at 579.

176. 175 U.S. 162 (1899).

award on appeal from the territorial Supreme Court of Arizona. Citing *Barber*, the appellee argued that the Supreme Court lacked jurisdiction because the matter fell within the domestic relations exception.<sup>177</sup> The Court agreed that this would have been the case had the matter originated in a state court, “[b]ut 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.”<sup>178</sup> Because specific congressional statutes dictated the jurisdiction of the territorial courts and of the courts hearing appeals from their judgments, the domestic relations exception did not apply.<sup>179</sup> The Court then reviewed the alimony award and counsel fees in the case.<sup>180</sup>

However, the Court held that it lacked jurisdiction to review the actual divorce decree.<sup>181</sup> This again was not because of a domestic relations exception, but due to the inability of the divorce to meet the amount in controversy required because “that was a matter the value of which could not be estimated in money. . . .”<sup>182</sup>

Though it was not applicable in the case, the *Simms* Court repeated the dicta from *Barber*.<sup>183</sup> It also cited the *Burrus* statement out of context, which began the statement’s use as support for the domestic relations exception.<sup>184</sup> Though *Simms* is cited as a foundational case for the domestic relations exception, the actual case held that it did not apply and merely quoted from dicta in *Barber* and *Burrus*. Moreover, *Simms* offered another factor to consider: whether the subject of divorce could ever meet the amount in controversy requirements of the jurisdictional statutes. If not, then this subject, as well as custody, may be excluded from federal courts not due to any exception to jurisdiction, but simply because they do not satisfy the diversity jurisdiction requirements.

A few years after *Simms*, the Court considered *De La Rama v. De La Rama*,<sup>185</sup> a case on appeal from the Supreme Court of the Philippine

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177. *Id.* at 167.

178. *Id.* at 167–68.

179. *Id.* at 165–68. The statute providing appellate jurisdiction to the Supreme Court to review judgments of the supreme court of a Territory “include[d] those cases, and those cases only, at law or in equity, in which ‘the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.’” *Id.* at 167.

180. *Id.* at 169–72.

181. *Id.* at 168.

182. *Id.* at 168–69. The Court also stated that, because the divorce judgment involved only questions of fact, the Court was not authorized to reexamine it. *Id.* at 169.

183. *Id.* at 167.

184. The misconstruing of the *Burrus* language has continued through the Supreme Court’s decision in *Ankenbrandt*. See *Ankenbrandt v. Richards*, 504 U.S. 689, 702–03 (1992).

185. 201 U.S. 303 (1906).

Islands.<sup>186</sup> The plaintiff wife had brought a suit against her husband for legal separation, alimony, and an award of marital property. The trial court granted the separation and awarded her over eighty thousand dollars for her share of marital property and alimony. The Supreme Court of the Philippines reversed, and the wife appealed to the U.S. Supreme Court.<sup>187</sup>

The Court began its opinion by citing the *Barber* dicta. However, the Court quickly noted that, as in *Simms*, this statement had no application to the case because it did not apply to the jurisdiction of the territorial courts or to the appellate jurisdiction of the Supreme Court over those courts.<sup>188</sup> The Court was more concerned with the scope of its review, and whether or not it could re-examine facts relating to the judicial separation on which the property and alimony award depended. The Court determined that if the denial of alimony or property depended upon evidence relating to the right to the legal separation, the Court needed to review the sufficiency of the testimony regarding the separation; “an appeal from the decree for alimony or other property right would be of no value whatever, unless the facts connected with the allowance or refusal of such right were open to review in the appellate court.”<sup>189</sup> The Court then examined in great detail the trial testimony and evidence concerning the grounds for separation, and ultimately found that the wife was entitled to the award of property and alimony *pendente lite*.<sup>190</sup>

Of most interest in the case is the rationale that the Court provided for the federal courts’ general refusal to hear divorce and alimony cases. The Court made no reference to the historical rationale regarding the English chancery courts’ scope of jurisdiction or to the scope of the congressional statute on federal jurisdiction. Rather, it stated:

It has been a long established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation *both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been*

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186. *Id.* at 309.

187. *Id.* at 310.

188. *Id.* at 308.

189. *Id.* at 310.

190. *Id.* at 312–19.

*somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value.*<sup>191</sup>

The Court then cited to *Barber* for this proposition. This language from *De La Rama* supports the theory that the *Barber* dicta were not establishing a historically based exception to federal jurisdiction for domestic relations; rather, it was merely stating that the requirements for diversity jurisdiction could not be met. This was due to the principle of coverture that prevented a married woman from establishing citizenship separately from her husband, a rule that the *De La Rama* Court noted was already becoming outmoded. Finally, the *De La Rama* Court adopted the argument from *Simms* that a divorce could not be assigned monetary value and so could not meet the amount in controversy requirement.

#### *D. Divorce and the Foreign Diplomat: Popovici*

The final case in which the Supreme Court addressed the domestic relations exception before *Ankenbrandt* involved a diplomat from Romania. In *Ohio ex rel. Popovici v. Agler*,<sup>192</sup> the Vice-Consul of Romania had married a resident of Ohio who later sued him for divorce and alimony in the Ohio state courts.<sup>193</sup> The Vice-Consul objected, arguing that the state courts did not have jurisdiction since Article III of the Constitution stated that federal courts exercise exclusive jurisdiction over foreign diplomats.<sup>194</sup>

Writing for the Court, Justice Holmes found that despite the “sweeping” language of Article III regarding foreign diplomats, its language must be interpreted in light of the “three-quarters of a century” in which the federal courts had not heard divorce and alimony matters.<sup>195</sup> Justice Holmes invoked the historical rationale, as well as the understanding of the Framers of the Constitution:

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191. *Id.* at 307 (emphasis added).

192. 280 U.S. 379 (1930).

193. *Id.* at 382.

194. U.S. CONST., art. III, § 2, cl. 1, cl. 2 (“The Judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls.” “In all Cases affecting Ambassadors, other public Ministers and Consuls . . . the supreme Court shall have original jurisdiction.”); *see also* Judicial Code, § 256, Pub. L. No. 61-475, 36 Stat. 1087 (1911); (“The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States, . . . Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants or against consuls or vice-consuls.”).

195. *Popovici*, 280 U.S. at 383.

If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. ‘Suits against consuls and vice-consuls’ must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts.<sup>196</sup>

The meaning of this opinion for the domestic relations exception is somewhat unclear. The above-quoted language could indicate that the Court was holding that the federal courts, even where Article III appeared to give them exclusive jurisdiction, could not hear a domestic relations matter due to the historical limitations on this jurisdiction that were incorporated into the Constitution. There are some problems with that analysis, however.

First, due to the procedural stance of the case, in which the diplomat was arguing that the state court lacked jurisdiction to decide the divorce, the Supreme Court was not considering whether a federal court could have jurisdiction over such a case, but rather whether or not the state had the right to exercise jurisdiction. Language in the opinion supports this perspective. For example, Justice Holmes stated, “[t]he words quoted from the Constitution do not of themselves and without more *exclude the jurisdiction of the State.*”<sup>197</sup> The opinion concludes: “In the absence of any prohibition in the Constitution or laws of the United States it is for the State to decide how far it will go.”<sup>198</sup> This has led some judges and commentators to argue that the case actually held that the state court *may* take jurisdiction of divorce and alimony cases involving foreign diplomats, not that the federal court *may not* exercise such jurisdiction.<sup>199</sup>

Moreover, to the extent that *Popovici* was arguing that the Constitution limits federal jurisdiction over domestic relations matters due to the historical understanding of jurisdiction derived from England, this has been overruled by the Court in *Ankenbrandt*, which stated explicitly that the domestic relations exception is not constitutionally based.<sup>200</sup>

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196. *Id.* at 383–84.

197. *Id.* at 383. (emphasis added).

198. *Id.* at 384.

199. See *Solomon v. Solomon*, 516 F.2d 1018, 1030 n.3 (3d Cir. 1975) (Gibbons, J., dissenting) (“[T]he fact that the Ohio court had jurisdiction tells us nothing about the presence or absence of federal district court jurisdiction.”); Atwood, *supra* note 32, at 583 n.86.

200. See *supra* text accompanying notes 24–25.



*E. Coverture and the Inability to Meet the Requirements of Federal Diversity Jurisdiction*

This review of the Court's case law in this area demonstrates that there has been no holding that actually barred jurisdiction in the federal courts due to the domestic relations exception. Moreover, the historical rationale, relied upon in *Ankenbrandt* to support maintaining the exception, is open to serious question and had not consistently been the basis for the Court's previous holdings in the area.<sup>201</sup> As Judge Gibbons memorably described the situation, "there is no well-established domestic relations exception to our subject matter jurisdiction," but rather only "a collection of misstatements of ancient holdings and of ill-considered dicta."<sup>202</sup>

It may be that the original justification for *Barber's* declaration regarding divorce and alimony cases was not the existence of an exception to federal jurisdiction, but simply that federal jurisdiction could not be established due to the inability of a married woman to establish a domicile separate from that of her husband.<sup>203</sup> In addition to *Barber* itself, the *De La Rama* Court expressly provided this explanation for the *Barber* statement.<sup>204</sup> Some lower federal courts also construed *Barber* in this way. For example, in *Bowman v. Bowman*,<sup>205</sup> a federal circuit court in Illinois stated: "It is a rule so well fixed as not to require the citation of authorities in its support that the citizenship of the wife follows the citizenship of the husband; and hence, for this reason, perhaps more than any other, this class of litigation has never obtained admission in the federal courts."<sup>206</sup> After quoting the *Barber* dicta, the court noted that the "main ground" of the *Barber* dissenting opinion was that there could be no diversity jurisdiction because of the legal unity of husband and wife, so that "we

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201. In fact, the historical explanation provided by Justice Daniel's dissent in *Barber* was mentioned only briefly in *Popovici*, and had not been discussed in any other Supreme Court decisions involving the domestic relations exception. See Dobbs, *supra* note 58, at 1146.

202. *Solomon v. Solomon*, 516 F.2d 1018, 1030 (3d Cir. 1975) (Gibbons, J., dissenting).

203. The *Ankenbrandt* Court may have recognized that, even if the historical rationale for the exception was somewhat dubious, it was a better justification than the principles of coverture, which would have been both obviously outdated and embarrassingly derogatory to women.

204. See *De La Rama v. De La Rama*, 201 U.S. 303, 307 (1906) (citing *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858)); see also Dobbs, *supra* note 58, at 1144 ("The Court's decision in *De La Rama* is significant because it was the first decision to provide a rationale for the Court's earlier dicta; however, the Court solely justified the domestic relations exception with the failure to meet statutory diversity requirements."); *supra* text accompanying note 191.

205. 30 F. 849 (C.C.N.D. Ill. 1887).

206. *Bowman*, 30 F. at 849.

have in that case the unanimous opinion of the court that this class of cases cannot be entertained here.”<sup>207</sup>

The assertion that an action for divorce or determination of marital status could not be heard in federal court because marital status could not be reduced to a pecuniary value also was an argument about failure to meet diversity requirements and did not establish an exception to such jurisdiction. In both *Simms* and *De La Rama*, the Court noted that a divorce could not satisfy the amount in controversy requirement, and so there was no basis for diversity jurisdiction in such an action.<sup>208</sup> In addition, several lower federal court cases adopted this rationale.<sup>209</sup>

Of course, with the end of legal recognition for coverture, the “inability to establish a separate domicile” argument is no longer valid. Moreover, since a plaintiff may aggregate multiple claims against a single defendant, the amount in controversy requirement is often met in divorce cases when there is a dispute over child support, maintenance, or property distribution.<sup>210</sup> Therefore, the justification for refusing to hear domestic relations cases based on failure to meet diversity jurisdiction requirements can no longer be valid. If this is correct, then the question is whether there are alternative rationales that justify barring federal jurisdiction in certain domestic relations cases. This question is explored in Part III.

### III. RATIONALES FOR THE DOMESTIC RELATIONS EXCEPTION

The *Ankenbrandt* Court noted that the “domestic relations exception” was not constitutionally required, as there was nothing in Article III, Section 2’s delineation of federal judicial power that suggested any limitation for domestic relations matters.<sup>211</sup> The rationale that the federal

207. *Id.* at 850. Despite changes in the law permitting wives to have independent legal identities, some courts continued to utilize the unitary domicile of a married couple to rationalize lack of diversity jurisdiction until quite recently. *See, e.g.*, *Campbell v. Oliva*, 295 F. Supp. 616 (E.D. Tenn. 1968); *Seidman v. Hamilton*, 173 F. Supp. 641 (E.D. Pa. 1959), *aff’d*, 275 F.2d 224 (3d Cir. 1960).

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

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

210. *See* 28 U.S.C. § 1332(a) (2006).

211. *Ankenbrandt v. Richards*, 504 U.S. 689, 695 (1992) (citing U.S. CONST. art. III, § 2). Some lower federal courts had previously made this point. *See, e.g.*, *Armstrong v. Armstrong*, 508 F.2d 348, 349 (1st Cir. 1974) (“Article III judicial power is broad enough to cover even such matrimonial matters if Congress were to provide.”); *Spindel v. Spindel*, 283 F. Supp. 797, 800-01 (E.D.N.Y. 1968). Some commentators have also noted a possible Tenth Amendment argument in support of the domestic relations exception. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). However, the Tenth Amendment appears to place limits on the federal government’s ability

statute on diversity jurisdiction incorporates the limitations on English chancery jurisdiction is weak, based on questionable historical analysis and a strained interpretation of the statute in *Ankenbrandt* that turns congressional silence into intent.<sup>212</sup> Further, the justification that the diversity requirements cannot be met in these cases has disappeared.<sup>213</sup> If there is no constitutional or statutory exception to federal jurisdiction, and no failure to meet diversity requirements, there appears to be no remaining justification for continuing to bar domestic relations matters from federal courts. However, the exception has remained remarkably resilient.<sup>214</sup> This Part reviews other rationales put forth by the courts to maintain the exception.

### A. *The Argument from Tradition*

Some lower federal courts, left without a constitutional or statutory justification for the exception, have frankly acknowledged that it was judicially created in dicta in a series of decisions by the Supreme Court.<sup>215</sup> As such, the lower federal courts are not in a position to question the exception, particularly because it has existed for so long.<sup>216</sup> *Ankenbrandt* also relies on this argument from tradition:

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to make substantive law, not on the jurisdiction of the federal courts. *See* Cahn, *supra* note 35, at 1095–97; Poker, *supra* note 35, at 160–61.

212. *See* *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982) (Posner, J.) (“[O]ne might question the suggestion . . . that a century of congressional silence constitutes legislative adoption of what was originally, and maybe still is today, a purely judge-made exception to the diversity jurisdiction.”) (internal citations omitted).

213. *See supra* text accompanying notes 209–10.

214. *See supra* text accompanying notes 59–114. As one commentator noted, “[A]bsent an explicit repudiation of the exception by Congress or the Supreme Court, the lower courts appear to be unwilling to abolish the exception.” Poker, *supra* note 35, at 143. At one point, there was an effort to insert the domestic relations exception into statutory law. One draft of a study on federal and state jurisdiction by the American Law Institute (ALI) contained a proposal to add a provision to the federal judicial code to omit from district court jurisdiction “actions arising under the law of any state concerning domestic relations.” AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURT § 1330 (2) (Tent. Draft No. 6, 1968). In the floor debate, a modification was proposed that would have made the provision more specific: it would bar federal jurisdiction over “[p]roceedings for divorce, separation, alimony or custody of children where the rights sought to be enforced arise under the laws of any state.” 45 A.L.I. Proc. 117 (1969) (remarks of Prof. Field, relaying a suggestion by Judge Weinstein). Ultimately the ALI was unable to agree on the language or the limits of § 1330, which also included a bar on federal jurisdiction over probate matters, competency hearings, and actions arising under workers’ compensation laws, and the entire section was omitted. This history is recounted in Atwood, *supra* note 32, at 573 n.20.

215. *Solomon v. Solomon*, 516 F.2d 1018, 1021–22 (3d Cir. 1975).

216. *See Lloyd*, 694 F.2d at 492 (“However dubious its historical pedigree, the domestic relations exception is too well established to be questioned by a lower court.”); *Sutter v. Pitts*, 639 F.2d 842, 843 (1st Cir. 1981) (“Regardless of the historical inaccuracies and doctrinal distortions that

We conclude, therefore, that the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees. Given the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders.<sup>217</sup>

Of course, unlike the lower courts, the Supreme Court has no need to adhere to prior dicta. This is particularly true when, as here, the dicta lack any consistent or convincing justification.<sup>218</sup>

### *B. Policy Rationales*

Given the murkiness of the jurisdictional justification for the domestic relations exception, the federal courts have asserted a number of policy rationales to support their invocation of the exception. They have also utilized a number of these rationales when utilizing their discretion to abstain in domestic relations cases. Many of these policies are connected to principles of federalism and comity, which suggest that the federal courts should defer to the state judicial system in areas where the state has particular interest, such as domestic relations. However, much of this reasoning is circular; the state courts may have a special expertise, interest, and tradition in the domestic relations area simply because the federal courts have refused to hear these cases. Further, the federal courts sitting in diversity would apply state law, and so would be able to take advantage of the states' experience in this area.

#### *1. State Expertise and Judicial Economy*

In support of maintaining the domestic relations exception, the *Ankenbrandt* Court cited the "special proficiency" possessed by the states in the area of domestic relations.<sup>219</sup> The state courts have developed relationships with local agencies, have access to specialized staff to monitor the ongoing compliance of the parties that is often necessary in

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mark the birth and early years of this exception to diversity jurisdiction, the exception has endured for too long for us to abandon it in the absence of contrary action by Congress or the Supreme Court.") (citations omitted).

217. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

218. See *supra* text accompanying notes 115–200.

219. *Ankenbrandt*, 504 U.S. at 704.

these cases, and have expertise in this area that the federal judiciary does not possess.<sup>220</sup> Given these specialized skills and institutions that have grown in the state court system over the last century and a half, it is argued that judicial economy dictates that the state courts continue to handle these cases, rather than attempting to reinvent the wheel in federal court.<sup>221</sup>

However, this expertise and these relationships with various institutions involved in family law issues developed in the state courts, and not in the federal courts, *because of* the domestic relations exception, and are not reasons for maintaining it.<sup>222</sup> The federal judiciary is surely capable of developing this proficiency and creating the necessary familiarity and connections with governmental agencies and other organizations that provide services and monitoring in family law cases.<sup>223</sup>

Some federal courts have argued that family law issues are simply too difficult and delicate to be handled by federal judges. For example in *Huynh Thi Anh v. Levi*,<sup>224</sup> where the Sixth Circuit abstained from hearing a constitutional claim involving custody procedures, the court stated:

There are some questions that are too hard and too remote from the experience of federal judges and bring home to us again the wisdom of the past in giving us a social union with a Federal structure . . . . We must rely on a judge in a court of family law with its more flexible standards and with the parties before him and their latest circumstances in mind to balance the equities and seek compromises that best accommodate the interests of the parties.<sup>225</sup>

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220. *Id.* at 703–04; *see also* *Solomon v. Solomon*, 516 F. 2d 1018, 1025 (3d Cir. 1975) (modern rationale for domestic relations exception is that state courts have long experience and expertise in family law matters not possessed by federal courts).

221. *Ankenbrandt*, 504 U.S. at 703–04; *see also* *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981) (Some states have specialized family courts which make them “better suited to process the large volume of such cases.”); *Armstrong v. Armstrong*, 508 F.2d 348, 350 (1st Cir. 1974) (There is “no reason to proliferate the number of available forums” for domestic relations litigation, particularly when states have created special family courts “with social work functions and facilities.”); *Cherry v. Cherry*, 438 F. Supp. 88, 90 (D.Md. 1977) (“Because state courts traditionally have adjudicated domestic relations cases, they have developed a proficiency and expertise in the area that is almost completely absent in the federal courts.”).

222. *See* *Poker*, *supra* note 35, at 161–62 (“[T]his rationale is more a statement about the result of the years of application of the exception rather than a justification for it . . . .”).

223. *See* Judith Resnik, *History, Jurisdiction, and the Federal Courts: Changing Contexts, Selective Memories, and Limited Imagination*, 98 W. VA. L. REV. 171, 220–21 (1995); Kerrie E. Maloney, Note, *Gender-Motivated Violence and the Commerce Clause: The Civil Rights Provision of the Violence Against Women Act After Lopez*, 96 COLUM. L. REV. 1876, 1894 (1996).

224. 586 F.2d 625 (6th Cir. 1978).

225. *Id.* at 633.

The statement strikes a false chord of humility; federal judges frequently utilize their discretion in making difficult decisions and are capable of applying this skill to the domestic relations area.<sup>226</sup> Moreover, to the extent that state family law provides more “flexible standards,” of course in a diversity case the federal court would be applying state substantive law.<sup>227</sup>

## 2. *Overcrowded Federal Dockets*

The federal judiciary has consistently expressed concern over the large increase in federal caseloads generally<sup>228</sup> and has argued against any expansion of federal jurisdiction that would open the “floodgates of litigation.”<sup>229</sup> Some courts have invoked this concern when justifying the domestic relations exception.<sup>230</sup> However, the relevant question is how the federal dockets compare to those of the state courts, where the domestic relations cases are now heard. The total number of federal cases is a “small fraction” of the number of cases in the state courts, and state courts bear a far greater burden in terms of caseloads.<sup>231</sup> Moreover, the state courts handling most family law problems have comparatively low financial resources to address the extremely high volume of cases.<sup>232</sup>

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226. See *Poker*, *supra* note 35, at 162 (There is “simply no reason to believe that federal judges would be unable to master the subject of domestic relations.”).

227. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–80 (1938); see *Cahn*, *supra* note 35, at 1092 (Federal courts must decide state law issues in diversity generally, and there is no reason why they cannot do so in family law matters.).

228. See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 57 tbl.3.1, 60–61 tbl.3.2 (1996) (In 1960, there were 79,200 cases filed in federal district courts and 3,765 appeals filed in the federal courts of appeal, while in 1995, the numbers had risen to 283,688 and 49,625, respectively.). *But see Workload of the Courts*, *THE THIRD BRANCH*, Jan. 2006 (reporting a ten percent decline in federal district court civil filings in 2005, and a two percent decline in criminal case filings in the same period).

229. Toby J. Stern, Note, *Federal Judges and Fearing the “Floodgates of Litigation,”* 6 U. PA. J. CONST. L. 377, 379 (2003) (criticizing the “floodgates” argument).

230. See, e.g., *Cherry v. Cherry*, 438 F. Supp. 88, 90 (D.Md. 1977) (“[T]he Court is unwilling to increase the workload of this already overburdened Court by ignoring a rule that has existed for over 100 years without any intimation of Congressional disapproval.”).

231. Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L. J. 619, 655–56 (2001) [hereinafter *Categorical Federalism*] (comparing annual federal district court filings of approximately three hundred thousand to the thirty million cases begun annually in state courts).

232. In 2005, the federal judiciary received a budget of \$5.42 billion. See U.S. Courts, *Judiciary Budget: Facts and Impact*, <http://www.uscourts.gov/judiciary2005.html>; see also *Elrod*, *supra* note 11, at 854 (“The current court system in most states is not prepared to deal with the staggering caseloads and the myriad of complex family problems that come before it. Courts dealing with family law issues have the greatest burdens and the fewest resources.”). In 2003, state courts reported over 5.5 million incoming domestic relations cases, and incoming domestic relations caseloads increased fifteen

As a practical matter, abandoning the domestic relations exception would not “flood” the federal court system with family law cases. The litigants would still need to satisfy the diverse citizenship and amount in controversy requirements for federal diversity jurisdiction.<sup>233</sup> And, in order to preserve institutional integrity, federal courts cannot refuse to hear cases for which they have jurisdiction because they are “too busy.”<sup>234</sup> Moreover, refusals of the lower federal courts to exercise the jurisdiction granted to them by Congress “blur the separation of judicial and legislative powers.”<sup>235</sup>

### 3. *Local Interest and Community Values*

The domestic relations exception has been justified by the rationale that state courts should retain family law cases because these matters can involve value judgments that can best be made locally.<sup>236</sup> This rationale

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percent in the prior ten years. See BUREAU OF JUSTICE STATISTICS & NATIONAL CENTER FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: A NATIONAL PERSPECTIVE FROM THE COURT STATISTICS PROJECT 32–33 (2004). One need only step across Foley Square in New York from the marble and wood-paneled federal courthouse to the Manhattan Family Court, brimming with people, to feel the palpable difference in resources and caseloads.

233. See Cahn, *supra* note 35, at 1075; see also Atwood, *supra* note 32, at 627 (arguing that limiting abstentions in domestic relations cases “would not transform the federal courts into common divorce courts”).

234. *Thermtron Products v. Hermansdorfer*, 423 U.S. 336, 344 (1976). See *McClellan v. Carland*, 217 U.S. 268, 281 (1910) (By staying a proceeding until a state action was resolved, the federal court had “practically abandoned its jurisdiction over a case of which it had cognizance, and turned the matter over for adjudication to the state court. This, it has been steadily held, a Federal court may not do.”); *Chicot County v. Sherwood*, 148 U.S. 529, 534 (1883) (“[T]he courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction.” (quoting *Hyde v. Stone*, 61 U.S. (20 How.) 170, 175 (1858))); see also Atwood, *supra* note 32, at 574.

235. Atwood, *supra* note 32, at 603–04. This issue of the allocation of jurisdiction between state and federal courts has parallels to the concerns that framed the “parity debate” that became a focus of federal courts scholars in the 1980s and early 1990s. That debate concerned whether state courts are equal to federal courts in their ability to address and vindicate constitutional rights. See, e.g., Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977); David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985). However, some of the same issues and assumptions about federal courts come into play, such as the relative quality of federal and state court judges. See Chemerinsky, *supra*, at 603. In this context, Martin Redish has argued that federal courts must exercise jurisdiction where they are authorized to do so by the general statutory grant, and they should refrain only where a legislative intent to deny federal jurisdiction is clear. See MARTIN H. REDISH, *THE FEDERAL COURTS IN THE POLITICAL ORDER* 49 (1991); see also Rush, *supra* note 35, at 20 & n.88 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264 (1821); *Meredith v. Winter Haven*, 320 U.S. 228, 234–55 (1943); *McNeese v. Bd. of Educ.*, 373 U.S. 668, 674 n.6 (1963)).

236. See Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1790 (1995) (arguing in support of maintaining state jurisdiction over family law because state entities are best

does have a certain amount of weight,<sup>237</sup> but the real question is whether in fact domestic relations decisions continue to reflect local interests or values. Changes in family law that create more consistency and uniformity, together with greater mobility of population, continue to undermine such arguments.<sup>238</sup> Moreover, this argument often is really a restatement of the “greater state expertise” rationale; states may have more interest in family law cases than federal courts because family law cases have not been part of the federal docket.

In addition, some courts and commentators espousing the “local values” justification for the domestic relations exception are critical of federal diversity jurisdiction generally.<sup>239</sup> However, Congress has long refused to eliminate diversity jurisdiction, and its modifications have mostly involved raising the amount in controversy requirement.<sup>240</sup> The Supreme Court has repeatedly recognized the bias concerns that underlie the need for federal diversity jurisdiction.<sup>241</sup> And, in family law, “local values” can often translate to local bias. The traditional argument that federal diversity jurisdiction reduces the potential for bias in litigation with out-of-state parties is particularly applicable in domestic relations cases, which often involve out-of-state plaintiffs in divorce or custody actions who have relocated after marital breakups.<sup>242</sup>

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sited to “draw upon community values and norms on the meaning of the good life for families and children”).

237. Unlike the other rationales, which either employ circular reasoning or are simply thinly veiled statements of disdain for family issues, the concept of local values and culture informing the standards for family law decision-making has some merit. Custody, abuse, and divorce decisions, for example, are impacted by views on morality, parenting, and marriage. Because these views can differ widely, it may seem appropriate to have local standards applied to this area of the law.

238. See Wand, *supra* note 59, at 361. Of course, the federal court sitting in diversity would be applying state law in these decisions. Moreover, though moral values, and views on parenting and marriage, can certainly differ, in our current society it is likely that any locality will contain divergent viewpoints. Values are not uniform within each state or local jurisdiction.

239. See Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530, 540 & n. 54 (1989) (citing judges and commentators advocating elimination of diversity jurisdiction); see also Cahn, *supra* note 35, at 1094, 1116 (noting ongoing disapproval of diversity jurisdiction among the federal judiciary).

240. Cahn, *supra* note 35, at 111 (noting legislation to limit diversity jurisdiction has been introduced in Congress, but never enacted); Friedman, *supra* note 239, at 540–41.

241. See Friedman, *supra* note 239, at 541 & n.56 (citing decisions).

242. See Atwood, *supra* note 32, at 604 (“[T]he perceived need for a neutral forum may be particularly pronounced in a domestic relations context.”); Cahn, *supra* note 35, at 1118–20 (The potential for bias is of particular concern in family law cases—within four years following divorce or separation, seventy-five percent of custodial mothers will move at least once); Wand, *supra* note 59, at 360 (uniform and federal laws granting full faith and credit to child custody determinations from other states were enacted to counter efforts of some parents to avoid an unfavorable custody ruling by traveling to a different state to relitigate the case and take advantage of state’s local bias for a parent or child now within its borders ). Cahn also argues that “[a]s long as diversity jurisdiction continues to



#### 4. “Docket Clutter”<sup>243</sup>

The rationale for the domestic relations exception that does not appear in court opinions, but which may have contributed to the courts’ longstanding adherence to it, is a sense that domestic relations issues are not the stuff of which federal dockets are made.<sup>244</sup> The concern about overcrowded federal dockets may be at least partially due to a concern about overcrowding the dockets with *these* cases.<sup>245</sup> As one federal court put it, the custody matter at issue was a “sad human drama [that] has spilled into federal court,” which is well left in state court’s hands as “this area of the law is ill-suited to federal court determinations.”<sup>246</sup> Another federal court stated, “So long as diversity jurisdiction endures, federal courts cannot shirk the inconvenience of sometimes trading in wares from the foul rage-and-bone shop of the heart.”<sup>247</sup>

This distaste for family law issues is of course not a legitimate rationale for refusing to hear these cases and is emblematic of the problem that abandonment of the domestic relations exception would help to address.<sup>248</sup> Federal judges do not conceive of their job as handling domestic relations

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exist, the federal courts’ historical discrimination against domestic relations cannot justify its continued exclusion. If diversity jurisdiction is to be limited, limitations should not be based solely on bias against the issues and litigants involved in certain cases.” Cahn, *supra* note 35, at 1122.

243. Ann Althouse, *Federalism, Untamed*, 47 VAND. L. REV. 1207, 1210 (1994) (Federal judges want to avoid family law cases out of a “sense that this work is insignificant docket-clutter beneath the dignity of the federal judge.”).

244. See Wand, *supra* note 59, at 359 (One justification for the exception, “although not expressly articulated by federal courts, is evident from reading federal court opinions: the distaste with which federal judges view domestic relations disputes and their disinclination to hear these cases.”).

245. See Cahn, *supra* note 35, at 1110 (“The notion that the federal courts should not overload their schedules with domestic relations cases implies that these cases are not as important as others which should, more appropriately, fill up the federal court dockets.”); Resnik, “*Naturally*” Without Gender, *supra* note 142, at 1749 (“Dealing with women—in and out of families, arguing about federal statutory rights of relatively small value—is not how [federal judges] want to frame their job.”).

246. *Minot v. Eckhard-Minot*, 13 F.3d 590, 591, 594 (2d Cir. 1994).

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

248. See Atwood, *supra* note 32, at 599 (noting that “distaste for the subject matter of a particular case is hardly grounds for dismissal”). One possible concern is that the abandonment of the domestic relations exception would permit wealthier litigants, who meet the diversity and amount in controversy requirements, to proceed in federal court, while relegating the poor to the state system, thereby creating disparity in treatment. Of course this separation of litigants occurs in all areas in which some parties are able to access federal court through diversity jurisdiction, and it is not a basis for making an exception for domestic relations cases. The difference in resources available to state and federal court systems is clearly an issue that deserves attention, but it should not be grounds for keeping all domestic relations litigants out of federal court. Moreover, by hearing domestic relations cases, the federal judiciary would become more invested and focused on the problems attendant in this area. It is my belief that the national attention to family law cases this would create could only help state courts obtain the resources that this area warrants.

issues. If that is so, then a change in their conception of their job would promote a greater respect for the issues that arise in family law cases, and the litigants that bring these claims.

### C. *The Obligation to Renounce the Domestic Relations Exception*

None of the policy rationales offered for maintaining the domestic relations exception are persuasive. If greater state experience exists in this area, it is *because* of the long existence of the exception, and therefore this experience cannot justify its continuation. Concerns regarding a strain on federal court resources are not convincing, because they do not compare to the burden currently placed on the state courts. The policy rationales most clearly reveal a frank bias against handling these cases in federal courts.

The courts' use of abstention in domestic relations cases often relies on these same unconvincing policy rationales. There also are other reasons to reject the broad use of abstention in domestic relations cases. The Court has not adhered literally to Chief Justice Marshall's statement in *Cohens v. Virginia* that if the Court has jurisdiction, it must exercise it.<sup>249</sup> Referring to *Cohens* in *Massachusetts v. Missouri*,<sup>250</sup> the Court noted that the *Cohens* statement

is not universally true but has been qualified in certain cases where the federal courts may, in their discretion, properly withhold the exercise of the jurisdiction conferred upon them where there is no want of another suitable forum . . . . Grounds for justifying such a qualification have been found in 'considerations of convenience, efficiency, and justice' applicable to particular classes of cases.<sup>251</sup>

Yet the Court consistently has made clear that discretionary refusal to hear cases over which the federal courts have jurisdiction must be unusual.<sup>252</sup> As the Court stated in *Colorado River Water Conservation District v. United States*,<sup>253</sup> the appropriateness of abstaining must be evaluated against "the virtually unflagging obligation of the federal courts

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249. 19 U.S. (6 Wheat.) 264, 404 (1858); *see supra* text accompanying note 6.

250. 308 U.S. 1 (1939).

251. *Id.* at 19 (quoting *Rogers v. Guaranty Trust Co.*, 288 U.S. 123, 131 (1933)) (citations omitted); *see also* *Vestal & Foster*, *supra* note 59, at 2–4 (discussing *Cohens* and exceptions to it).

252. *See, e.g.*, *Meredith v. Winter Haven*, 320 U.S. 228, 234–35 (1943) (Unless there are exceptional circumstances, federal courts should not refuse jurisdiction, and to do so "merely because the answers to the questions of state law are difficult or uncertain or have not yet been given by the highest court of the state, would thwart the purpose of the jurisdictional act.").

253. 424 U.S. 800 (1976).

to exercise the jurisdiction given them.”<sup>254</sup> Moreover, the abstention doctrines have been controversial precisely because they undermine the very reasons federal jurisdiction was conferred in the first place and deny plaintiffs properly in federal court the right to proceed in the forum of their choice.<sup>255</sup>

It is possible that there are situations in which the use of an abstention doctrine by a federal court in a domestic relations case is appropriate.<sup>256</sup> However, if abstention is utilized, it must be because the principles of the doctrine are met, and not because the case involves domestic relations matters.<sup>257</sup> The fact that, because of the domestic relations exception, the states have traditionally handled these types of cases cannot then be used to justify abstention due to a strong state interest in the area. Such a basis for abstention is just like the policy rationale for the domestic relations exception that justifies the exception on the grounds of greater state expertise or interest. The federal courts should not let the impact of the domestic relations exception broaden their use of abstention doctrines; doing so would perpetuate the same illegitimate “ongoing state interest” rationale.

The Supreme Court should abandon the domestic relations exception because there simply is no convincing legal or policy rationale for its existence. In addition, by maintaining the exception the Court keeps alive a doctrine rooted in the denial of women’s equality and perpetuates in modern form a belief that “women’s issues” are not fit for national attention.

The nineteenth-century dichotomy between public and private spheres has been discussed extensively by feminist scholars.<sup>258</sup> In this

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254. *Colorado River*, 424 U.S. at 817.

255. See Friedman, *supra* note 239, at 535, 538–41 (contrasting the Court’s endorsement of diversity jurisdiction to avoid state court bias with its employment of federal abstention doctrines in several diversity cases). Friedman makes the same observation concerning the Court’s “selective amnesia” in ordering lower courts to abstain in federal question cases, “forgetting how the cases . . . originally came to fall within federal jurisdiction.” *Id.* at 538–39. The Court originally construed federal statutes to confer federal jurisdiction out of concern that state courts could not protect federal rights, but in abstention cases, the Court “denied such concern, vigorously asserting state sensitivity to claims of federal rights.” *Id.*

256. See Atwood, *supra* note 32, at 614 (arguing that *Younger* principles should apply to a federal court plaintiff seeking intervention in a pending state custody dispute).

257. See *id.* Atwood argues that in the context of a federal court plaintiff seeking to intervene in a pending state custody case, abstention is warranted “by the procedural posture of the case and the extraordinary nature of the requested relief, not by the domestic relations subject matter of the litigation.” *Id.*

258. See Martha Albertson Fineman, *What Place for Family Privacy?*, 67 GEO. WASH. L. REV. 1207, 1207 (1999) (The nineteenth century framed family and state as “separate spheres,” so that family was a sphere of privacy in which the public sphere, the state, rarely intruded.); Susan Moller

construction, the public sphere, the world of political and economic participation, was reserved for men, while the private sphere of family and home was the world to which women were confined. This framework can describe the dichotomy between the federal and state courts as well. In relegating certain family law issues to the state courts, “the Court echoes the outmoded dichotomy between a public sphere (the marketplace, the federal courts) and a private sphere (the family, the state courts).”<sup>259</sup> As Judith Resnik has put it, jurisdiction has gender, and “whenever power is being allocated between state and federal courts, one must ask not only how women are treated, but how the allocation affects our understanding of the problems that belong to women and to men.”<sup>260</sup>

By discarding the domestic relations exception, the Court would achieve both tangible and symbolic results. The federal courts are perceived as superior to their state counterparts, both in terms of the quality and prominence of its judges, and the importance of the cases they consider.<sup>261</sup> By definition, federal courts operate on a national stage. A focus by the federal judiciary on domestic relations matters would make a powerful statement about the value of these issues to our society.<sup>262</sup>

However, the attitude of the federal judiciary toward women’s issues, an attitude that both created and sustained the domestic relations

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Okin, *Gender, the Public and the Private*, in *POLITICAL THEORY TODAY* 67, 69 (David Held ed., 1991) (The continuation of the public/private dichotomy “enables theorists to ignore the political nature of the family, the relevance of justice in personal life, and, as a consequence, a major part of the inequalities of gender.”); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 *HARV. L. REV.* 947, 979 (2002) (The struggle for women’s suffrage involved more than political equality, and opponents invoked the “separate spheres” argument, which women would violate if permitted to participate politically.).

259. Cahn, *supra* note 35, at 1101; see also Elizabeth S. Saylor, *Federalism and the Family After Morrison: An Examination of the Child Support Recovery Act, the Freedom of Access to Clinic Entrances Act, and a Federal Law Outlawing Gun Possession by Domestic Violence Abusers*, 25 *HARV. WOMEN’S L.J.* 57, 81 (2002) (Federal courts have used the domestic relations exception to refuse to hear any case involving the family, or simply women.).

260. Resnik, *Reconstructing Equality*, *supra* note 15, at 417.

261. *Id.* at 408 (“Jurisdictions have hierarchies, and . . . in this country, federal jurisdiction is assumed to be a mark of a matter’s import.”); Cahn, *supra* note 35, at 1105 (“[I]n the world of federal and state courts, state courts are ranked second.”); Maloney, *supra* note 223, at 1902 (Federal courts have superior resources, which in turn, can lead to higher-caliber judges.).

262. Maloney, *supra* note 223, at 1902; Cahn, *supra* note 35, at 1075 (noting “rhetorical significance” of recognition that “families are a national issue”); Resnik, “*Naturally*” *Without Gender*, *supra* note 142, at 1699 (“Because the federal courts claim to be and are understood as the place in which the national agenda is debated and enforced, women must insist that our presence be recorded and that we not be summarily sent elsewhere.”). Of course, Congress would have the power to reinstate the domestic relations exception to federal jurisdiction by statute. However, it is highly unlikely that after a removal of the exception by the Court, there would be the political will to enact legislation that affirmatively excluded domestic relations cases, a large proportion of which involve women, from federal court.

exception, would not disappear with its abandonment.<sup>263</sup> In Part IV, I suggest that the Supreme Court's treatment of domestic violence may reflect the same attitude, and it may contribute to the denial of full access to federal courts for women.

#### IV. DOMESTIC VIOLENCE AND CITIZENSHIP

The domestic relations exception continues to impact our view of the importance of "women's issues," even after it has outlived its origins in official inequality for women. This is apparent in the way that the Supreme Court has addressed domestic violence and battered women's access to courts to seek redress for their injuries. There is a direct connection between domestic violence and the lack of equality for women.<sup>264</sup> In addition, the inability of battered women to seek remedies through public institutions, such as the courts, also impacts women's full participation as citizens.<sup>265</sup>

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263. Supreme Court case law demonstrates that the perspective that underlies the domestic relations exception has permeated several areas of federal law. *See, e.g.*, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1 (2004) (domestic relations exception as "prudential" limitation on Article III standing); *Thompson v. Thompson*, 484 U.S. 174, 186 (1988) (finding no private implied federal cause of action under the Parental Kidnapping Prevention Act (PKPA) because no evidence of such intent by Congress, and "[i]nstructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state-law questions that they have little expertise to resolve[,] . . . a cost that Congress made clear it did not want the PKPA to carry"); *Lehman v. Lycoming County*, 458 U.S. 502 (1982) (dismissing habeas corpus action of mother seeking to regain custody of children from foster care; habeas statute should be used only where "federal interest in individual liberty is so strong that it outweighs federalism" concerns, and this family matter did not rise to that level); *Sosna v. Iowa*, 419 U.S. 393, 404 (1975) (holding Iowa's residency requirement for divorce did not infringe the constitutional right to travel because the state had a strong interest in regulation of domestic relations that was "virtually exclusive" to the states); *see also Santosky v. Kramer*, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting) (arguing that standard of review in termination of parental rights proceedings should be determined by states, as domestic relations is an "area [that] has been left to the States from time immemorial, and not without good reason").

264. *See* Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 2003 SUP. CT. REV. 357, 445 (Domestic violence impacts not only individual women, but "[i]n the aggregate, battering is a major source of the subordination of women.").

265. *See* KRISTIN A. KELLY, *DOMESTIC VIOLENCE AND THE POLITICS OF PRIVACY* 155 (2003) (Absence of a public response erodes the social contract that is the basis of citizenship and fails to honor the right of victims to protection by the state.); Karst, *supra* note 264, at 445 (Lack of state intervention to protect against private violence is a "massive disempowerment of women as a group, not only denying them liberty but excluding them from the fundamentals of equal citizenship."); Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHL.-KENT L. REV. 687, 692 (2000) (By recognizing violations against women as violations of the law, women gain access to real citizenship.).

A. *Domesticating Domestic Violence: The Violence Against Women Act's Civil Rights Provision and United States v. Morrison*

There was an explicit connection between the endorsement of coverture and domestic violence in the law of the nineteenth century. Because under coverture a husband was responsible for his wife's actions, he had the right of "chastisement," to conform her conduct so that he would not be held liable. The North Carolina Supreme Court expressed this concept in the 1864 opinion of *State v. Black*:<sup>266</sup> "A husband is responsible for the acts of his wife, and he is required to govern his household, and for that purpose the law permits him to use towards his wife such a degree of force as is necessary to control an unruly temper and make her behave herself."<sup>267</sup> This right to control was directly connected to the marriage bond. In *Black*, the prosecutor argued that because the husband and wife were living separately, the husband's right of chastisement should not attach.<sup>268</sup> The court rejected that point because the couple had made simply a private agreement to live separately; only if they had obtained legal recognition of their separation, through a divorce "from bed and board," would this argument apply.<sup>269</sup> Otherwise, "[t]he husband is still responsible for her acts, and the marriage relation and its incidents remain unaffected."<sup>270</sup> Therefore, domestic relations law and the legal treatment of domestic violence were integrally related. As women became legally invisible upon marriage, so did the violence against them at the hands of their husbands.

These principles also justified a prohibition on seeking court redress for this violence. Because domestic violence, as long as not excessive, was viewed as a necessary right of a husband responsible for his wife's actions, it should be kept, with other intimate family matters, away from public view. The opinion in *Black* exemplified beliefs about the role of judicial review of domestic violence:

[T]he exposure of a scene like that set out in this case can do no good. In respect to the parties, a public exhibition in the Court

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266. 60 N.C. (1 Win.) 266 (1864).

267. *Black*, 60 N.C. (1 Win.) at 267. See WILLIAM BLACKSTONE, 1 COMMENTARIES \*444 ("For, as he is to answer for her misbehaviour, the law thought it reasonable to intrust him with this power of restraining her.").

268. *Black*, 60 N.C. (1 Win.) at 268.

269. *Id.*

270. *Id.*; see also *Abbott v. Abbott*, 67 Me. 304, 306 (1877) ("The legal character of an act of violence by husband upon wife and of the consequences that flow from it, is fixed by the [marital] condition of the parties at the time the act is done.").

House of such quarrels and fights between man and wife, widens the breach, makes a reconciliation almost impossible, and encourages insubordination; and in respect to the public, it has a pernicious tendency; so, *pro bono publico*, such matters are excluded from the Courts, unless there is a permanent injury or excessive violence or cruelty indicating malignity and vindictiveness.<sup>271</sup>

Domestic violence epitomized activity that should remain in the “private sphere.”<sup>272</sup>

When the formal constraints of coverture had ended, the belief that domestic violence should not be addressed by public institutions, including the criminal justice system or the courts, continued until very recently.<sup>273</sup> For the past twenty years, the conception of domestic violence as a private “family matter” has been rejected, at least as a matter of theory. However, this view continues to be demonstrated in the current treatment of domestic violence by the Supreme Court, and it is exemplified by the Court’s denial of access to the federal courts for women seeking redress for the violence perpetrated against them by intimate partners. Just like the domestic relations exception, the current handling of domestic violence is working to exclude “women’s issues” from the federal courts and national attention.

As part of the Violence Against Women Act (VAWA), comprehensive legislation to address domestic violence,<sup>274</sup> Congress included a provision that created a private cause of action against any person who committed a “crime of violence motivated by gender” and allowed any person injured by such a crime to obtain compensatory damages, punitive damages, and injunctive, declaratory, or other appropriate relief.<sup>275</sup>

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271. *Black*, 60 N.C. (1 Win.) at 268. Unless the violence by the husband is excessive, “the law will not invade the domestic forum or go behind the curtain. It prefers to leave the parties to themselves, as the best mode of inducing them to make the matter up and live together as man and wife should.” *Id.* at 267.

272. See Fineman, *supra* note 258, at 1216.

273. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1661–66.

274. Violence Against Women Act of 1994, Pub. L. No. 103-22, 108 Stat. 1902-55 (codified in scattered sections of titles 18, 28, and 42 of the U.S. Code).

275. 42 U.S.C. § 13981(c) (2006). There is extensive scholarly literature discussing both this provision and *United States v. Morrison*, the case that ruled it unconstitutional, and it is not my purpose here to undertake a comprehensive analysis of the provision or the case. See, e.g., Sally F. Goldfarb, *The Supreme Court, the Violence Against Women Act, and the Use and Abuse of Federalism*, 71 FORDHAM L. REV. 57 (2002); Julie Goldscheid, *Advancing Equality in Domestic Violence Law Reform*, 11 AM. U. J. GENDER SOC. POL’Y & L. 417 (2003); Catharine A. MacKinnon, *Disputing Male Sovereignty: On United States v. Morrison*, 114 HARV. L. REV. 135 (2000); Judith

Despite the fact that no intimate or family relationship between the parties was required in order to bring an action under the civil rights provision, from the start it was linked to family issues. During the drafting of the civil rights provision, there was concern that plaintiffs would be able to join family law matters, such as divorce, to a federal civil rights claim and establish an end-run around the domestic relations exception.<sup>276</sup> The report of the ad hoc committee of the Judicial Conference of the United States that had been assembled to study the civil rights provision expressed concern that the provision would “embroil the federal courts in domestic relations disputes.”<sup>277</sup> Chief Justice Rehnquist echoed this concern in his 1991 report on the federal judiciary, stating that the civil rights remedy “could involve the federal courts in a host of domestic relations disputes.”<sup>278</sup> In response to this opposition, the final version of the Act explicitly prohibited the use of supplemental jurisdiction to join divorce, alimony, marital property, or child custody claims to a case brought under the civil rights provision.<sup>279</sup>

Meanwhile, the constitutionality of the VAWA civil rights provision was brought into question by the Supreme Court’s decision in *United States v. Lopez*, which limited the scope of congressional authority to legislate under the Commerce Clause.<sup>280</sup> Most striking, the *Lopez* Court raised the specter of federal attempts to legislate in the area of family law. If limits were not placed on Congress’s authority under the Commerce Clause, the majority reasoned, the required connection of an activity to interstate commerce could become weak enough to permit federal

Resnik, *Categorical Federalism*, *supra* note 231. My interest is in understanding the “domestic relations” framework in which the Court viewed the provision.

276. See Resnik, *Reconstructing Equality*, *supra* note 15, at 402 & n.39 (citing *Violence Against Women: Victims of the System, Hearings on S. 15 Before the S. Comm. on the Judiciary*, 102d Cong. 314–317 (1991) (statement of Hon. Vincent L. McKusick, President, Conference of Chief Justices) (“[I]t can be anticipated that this right will be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as it is.”)).

277. Report of the Judicial Conference Ad Hoc Committee on Gender-Based Violence 1 (Sept. 1991), *quoted in* Resnik, “*Naturally*” *Without Gender*, *supra* note 142, at 1687.

278. William H. Rehnquist, *Chief Justice’s 1991 Year-End Report on the Federal Judiciary*, THE THIRD BRANCH, Jan. 1992, at 3.

279. 42 U.S.C. § 13981 (e)(4) (2006). The provision states:

Neither section 1367 of title 28 nor subsection (c) of this section shall be construed, by reason of a claim arising under such subsection, to confer on the courts of the United States jurisdiction over any State law claim seeking the establishment of a divorce, alimony, equitable distribution of marital property, or child custody decree.

*Id.*

280. 514 U.S. 549 (1995). Congress had stated that it based its authority to enact the VAWA provision on the Commerce Clause and Section 5 of the Fourteenth Amendment.



encroachment on areas of clear state authority, such as family law: “Under the dissent’s rationale, Congress could just as easily look at child rearing as ‘fall[ing] on the commercial side of the line’ because it provides a ‘valuable service—namely, to equip [children] with the skills they need to survive in life, and more specifically, in the workplace.’”<sup>281</sup> Considering the regulation of family law an area within Congress’s authority seemed so obviously wrong to the Court that it was used to demonstrate the absurd lengths to which the Commerce Clause power could extend if limits were not placed on Congress.<sup>282</sup> Notably, even the *Lopez* dissent distinguished activities such as “marriage, divorce, and child custody” from the area that Congress could regulate under the Commerce Clause.<sup>283</sup>

In *United States v. Morrison*,<sup>284</sup> the Court echoed its language in *Lopez* and argued that if it failed to place real limits on congressional power under the Commerce Clause, there would be nothing to stop Congress from regulating in clear areas of state concern, such as family law, “since the aggregate effect of marriage, divorce, and child-bearing on the national economy is undoubtedly significant.”<sup>285</sup> The Court then explicitly connected the civil rights provision to family law: “Congress may have recognized this specter when it expressly precluded § 13981 from being used in the family law context. Under our written Constitution, however, the limitation of congressional authority is not solely a matter of legislative grace.”<sup>286</sup> The Court then went on to state that “[t]he Constitution requires a distinction between what is truly national and what is truly local.”<sup>287</sup>

In finding that the civil rights provision was not authorized under the Commerce Clause, the Court characterized the provision as a type of family law, and therefore, only local in scope.<sup>288</sup> By doing so, the Court demonstrated both that it continued to conceptualize family issues as a

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281. *Lopez*, 514 U.S. at 565 (alteration in original).

282. See Dailey, *supra* note 236, at 1789; Morgan, *supra* note 11, at 195.

283. *Lopez*, 514 U.S. at 624 (Breyer, J., dissenting). Justice Breyer argued that the specific law at issue in *Lopez* demonstrated a particular connection between education and the national economy because gun possession was such a well documented threat to the educational process. *Id.* Maloney, *supra* note 223, at 1907–08 (noting that both the majority, in dicta, and the dissent suggested that family law issues fall outside Congress’s authority under the Commerce Clause since they are traditionally handled under state law).

284. 529 U.S. 598 (2000).

285. *Morrison*, 529 U.S. at 615–16.

286. *Id.* at 616.

287. *Id.* at 617–18.

288. See Siegel, *supra* note 258, at 1029 (arguing that the Court’s Commerce Clause analysis in *Morrison* “invokes separate spheres discourse to identify markets as of ‘national concern’ and families as a matter of ‘local concern’”).

subject not meant for federal courts, and that it viewed any issues predominantly affecting women as equivalent to “domestic relations.”<sup>289</sup> In enunciating these views, the Court precluded plaintiffs seeking to redress injuries due to gender-motivated violence from litigating in federal court.<sup>290</sup> The principles motivating the domestic relations exception continued, albeit in a different form.

*B. Domestic Violence and Access to the Federal Courts: Castle Rock v. Gonzales*

Even as some elements of coverture were breaking down, the legal system continued to keep a firm grip on women’s access to the courts. This is nowhere more true than in women’s attempts to seek redress for the violence inflicted upon them by their husbands, because claims of domestic violence threatened the core of the traditional legal relationship between husband and wife.

*1. Access to the Courts: Thompson v. Thompson*

The Supreme Court’s decision in *Thompson v. Thompson*<sup>291</sup> exemplifies its response when issues of coverture, domestic violence, and women’s equality converge. In *Thompson*, the Court considered whether a wife could sue her husband in tort for personal injury.<sup>292</sup> Under the system of coverture, there was no question that a married woman and her husband could not make an enforceable contract with each other or sue each other in tort, because as one legal unit, they would be suing themselves. By the time of the *Thompson* case, some jurisdictions had passed statutes that altered and destroyed some of the basic constraints of coverture.<sup>293</sup> The Court in *Thompson* was called upon to construe such a statute enacted by Congress for the District of Columbia, and in so doing determine if the

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289. See Resnik, “Naturally” Without Gender, *supra* note 142, at 1760 (noting “the troubling equation of ‘women’ with ‘families’ and the accompanying assumption of the absence of family matters from the federal courts”); see also Goldfarb, *supra* note 275, at 67.

290. See Resnik, *Reconstructing Equality*, *supra* note 15, at 397 (“Advocates of women’s equality . . . sought to make the physical safety and dignity of women an element of national citizenship rights. But they were told that it was jurisdictionally improper in this federation to seek such recognition.”); see also Linda C. McClain, *Discrimination and Inequality: Emerging Issues Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1234 (2000) (In striking down VAWA’s civil rights provision, the Court “failed to accept the link between violence against women and their status as equal citizens under the federal Constitution.”).

291. 218 U.S. 611 (1910).

292. *Thompson*, 218 U.S. at 614.

293. *Id.* at 615.

law permitted a wife to sue her husband for torts committed by him on her person.

The Court held that the legislation did not provide such a right to married women.<sup>294</sup> Though the law stated that “[m]arried women shall have power . . . to sue separately . . . for torts committed against them, as fully and freely as if they were unmarried,” the Court held that this was limited to suits by married women against individuals other than their husbands.<sup>295</sup> Congress could have enacted a law to permit women to sue their husbands, but “such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention.”<sup>296</sup> The Court further explained why allowing such actions might be a harmful policy:

[It] would . . . open the doors of the courts to accusations of all sorts of one spouse against the other, and bring into *public notice* complaints for assault, slander and libel, and alleged injuries to property of the one or the other, by husband against wife or wife against husband. Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it.<sup>297</sup>

The dissent argued against the majority’s reading of the statute, and would have found that, because the provision contained no qualifying language, married women were permitted to sue their husbands.<sup>298</sup>

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294. *Id.* at 616.

295. *Id.* at 616–17. The Court explained that the intent of the statute was to permit a married woman to sue separately without the joinder of her husband, as had been previously required under coverture, not to permit her to sue her husband. *Id.* at 617; *see also* *Faris v. Hope*, 298 F. 727, 728–30 (8th Cir. 1924) (reversing actual and punitive damages award to wife in libel suit against her husband because Missouri Married Women’s Act did not permit married woman to sue her husband in tort, though in this case divorce had been issued and was pending on appeal at the time of suit).

296. *Thompson*, 218 U.S. at 618.

297. *Id.* at 617–18 (emphasis added). As the lower court’s opinion put it, the married women’s statutes that had been passed were designed “to further and promote the property rights and interests of married women, but not to interfere with or undermine the conjugal relations.” *Thompson v. Thompson*, 31 App. D.C. 557, 559 (D.C. Cir. 1908). In ruling that the wife could not sue her husband for a personal tort under the statute, the Court of Appeals of the District of Columbia further stated: “In our desire to accord to woman every right to which she is entitled, let us not undermine the basis of society by disregarding the sanctity of the home.” *Id.* at 560; *see also* *Paiewonsky v. Paiewonsky*, 446 F.2d 178, 179 (3d Cir. 1971) (holding interspousal tort immunity justified by furthering a policy of domestic harmony and minimizing the danger of fictitious, fraudulent, and trivial claims).

298. *Thompson*, 218 U.S. at 621–22 (Harlan, J., dissenting).

However, the dissent did not disagree with the majority about the potential harm of allowing such actions.<sup>299</sup>

The Court does not tell us much about what brought Jessie Thompson to bring an assault and battery claim against her husband, Charles.<sup>300</sup> From the dissent, we learn that: “The declaration contains seven counts. The first, second and third charge assault by the husband upon the wife on three several days. The remaining counts charge assaults by him upon her on different days named—she being at the time pregnant, as the husband then well knew.”<sup>301</sup>

Given “such atrocious wrongs” by Charles, the *Thompson* Court tried to mitigate the harshness of its result by finding alternative remedies that Jessie could seek.<sup>302</sup> The Court stated that Jessie could “resort to the criminal courts, which, it is to be presumed, will inflict punishment commensurate with the offense committed.”<sup>303</sup> The “it is to be presumed” language here is telling. It has been well documented that prosecution of a criminal case involving domestic violence is at best inconsistent today, would have been unlikely through the mid-1980s, and in 1910, would have been virtually unheard of.<sup>304</sup> The Court also suggested that she might sue for divorce, separation, and for alimony, and that “[t]he court in protecting her rights and awarding relief in such cases may consider, and, so far as possible, redress her wrongs and protect her rights.”<sup>305</sup> Again, the “so far as possible” language reveals that the Court itself is not convinced that its own suggested remedy would be feasible. Even assuming that she could easily sue for divorce and receive alimony, any financial award would be for ongoing support and would not encompass compensation for past injury, for which she had claimed damages in the amount of \$70,000.<sup>306</sup> Finally, the Court suggested that Jessie could “resort to the chancery court

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299. *Id.* at 621 (“[I]f, as suggested, [permitting wife to sue her husband would] be undesirable on grounds of public policy, it is not within the functions of the court to ward off the dangers feared or the evils threatened simply by a judicial construction.”).

300. The first names of the parties are provided in the lower court’s decision. *Thompson v. Thompson*, 31 App. D.C. 557, 558 (D.C. Cir. 1908).

301. *Thompson*, 218 U.S. at 619–20. The lower court opinion states only that the seven counts claim seven separate assaults by the husband. *Thompson*, 31 App. D.C. at 558.

302. *Thompson*, 218 U.S. at 617. This is similar to the Court’s suggestion in *Castle Rock v. Gonzales* that Jessica Gonzales seek state tort remedies, after denying her the right to seek federal protection. And, as in *Castle Rock*, the alternative remedies suggested by the Court are hardly adequate substitutes. *See infra* text accompanying notes 329–34.

303. *Thompson*, 218 U.S. at 619.

304. *See* Sack, *supra* note 273, at 1661–65, 1668–74 (discussing the history of domestic violence criminal justice policies).

305. *Thompson*, 218 U.S. at 619.

306. *Id.* at 614.

for the protection of her separate property rights.”<sup>307</sup> However, the Court quickly noted that it was not ruling on whether such lawsuits by a wife would be permitted.<sup>308</sup> In any case, the tort damages sought by the wife here were for injuries against her person and did not relate to protection of her separate property.<sup>309</sup>

None of the remedies suggested by the Court, to the extent they were even accessible by a married woman, came close to providing an adequate substitute for a tort action against an abusive husband, from which the Court had barred her.<sup>310</sup> Over ninety years later, in *Castle Rock v. Gonzales*, the Court again examined the remedies available to a woman who had been abused by her husband.<sup>311</sup>

## 2. *Castle Rock v. Gonzales*

In 2005, the Supreme Court considered the issue it faced in *Thompson* in a modern guise. While *Thompson* involved the right of a woman to challenge domestic violence in an action against her husband, *Castle Rock v. Gonzales* concerned the right of a woman to challenge such violence in a federal 42 U.S.C. § 1983 action against a city and its police department for failing to obey the law and arrest her husband.<sup>312</sup> Though the contexts are somewhat different, the issue of a woman’s access to the courts to address domestic violence remains the same. The *Castle Rock* opinion suggests that the fight for access to federal courts is located not just in the

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307. *Id.* at 619 (citation omitted).

308. *Id.* (“Whether the wife alone may now bring actions against the husband to protect her separate property, such as are cognizable in a suit in equity when brought through the medium of a next friend, is a question not made or decided in this case.”) (citations omitted).

309. *See Bagley v. Forrester*, 53 F.2d 831, 833 (5th Cir. 1931) (noting the distinction between suits by wife against husband which involve her separate property, and those that involve personal injury). The *Bagley* court quoted Cooley on Torts: “When the wife is by statute given full control over property acquired by her, the marital relation will not protect the husband against an action for unlawfully interfering with her property, but under such a statute the wife cannot maintain an *action* against her husband for a personal injury.” *Id.*

310. *See Merenoff v. Merenoff*, 388 A.2d 951, 962 (N.J. 1978) (noting that “no court in this day and age subscribes seriously” to the “alternative remedy” theory that *Thompson* advanced as justification for retaining interspousal tort immunity, and that neither criminal law nor divorce equates to a “civil right to redress and compensation for personal injuries”). Interspousal tort immunity is not an artifact from the nineteenth and early twentieth centuries. Many states maintained such immunity for personal torts well into the twentieth century. *See Paiewonsky v. Paiewonsky*, 446 F.2d 178 (3d Cir. 1971) (noting that a majority of states at that time retained the ban on interspousal tort actions). As of 2003, the doctrine continued to exist in four states. *See Bozman v. Bozman*, 830 A.2d 450, 487 (Md. Ct. App. 2003).

311. 545 U.S. 748 (2005).

312. *Id.* at 750.

fate of the domestic relations exception, but also in another field traditionally linked to women, domestic violence.

In *Castle Rock*, Jessica Gonzales claimed that her due process rights were violated when Castle Rock police officers failed to respond properly to her repeated reports that her estranged husband was violating the terms of a domestic violence protection order.<sup>313</sup> The case concerned whether a person who had obtained a protection order had a constitutionally protected property interest, and therefore a claim under 42 U.S.C. § 1983, in having police enforce the order when they had probable cause to believe it had been violated.<sup>314</sup>

We have more details about Jessica Gonzales's tragedy than we did about the abuse of Jessie Thompson. Gonzales's husband, from whom she was separated, took their children around 5:00 or 5:30 p.m. one evening when they were playing outside her home, in violation of the terms of the protection order she had obtained against him.<sup>315</sup> When she realized that her children were missing and suspected that her estranged husband might be involved, Gonzales repeatedly called police to ask them to enforce her protection order.<sup>316</sup> The police department ignored her requests, stating that there was nothing they could do and telling her to call the police later in the evening if the children had not returned home.<sup>317</sup> Even after Gonzales talked to her husband on his cell phone at 8:30 p.m. and learned that he had the children at a nearby amusement park, the police refused to go to the scene to apprehend her husband and locate the children.<sup>318</sup> When the children had not been returned by midnight, she went to her husband's apartment and called police again at 12:10 a.m. She was told to wait there for an officer to arrive. When no one came, Gonzales proceeded to the police station at 12:50 a.m. and submitted an incident report.<sup>319</sup> Again, nothing was done. At approximately 3:20 a.m., her husband arrived at the police station and opened fire with a handgun he had purchased earlier that

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313. *Id.* at 751.

314. *Id.* at 750–51.

315. *Id.* at 753. The order, which had been served on the husband, required him to stay at least one hundred yards from the family home at all times. *Id.* at 751. In the final order, the court had given the husband the right to visit with his three daughters on alternative weekends, for two weeks in the summer, and “upon reasonable notice,” a mid-week dinner visit “arranged by the parties.” The modified order permitted him to visit the home to collect the children for such “parenting time.” *Id.* The husband had not contacted Gonzales nor made any arrangements to pick up the girls on the evening in question. *Id.*

316. *Id.* at 751.

317. *Id.* at 753.

318. *Id.*

319. *Id.* at 753–54.

evening. Police returned fire, killing him. Police then looked inside his truck, where they found the bodies of all three daughters, whom he had already murdered.<sup>320</sup>

The Colorado statute regarding protection orders stated: “A peace officer shall use every reasonable means to enforce a restraining order,” and

[a] peace officer shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of a restrained person when the peace officer has information amounting to probable cause that . . . [t]he restrained person has violated or attempted to violate any provision of a restraining order; and . . . [t]he restrained person has been properly served with a copy . . . or . . . has received actual notice of the existence and substance of such order.<sup>321</sup>

In addition, the protection order form issued against Mr. Gonzales contained a warning to respondents, as well as a notice to law enforcement officials that explained the requirement of arrest in the same language as the statute.<sup>322</sup>

Gonzales argued that both the explicit terms of the protection order, as well as the Colorado statute under which it was issued, made clear that police were required to make an arrest when they had probable cause to believe that the person against whom the order was issued had violated its terms. If the person could not be located, police were required to seek a warrant for his arrest. These requirements, it was argued, gave Gonzales a property interest in the order’s enforcement; when the Castle Rock police department did not undertake this enforcement, they deprived her of her procedural due process rights.<sup>323</sup>

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320. *Id.*

321. Colo. Rev. Stat. § 18-6803.5(3) (1999), *cited in Castle Rock*, 545 U.S. at 758–59.

322. The protection order form stated:

NOTICE TO LAW ENFORCEMENT OFFICIALS: YOU SHALL USE EVERY REASONABLE MEANS TO ENFORCE THIS RESTRAINING ORDER. YOU SHALL ARREST, OR, IF AN ARREST WOULD BE IMPRACTICAL UNDER THE CIRCUMSTANCES, SEEK A WARRANT FOR THE ARREST OF THE RESTRAINED PERSON WHEN YOU HAVE INFORMATION AMOUNTING TO PROBABLE CAUSE THAT THE RESTRAINED PERSON HAS VIOLATED . . . ANY PROVISION OF THIS ORDER . . . .

*Castle Rock*, 545 U.S. at 752.

323. The protection order, which had been served on Gonzales’s husband, stated that a knowing violation of a restraining order is a crime, and that respondent could be arrested without notice “if a law enforcement officer has probable cause to believe that you have knowingly violated this order.” *Id.*

Justice Scalia, writing for the Court, found that no such property interest was created.<sup>324</sup> Therefore, Gonzales had no claim against the Castle Rock police department under 42 U.S.C. § 1983.<sup>325</sup> The result itself may not be much of a surprise, given the Court's constricted view of plaintiff's claims in civil rights actions in the past several years.<sup>326</sup> However, the concerns motivating the Court are highly reminiscent of those that have maintained the domestic relations exception. Moreover, what is striking is how the Court, and particularly Justice Scalia, the author of the opinion, ignored their own theories of statutory interpretation in order to arrive at this result.

The Court feared that if the Fourteenth Amendment were interpreted to permit this type of federal claim, the federal courts would be reduced to handling what should be state tort matters. The Fourteenth Amendment should not be treated as “a font of tort law.”<sup>327</sup> Similar to the rationale espoused for keeping domestic relations cases out of federal court, the government and its amici raised concerns that permitting Gonzales's claim under 42 U.S.C. § 1983 would deluge the courts with constitutional claims, as well as impose huge costs on local governments.<sup>328</sup>

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324. *Id.* at 768. In so doing, the Court diverged from its statement in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), that a property interest is “defined by existing rules or understandings that stem from an independent source such as state law,” by suggesting in dicta not only that Colorado had not created an entitlement to police enforcement of a protection order, but also that a person could never have a property interest in police protection from harm by a private third party. See *The Supreme Court, 2004 Term: Leading Cases*, 119 HARV. L. REV. 208, 209, 213 (2005) [hereinafter *Leading Cases*]. The Court argued that this type of entitlement had no ascertainable monetary value, and, because a private individual's interest in protection was only incidental to governmental action taken against a third party (the violator of the order), it was not a recognized property interest for procedural due process analysis under *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773 (1980). See *Leading Cases, supra*, at 211–12. Interestingly, the Court's argument that a claim for police protection could not be a recognized property interest because it had no “ascertainable monetary value” is reminiscent of the Court's early argument that domestic relations matters such as divorce could not meet the requirements of federal diversity jurisdiction because they had no pecuniary value. Both arguments kept the claims at issue out of federal court.

325. *Castle Rock*, 545 U.S. at 768.

326. See *DeShaney v. Winnebago County Dep't. of Soc. Serv.*, 489 U.S. 189 (1989).

327. *Castle Rock*, 545 U.S. at 768 (citation omitted).

328. Petitioner's Opening Brief at 36–37, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278) (discussing the “flood of claims” that would burden municipal governments); Brief of Amici Curiae International Municipal Lawyers Ass'n et al. in Support of Petitioner at 3–4, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278). See *id.* at 9–10 (“[T]he federal courts would see their dockets swell because there would be no reason and no incentive for citizens . . . to use the state courts to press a tort claim.”); see also G. Kristian Miccio, *Exiled from the Province of Care: Domestic Violence, Duty and Conceptions of State Accountability*, 37 RUTGERS L.J. 111, 138–39 (2005) (commenting on this amici argument). The *Castle Rock* Court did not create a “domestic violence exception” to federal court jurisdiction, nor did it invoke the domestic relations exception. Yet it stretched to find a rationale for barring federal civil rights claims involving domestic violence that would have the effect of these exceptions. This is much like the reasoning of Justice Blackmun's



At the conclusion of the opinion, the Court suggested that Gonzales might find remedies in state law, noting that, although § 1983 does not “create a system by which police departments are generally held financially accountable for crimes that better policing might have prevented, the people of Colorado are free to craft such a system under state law.”<sup>329</sup> The Court also noted that Gonzales’s complaint alleged willful and wanton conduct by the police, for which government employees could not claim immunity under Colorado law.<sup>330</sup>

However, as in *Thompson*, the suggested state remedies were not viable alternatives to the claim denied by the Court. As amici for Gonzales argued, the Colorado statute had been enacted because state tort law was inadequate to provide protection to domestic violence victims; tort law “focused on compensation following violence rather than procedural protection to guard against violence in the first instance.”<sup>331</sup> Moreover, the state tort law presented substantial hurdles. It required a heightened showing of intent, “willful and wanton” conduct with respect to the resulting harm—here the death of the Gonzales children. In fact, the Colorado courts “have frequently rejected state law tort suits alleging that wrongful police inaction that eventually led to criminal conduct was sufficiently ‘willful and wanton’ to overcome qualified immunity.”<sup>332</sup> The state tort law’s causation element also made it difficult to prevail in claims against the police; “even if a defendant has acted wrongfully, no tort liability attaches to the wrongful conduct if the injury of which the plaintiff complains could not have been reasonably foreseen by the defendant.”<sup>333</sup> Because in domestic violence cases there is always an intervening violent act by the abuser, the distance between the police

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concurrence in *Ankenbrandt*, where he rejected the notion of a domestic relations exception but argued for the use of an abstention doctrine to arrive at the same result. *See supra* text accompanying notes 50–57.

329. *Castle Rock*, 545 U.S. at 768–69.

330. *Id.* at 769 n.15 (noting that Colorado statutory immunity for government employees does not apply to conduct that is “willful and wanton”).

331. Brief Amicus Curiae of the National Ass’n of Women Lawyers et al. in Support of Respondent at 3, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278). Moreover, the existence of state tort remedies does not bar a claim under 42 U.S.C. § 1983. *Id.* at 4.

332. *Id.* at 11. Under a 42 U.S.C. § 1983 claim, the plaintiff has to prove only that the police had a “willful and wanton” state of mind with respect to depriving her of her right to adequate process before, here, denying enforcement of her restraining order. *Id.* at 11 n.3.

333. *Id.* at 12.

inaction and its ultimate effect “raises doubts as to whether the injury at issue could reasonably have been foreseen.”<sup>334</sup>

The Court’s interpretation of the provision at issue is inconsistent with its general theory of statutory interpretation. The reliance on a statute’s plain meaning is an aspect of statutory interpretation that is well settled in the Court. As Justice Blackmun stated in his *Ankenbrandt* concurrence, “[t]his Court has recognized that in the absence of a ‘clearly expressed’ intention to the contrary, the language of the statute itself is ordinarily ‘conclusive.’”<sup>335</sup> Justice Scalia is well known for his view that the first and primary source of statutory interpretation is the plain meaning of a statute’s text.<sup>336</sup> In *Hartford Underwriters Insurance Co. v. Union Planters Bank*, Justice Scalia wrote for a unanimous Court in interpreting a bankruptcy statute.<sup>337</sup> He stated, “[W]e begin with the understanding that Congress ‘says in a statute what it means and means in a statute what it says there.’”<sup>338</sup> Further, “when ‘the statute’s language is plain, ‘the sole function of the courts’”—at least where the disposition required by the text is not absurd—“is to enforce it according to its terms.””<sup>339</sup> In addition,

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334. *Id.* In a 42 U.S.C. § 1983 claim, the only causation that needs to be proved is between police inaction and the deprivation of a property interest without procedural due process, a more direct and clear connection. *Id.* at 12–13 n.4.

335. *Ankenbrandt v. Richards*, 504 U.S. 689, 707 (1992) (Blackmun, J., concurring in the judgment) (citing *Consumer Prod. Safety Comm’n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)); see also *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (Thomas, J.) (“[W]hen the words of a statute are unambiguous, then . . . [the] ‘judicial inquiry is complete.’”) (citations omitted).

336. See, e.g., William N. Eskridge, Jr., *Textualism, The Unknown Ideal?*, 96 MICH. L. REV. 1509, 1511 (1998) [hereinafter *The Unknown Ideal?*] (“Scalia’s main point is that a statutory text’s apparent plain meaning must be the alpha and the omega in a judge’s interpretation of the statute.”). For Justice Scalia, the plain meaning of a statute is determined according to the words’ ordinary usage. *Id.* (“[P]lain meaning is that which an ordinary speaker of the English language—twin sibling to the common law’s reasonable person—would draw from the statutory text.”). Justice Scalia frequently refers to dictionary meanings in order to determine a word’s common usage. See, e.g., *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225–28 (1994) (Scalia, J.) (referring to several dictionaries to determine meaning of the word “modify” in a statute, and discounting a different meaning from a single dictionary that contradicts the meaning from all other dictionaries); see also David M. Zlotnick, *Justice Scalia and His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology*, 48 EMORY L.J. 1377, 1388–90 (1999) (discussing, in constitutional context, Justice Scalia’s use of textualism, including reliance on “ordinary social and dictionary meaning of individual words” as most important, and often decisive, in interpretation, and his “theoretical bias toward defining words narrowly”).

337. 530 U.S. 1, 4–5 (2000) (Scalia, J.).

338. *Hartford Underwriters Ins. Co.*, 530 U.S. at 6 (quoting *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

339. *Id.* (quoting *United States v. Ron Pair Enter.*, 489 U.S. 235, 241 (1989)). In *Ron Pair Enterprises*, Justice Scalia had joined the majority opinion which stated that the plain meaning of a statute “should be conclusive” except in the “‘rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.’” 489 U.S. at 242 (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

Justice Scalia rejected the position that the Court may assess the “relative merits of different approaches” to, in this case, bankruptcy issues: “It suffices that the natural reading of the text produces the result we announce. Achieving a better policy outcome . . . is a task for Congress, not the courts.”<sup>340</sup>

It is hard to imagine any language in the Colorado protection order statute that could make it plainer that arrest upon probable cause to believe that a protection order had been violated, or if impractical, then application for an arrest warrant, was mandatory. Yet Justice Scalia seemingly ignored the explicit language of the statute in *Castle Rock*, arguing that “[w]e do not believe that these provisions of Colorado law truly made enforcement of restraining orders *mandatory*. A well-established tradition of police discretion has long coexisted with apparently mandatory arrest statutes.”<sup>341</sup> He argued that therefore “a true mandate of police action would require some stronger indication from the Colorado Legislature than ‘shall use every reasonable means to enforce a restraining order.’”<sup>342</sup>

It is consistent with Justice Scalia’s theory of statutory interpretation to consider the specific words of the provision at issue in context when necessary in order to determine their meaning. As William Eskridge has noted, though Justice Scalia starts with the plain meaning, he will consider what interpretation is most consistent with the statute as a whole, whether similar language has been used elsewhere in the statutory code, how such language has been interpreted, and which rules of grammar and syntax are implicated.<sup>343</sup> Assuming he felt it was necessary in order to determine the

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340. *Hartford Underwriters Ins. Co.*, 530 U.S. at 13–14. Justice Scalia’s method of statutory interpretation is rooted in his view of the separation of powers: “[I]t is simply incompatible with democratic government, or indeed, even with fair government, to have the meaning of a law determined by what the lawgiver meant, rather than by what the lawgiver promulgated.” Antonin Scalia, *Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* 17 (Amy Gutmann, ed., 1997); see also Eskridge, *The Unknown Ideal?*, *supra* note 336, at 1511 (“[T]he constitutional role of the legislature is to enact statutes, not to have intent or purposes, and the role of the courts is to apply the words and only the words, without regard to arguments of fairness or political equilibrium.”).

341. *Castle Rock v. Gonzales*, 545 U.S. 748, 760 (2005).

342. *Id.* This avoidance of the plain language of the text is reminiscent of the Court’s interpretation of the statute in *Thompson* that was contrary to its plain meaning. See *supra* text accompanying notes 295–96.

343. Eskridge, *The Unknown Ideal?*, *supra* note 336, at 1512. See William D. Popkin, *An “Internal” Critique of Justice Scalia’s Theory of Statutory Interpretation*, 76 MINN. L. REV. 1133, 1148 (1992) (discussing Justice Scalia’s “treatment of multiple statutes as a single document written by an ideal drafter who integrates them into a super-text” so that he can apply maxims of language usually applied to a single statute to multiple statutes, where, for example, similar terms in different statutes are given the same meaning). Popkin argues that such an interpretation does not describe the

meaning of “shall” in the provision, if he had followed his own theory, Justice Scalia would have looked to the whole statute of which this provision was a part. Here, the provision mandating arrest for violations of domestic violence protection orders was part of an omnibus bill directed at enhancing protections for domestic violence victims.<sup>344</sup> This 1994 bill included not only the provision on enforcement of protection orders, but also, among other things, the creation of a centralized protection order registry, and requirements for entering new orders so that law enforcement could easily access information about existing orders.<sup>345</sup> The statute also created good faith immunity for police officers who arrest a person in violation of a protection order, thus encouraging officers to make these arrests without fear of liability if later the order turns out not to be valid.<sup>346</sup> Therefore, if Justice Scalia had followed his own theory, he would have observed that the statute of which this provision was a part was directed toward increased enforcement of domestic violence laws and protection of victims.

Moreover, the plain text, as well as the history of the statute, “demonstrates that the General Assembly recognized traditional police discretion and specifically rejected its applicability to protection order violations.”<sup>347</sup> Following his own method, Justice Scalia would not have analogized the mandatory domestic violence statutes to a “tradition” of police discretionary enforcement of criminal statutes mandating arrest generally.<sup>348</sup>

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actual workings of a legislature, and that people do not “routinely integrate language usage over time with the care of an ideal drafter.” *Id.* at 1149.

344. Brief of Peggy Kearns et al. as Amici Curiae in Support of Respondent at 7, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278) [hereinafter Brief of Peggy Kearns] (noting that the bill included provisions which toughened civil and criminal penalties to hold batterers accountable and deter them from committing future acts of violence).

345. See Respondent’s Brief on the Merits at 22, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278).

346. *Id.*

347. Brief of Peggy Kearns, *supra* note 344, at 11.

348. Though the legislative history of the Colorado statute overwhelmingly demonstrates that the legislature intended the mandatory language to mean what it said, Justice Scalia believes that legislative history is not an appropriate source for statutory interpretation. See, e.g., *Zedner v. United States*, 126 S. Ct. 1976, 1990 (2006) (Scalia, J., concurring in part and concurring in the judgment) (“I believe that the only language that constitutes ‘a Law’ within the meaning of the Bicameralism and Presentment Clause of Article 1, § 7, and hence the only language adopted in a fashion that entitles it to our attention, is the text of the enacted statute.”); *Koons Buick Pontiac GMC, Inc. v. Bradley Nigh*, 543 U.S. 50, 70, 73 (2004) (Scalia, J., dissenting) (“I have often criticized the Court’s use of legislative history because it lends itself to a kind of ventriloquism. The Congressional Record or committee reports are used to make words appear to come from Congress’s mouth which were spoken or written by others (individual Members of Congress, congressional aides, or even enterprising lobbyists.”)). *But see* *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 112–13 (1991) (Stevens, J., dissenting)

Justice Scalia did concede that the dissent was correct that in the specific context of domestic violence, mandatory arrest statutes have been found in some States to be more “mandatory” than traditional mandatory arrest statutes.<sup>349</sup> But he then proceeded to an argument that was not about the meaning of the statute, but instead concerned the substantive law: that the “mandate” to police was not clear, and so could not create an entitlement.<sup>350</sup>

Writing for the majority, Justice Scalia appeared to abandon some core principles of his statutory interpretation theory in order to reach the conclusion that Jessica Gonzales had no federal cause of action against the police.<sup>351</sup> In doing so, the Court denied battered women access to the

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(objecting to the “literal approach” to statutory interpretation, in which the judge puts on “thick grammarian’s spectacles” and “ignore[s] the available evidence of congressional purpose”); see also William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 655 (1990) (arguing that Justice Scalia will look at whether the meaning of a term is consistent with other parts of a statute or other terms in similar statutes, but not at whether the meaning is consistent with legislative history).

349. *Castle Rock v. Gonzales*, 545 U.S. 748, 761–62 (2005).

350. Justice Scalia argued that because the statute did not make clear what police must do when a defendant was not present on the scene, there was too much police discretion involved to create an entitlement. *Id.* at 764. However, the statute is completely clear on conduct required if it is “impractical” to make an arrest—i.e., if the defendant cannot yet be located—they must seek an arrest warrant; there is no discretion involved. Justice Scalia goes further to argue that even if the statute made enforcement mandatory because of its domestic violence context, “that would not necessarily mean that state law gave respondent an entitlement to enforcement of the mandate.” *Id.* at 764–65. Of course, it is obvious that the protection order is issued for the purpose of protecting a specified person or persons, and it was on this group that the benefit was conferred.

351. In addition to the question of statutory interpretation, Justice Scalia also refused to defer to the Tenth Circuit as the appropriate court to determine the state law of Colorado, a state within its jurisdiction. An important issue in the case was whether under Colorado law the state statute concerning enforcement of protection orders created an “entitlement” to such enforcement for subjects of such orders, such as Jessica Gonzales. Under well settled case law, the Supreme Court gives deference to the interpretation of state law made by the circuit court of appeals with jurisdiction over the state whose law is at issue and should overturn that interpretation only where it is clearly wrong or otherwise seriously deficient. See, e.g., *Castle Rock*, 545 U.S. at 774–75 (Stevens, J., dissenting); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 167 (1998). Here, the Tenth Circuit had interpreted the Colorado law to create such an entitlement. *Castle Rock*, 545 U.S. at 756 (majority opinion). Justice Scalia, a proponent of judicial restraint, might be expected to accept such deference. At a minimum, if he was not comfortable with the Tenth Circuit’s mode of decision making, he might have certified the question of state law to the Colorado Supreme Court, an alternative proposed by Justice Stevens in his dissent. *Id.* at 776–77 (Stevens, J., dissenting). This would comport with Justice Scalia’s view of federalism and deference to states’ interpretations of their own laws. As the dissent also noted, “by certifying a potentially dispositive state-law issue, the Court would adhere to its wise policy of avoiding the unnecessary adjudication of difficult questions of constitutional law.” *Id.* at 778. However, Justice Scalia did neither of these things. Though acknowledging the presumption of deference to the views of a federal court as to the law of a state within its jurisdiction, he stated that the presumption can be overcome, and “we think deference inappropriate here,” because the Tenth Circuit did not “draw upon a deep well of state-specific expertise.” *Id.* at 757 (majority opinion). The dissent noted that Justice Scalia did not even attempt to demonstrate that the en banc majority in the Tenth

courts in two basic ways. First, by failing to recognize that a domestic violence protection order creates a property interest requiring government enforcement, the Court undermined the right of domestic violence victims to gain meaningful access to state courts.<sup>352</sup> For such access to have meaning there must be a governmental obligation to implement and enforce court orders. In these cases, post-incident remedies such as bringing contempt charges against the abuser would not be adequate, and police action to enforce the order is the only alternative.<sup>353</sup> Second, the Court's holding blocked battered women from using the federal courts to hold local governments accountable for their failures to enforce. By failing to recognize the right of domestic violence victims to bring 42 U.S.C. § 1983 actions in these circumstances, the Court stated that domestic violence is not the business of the federal courts.

The domestic relations exception and the inequality for women that it embodies are historically connected to our courts' approval and tolerance of, and then inattention to domestic violence. But the exception is not a relic of history, and it continues to have a powerful hold on our conception of what is worthy of public focus today. In a federal court system without the domestic relations exception, where issues central to women were also a focus of federal attention, the rationales of *Morrison* and *Castle Rock* could not be sustained. The Court could not designate domestic violence as a matter of purely local concern, nor could it diminish government accountability for the enforcement of domestic violence laws. By eliminating the domestic relations exception, we could begin to dismantle its effects, including the refusal to recognize national remedies for domestic violence.

### CONCLUSION

The domestic relations exception cannot be sustained on constitutional, statutory, or historical grounds, and the policy rationales invoked to support it have little substance. The exception's origins may be better explained by the principle of coverture that denied married women the ability to establish diversity jurisdiction. Though coverture has ended, these origins make obvious the impact that the continuation of the

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Circuit was "clearly wrong" and argued that this showing could not be made. *Id.* at 775 (Stevens, J., dissenting).

352. See Brief Amicus Curiae of the American Civil Liberties Union et al. in Support of Respondent at 13–15, *Castle Rock v. Gonzales*, 545 U.S. 748 (2005) (No. 04-278).

353. *Id.*

domestic relations exception has on the citizenship rights of women.<sup>354</sup> Without full access to federal courts, women cannot enjoy the full political and civil participation that equal citizenship entails. Though the Supreme Court had the occasion to definitively dispose of the domestic relations exception last term in *Marshall v. Marshall*, it failed to do so.<sup>355</sup> If the Court is to fully recognize women's equality, it must take this step. Moreover, the limit on women's equality that underlies the domestic relations exception persists in other forms. The Court's denial of federal remedies for domestic violence exemplified in *Morrison* and *Castle Rock* perpetuates the belief that women cannot lay full claim to the rights of citizenship.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>356</sup> the Court addressed the connection of coverture to domestic violence, and its impact on women's ability to participate in society as equal citizens. The Court struck down a state provision that required a woman to notify her spouse of her choice to have an abortion, arguing that this requirement would severely impact victims of domestic violence, who may fear additional abuse if they inform their husbands.<sup>357</sup> For these women, the notification provision would be tantamount to a requirement that they obtain their husbands' consent before making these decisions.<sup>358</sup> And to require a husband's consent would take the Court back toward the principles of coverture.

The Court in *Casey* explained how the treatment of battered women affects the equality of all women. It noted that "not so long ago," the Court affirmed the common law principle that a married woman had no legal

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354. Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1618–19, 1632 (2001) [hereinafter *Domain of Civic Virtue*]. The law of domestic relations was called by the law "the law of baron et feme," literally the law of lord and woman. LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 12 (1998). As Linda Kerber has explained, coverture "excused married women from civic obligation because married women owed their primary obligation to their husbands." *Id.* at 304.

355. 126 S. Ct. 1735 (2006). See *supra* text accompanying notes 1–9.

356. 505 U.S. 833 (1992).

357. *Id.* at 895.

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Whether the prospect of notification itself deters such women from seeking abortions, or whether the husband, through physical force or psychological pressure or economic coercion, prevents his wife from obtaining an abortion until it is too late, the notice requirement will often be tantamount to the veto found unconstitutional in *Danforth*.

*Id.* at 897. In *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 69 (1976), the Court had found a spousal consent requirement unconstitutional.

existence separate from her husband.<sup>359</sup> Even after married women had gained a legal existence, they were still relegated to a narrow scope of activity: “Only one generation has passed since this Court observed that ‘woman is still regarded as the center of home and family life,’ with attendant ‘special responsibilities’ that precluded full and independent legal status under the Constitution.”<sup>360</sup> If a husband could effectively veto his wife’s choice, there is no reason why the state could not require a married woman to get the permission of her husband to use a post-fertilization contraceptive, to engage in any conduct that could cause risks to the fetus, or to do anything that could affect her reproductive organs before she is actually pregnant.<sup>361</sup> The Court concluded: “A State may not give to a man the kind of dominion over his wife that parents exercise over their children.”<sup>362</sup>

In this part of the *Casey* opinion, the Court found that the Constitution does not permit abusers to bar battered women from exercising their rights. To hold otherwise would open the door to the regressive treatment of all women and would embrace a view of the status of all married women that is “repugnant to our present understanding of marriage and the nature of the rights secured by the Constitution.”<sup>363</sup>

The *Casey* Court clearly understood that the repression of battered women is closely related to the restraints our justice system continues to place on women’s equality generally.<sup>364</sup> The Court must return to that understanding. The overruling of the domestic relations exception is a critical step in the process toward equality. The Court cannot allow the legacy of the exception, as revealed in the denial of federal rights to

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359. *Casey*, 505 U.S. at 896–97 (citing *Bradwell v. Illinois*, 83 U.S. (16 Wall) 130, 141 (1872)).

360. *Id.* at 897 (citing *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)).

361. *Id.* at 898.

362. *Id.* In his concurrence in *Casey*, Justice Blackmun made the direct connection between a woman’s right to reproductive choice and equality: “A State’s restrictions on a woman’s right to terminate her pregnancy also implicate constitutional guarantees of gender equality.” *Id.* at 928 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). He continued by arguing that “[t]his assumption—that women can simply be forced to accept the ‘natural’ status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause.” *Id.*

363. *Id.* at 898.

364. See KERBER, *supra* note 354, at 307 (stating that the *Casey* decision striking down the spousal notification requirement “is the moment when coverture, as a living legal principle, died”); McClain, *Domain of Civic Virtue*, *supra* note 354, at 1634 (“[T]he Court made clear that our constitutional order cannot permit states to allow households to reinstate coverture; for principles of individual liberty and equality directly conflict with patriarchy as a mode of family and societal governance.”); see also Karst, *supra* note 264, at 414 (A women’s control over her reproductive rights was necessary not only for women to participate in economic life, but also because it “offered a path to self-realization.”).



victims of domestic violence, to endure, if it is committed to a view of women as equal citizens.