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THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION: RETHINKING AN UNSETTLED FEDERAL COURTS DOCTRINE†

MICHAEL ASHLEY STEIN*

INTRODUCTION

In 1859, Supreme Court dicta disclaimed federal court jurisdiction over “the subject of divorce, or . . . alimony.”¹ This pronouncement, unsupported by either precedent or authority, became the cornerstone of an “exception” to federal jurisdiction over “domestic relations”—i.e., “family law”—cases. Domestic relations actions span a wide spectrum of subjects that arise under both diversity and federal question jurisdiction and can be divided into four categories:² (1) “core” cases, which make declarations of status such as marriage, divorce, alimony, custody, and their attendant obligations;³ (2) “core enforcement” cases that seek to enforce obligations granted in core cases;⁴ (3) “domestic tort” cases, which claim injuries to rights awarded in core cases;⁵ and (4)

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¹ *Barber v. Barber*, 62 U.S. (21 How.) 582 (1858).

² The categories used in this Article modify those announced by Justice Blackmun. See *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2221–22 (1992) (Blackmun, J., concurring).

³ With one notable exception, core cases have consistently been excluded from federal jurisdiction. See *infra* notes 48–49.

⁴ See, e.g., *Drewes v. Ilnicki*, 863 F.2d 469, 471 (6th Cir. 1988) (action to enforce support arrearages); *Jagiella v. Jagiella*, 647 F.2d 561, 562 (5th Cir. 1981) (suit for overdue child support payments); *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975) (claim based on separation agreement); *Hernstadt v. Hernstadt*, 373 F.2d 316 (2d Cir. 1967) (alleging violation of custody and visitation agreement).

⁵ See, e.g., *Ingram v. Hayes*, 866 F.2d 368 (11th Cir. 1988) (action for intentional infliction of emotional distress); *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982) (claim of interference with the custody of a child); *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) (suit for past violations of an established custody order); *Sutter v. Pitts*, 639 F.2d 842 (1st Cir. 1981) (asserting claim for malicious frustration of exercise of civil rights). This category intentionally excludes contract

"domestic federal question" cases that claim constitutional or other federal violations of core case rights.⁶ Core, core enforcement, and domestic tort cases are usually brought pursuant to the diversity statute⁷ while domestic federal question cases invoke federal question jurisdiction.⁸

The "domestic relations exception" to federal court jurisdiction has not been uniformly embraced. Over the years, both federal courts and commentators have debated the validity and scope of a domestic relations exception to either diversity or federal question jurisdiction. The disagreement among federal judges has occasioned inter-circuit conflicts over federal court adjudication of core enforcement, domestic tort, and domestic federal question actions, as well as intra-circuit conflicts over domestic federal question actions. Commentators, in turn, disagree not only about the merits of continuing to recognize such an exception, but also as to whether the exception is a jurisdictional or a jurisprudential bar to hearing cases.

Underlying these disagreements is a complex and unresolved debate over the proper role of federal courts in adjudicating a substantive area of law traditionally considered within the exclusive purview of state courts. At issue are the competing federal courts notions of mandatory jurisdiction and discretion, differing ideas of federalism and comity, and the controversy over whether parity exists between federal and state tribunals. Although I do not in this Article attempt final resolution of these issues,⁹ I propose that the question of where

cases, because most assertions of breach of contract may be characterized as core enforcement actions. *See, e.g., Jagiella*, 647 F.2d at 562 (suit for overdue child support payments).

An area of contract law that does not fall within the core enforcement category and has yet to be raised in federal court as a domestic relations case is the area of claims arising from surrogate motherhood contract agreements. As more and more states outlaw such arrangements, prospective parents may reach out to surrogates in other jurisdictions, creating diversity of citizenship and causing constitutional as well as conflict-of-law problems. *See generally* MARTHA A. FIELD, *SURROGATE MOTHERHOOD* (1988).

⁶ *See, e.g., Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 23 (1st Cir. 1991) (habeas corpus petition challenging Puerto Rico's alimony statute); *Hooks v. Hooks*, 771 F.2d 935, 935-36 (6th Cir. 1985) (§ 1983 action alleging conspiracy to wrongfully deprive claimant of physical custody of her children); *Lossman v. Pekarske*, 707 F.2d 288 (7th Cir. 1983) (§ 1983 action alleging deprivation of liberty associated with removal of children from father's custody); *Rowell v. Oesterle*, 626 F.2d 437 (5th Cir. 1980) (habeas corpus petition seeking "release" of petitioner's two children).

A federal question claim that has not yet arisen but which will probably be asserted in the near future is the issue of ownership and fair use of intellectual property that had been part of a marital estate. *See* 28 U.S.C. § 1338(a) (1988) (providing exclusive federal jurisdiction over patent, trademark, and copyright cases).

⁷ 28 U.S.C. § 1332 (1988).

⁸ 28 U.S.C. § 1331 (1988).

⁹ As Professor Robert Cover notes, "[t]he jurisdictional complexities of the American system

domestic relations belongs in our dual system acts as a baseline for considering these different notions.¹⁰ In addition, resolution of these issues is of practical significance to our judicial system in a variety of other contexts, because their examination can help better define the boundaries between federal and state courts.

The Supreme Court has not issued clear guidance that would help resolve this debate. In 1992, in *Ankenbrandt v. Richards*, the Supreme Court addressed the subject of a domestic relations exception for the first time in more than sixty years.¹¹ The Court both reaffirmed and narrowed an exception of certain core cases from federal jurisdiction, but declined either to explicate the jurisdictional boundaries of core enforcement and domestic tort actions or to explain the mechanics of abstaining from either type of action.¹² The Court also failed to address whether domestic federal question claims are exempt from district court review. As a result the lower federal courts have been left without clear guidance on how to resolve their inconsistent and often conflicting approaches to the domestic relations exception—if indeed such an exception is to be recognized and applied at all.

This Article examines the circuitous development of the domestic relations exception to federal jurisdiction from *Barber v. Barber* to the contemporary decision of *Ankenbrandt v. Richards*. It asserts that, following *Ankenbrandt*, federal court jurisdiction exists over all non-core actions properly arising under either the diversity or federal question jurisdiction statutes. The Article then addresses the issue of whether the existence of jurisdiction compels federal court adjudication of all domestic related disputes within their purview or, instead, permits abstention from those cases. The Article asserts the propriety of abstention principles and proposes a new form of abstention whose application would exclude from federal review all core cases as well as suits raising difficult issues of unresolved state law. It then evaluates the competing policy concerns informing a federal court's decision whether to exert jurisdiction over non-core actions, concluding that

of courts have occupied generations of scholars, perplexed generations of students, and enriched generations of lawyers." Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 639 (1981).

¹⁰ See Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1747 (1991) ("The subsequent construction of [*Barber*] as about the disavowal of federal court authority, and the overlay of congressional regulation of family life might be a basis for teachers and theorists of the federal courts to discuss the appropriate allocation of authority between state and federal court systems . . .").

¹¹ 112 S. Ct. 2206 (1992).

¹² *Id.*

prudential considerations support the jurisdictional lines drawn in the proposed "*Ankenbrandt* abstention" doctrine.

Part I sets forth the history of the domestic relations exception to federal jurisdiction, from its origin in *Barber v. Barber*¹³ to the Supreme Court's most recent treatment of the exception in *Ankenbrandt v. Richards*.¹⁴ Part II addresses the question of whether federal courts must assert their jurisdiction over non-core cases. It begins by reviewing the debate between those scholars who advocate mandatory jurisdiction and those who support judicially created exceptions, especially abstention. It concludes that equitable restraint of federal courts is a valid limitation on federal jurisdiction provided the limitation is principled and well delineated. Part II then reviews existing abstention doctrines and considers their applicability to non-core domestic relations matters. It asserts that the proper type of abstention doctrine to apply in the domestic relations context is a corollary of existing abstention doctrine. Part II concludes by proposing and explicating the parameters of a new abstention doctrine—"Ankenbrandt abstention." Under *Ankenbrandt* abstention, federal courts would abstain from hearing cases over which they otherwise have jurisdiction if those cases were either core cases or raised difficult issues of unresolved state law. District courts could also retain jurisdiction over a suit to ensure later resolution of non-domestic issues.

Because abstention under *Ankenbrandt*, as under any other abstention doctrine, would be discretionary, Part III examines the policy reasons traditionally offered by federal courts for declining to hear domestic relations cases. These reasons include special state interest and expertise, an unstated distaste for what are perceived as local family matters, and federal docket congestion. Part III demonstrates that countervailing policy concerns favoring federal court jurisdiction outweigh each of these traditionally utilized policies. These countervailing concerns include recognition of the national character of many family law doctrines, traditional diversity concerns of preventing prejudice against non-local parties, a general institutional duty of federal courts to exercise their jurisdiction, and the protection of federal rights. Interwoven with this analysis are notions of federalism, comity and parity.

¹³ 62 U.S. (21 How.) 582 (1858).

¹⁴ 112 S. Ct. 2206.

I. THE HISTORY OF THE DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION

In 1858, Huldah Adeline Barber, through her "next friend,"¹⁵ applied to the New York Court of Chancery for divorce from her husband, Hiram Barber.¹⁶ Shortly after the grant of the decree, which also awarded Huldah alimony,¹⁷ Hiram fled to Wisconsin in order to avoid New York state court jurisdiction. He then sued his former wife for divorce in a Wisconsin state court, omitting from his complaint any reference to the New York decree and asserting instead that his wife had "wilfully abandoned him."¹⁸

In response, Huldah sued Hiram in Wisconsin federal district court for enforcement of the New York State divorce decree. Hiram moved for dismissal of the suit, alleging that the district court lacked jurisdiction to hear the matter on two grounds. First, he asserted that the federal court could not adjudicate the dispute because diversity of citizenship could never exist between previously married individuals, the wife's citizenship necessarily remaining that of her husband.¹⁹ Sec-

¹⁵ Like other married women of her era, Mrs. Barber was represented through a "next friend" because she was not legally able to bring suit on her own behalf. See 1 ROGER FOSTER, *FEDERAL PRACTICE IN CIVIL CASES* 91-92 (Boston, Boston Book Co. 1892) ("[T]he rule was early laid down as follows: 'Where the wife complains of the husband and asks relief against him she must use the name of some other person in prosecuting the suit . . .'" (quoting *Bein v. Heath*, 47 U.S. (6 How.) 228, 240 (1848))). This practice was adopted from English common law, under which a woman could not maintain a suit in her own name unless her husband was either exiled or had "abjured the realm." See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *443.

¹⁶ See *Barber*, 62 U.S. at 582.

¹⁷ In issuing the decree, the court of chancery found that Hiram was "guilty of cruel and inhuman treatment of his wife" whom "he had abandoned, neglected and refused to provide for." *Barber*, 62 U.S. at 585. The divorce granted was therefore *a mensa et thoro*, or "from bed and board . . . by which the parties are separated and forbidden to live or cohabit together, without affecting the marriage itself," in contrast to divorce *a vinculo matrimonii*, or "from the bond of marriage." See BLACK'S LAW DICTIONARY 480 (6th ed. 1990). Divorces *a mensa et thoro* were granted in England, usually by ecclesiastical courts, for abandonment and for acts of cruelty. The grant of a divorce *a vinculo matrimonii* was only by act of Parliament and presupposed the marriage void *ab initio*. See 1 WILLIAM BLACKSTONE, *COMMENTARIES* *440-41; see also HOMER H. CLARK, JR., *LAW OF DOMESTIC RELATIONS* § 11.1, at 281 (1968).

¹⁸ See *Barber*, 62 U.S. at 588. Based on Huldah's allegedly absconding, Hiram had requested a divorce *a vinculo matrimonii*.

¹⁹ See *id.* at 589. This was a generally accepted legal axiom of the Barbers' time. See, e.g., C.L. BATES, *FEDERAL PROCEDURE AT LAW: A TREATISE ON THE PROCEDURE IN SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES* 210-11 (1908); JOHN W. DWYER, *THE LAW AND PROCEDURE OF THE UNITED STATES* 205-06 (1901); ROBERT M. HUGHES, *HANDBOOK OF JURISDICTION AND PROCEDURE IN UNITED STATES COURTS* 246 (1913); ALFRED JOHN SCHWEPPE, *SIMKINS FEDERAL PRACTICE* 337-38 (rev. ed. 1934). Like many other women's legal disabilities extant in the United States, this precept originated in England. See EDWARD COKE, *THE FIRST*

ond, he argued that the district court lacked jurisdiction because the subject of alimony was strictly within the purview of English ecclesiastical courts at the time of the adoption of the Constitution.²⁰ Because he viewed federal court jurisdiction as extending only to matters that had been within the scope of English law and equity powers, that jurisdiction did not extend to alimony.²¹ The district court rejected Hiram's assertions and exercised jurisdiction. On appeal to the Supreme Court,²² Hiram continued to aver that the district court lacked both diversity and subject matter jurisdiction.

Rejecting both of Hiram's jurisdictional arguments, the Supreme Court affirmed the New York state divorce and alimony decree and directed the Wisconsin federal territorial court to issue a mandate

PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 112 (London 1628) ("By marriage, the husband and wife become 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 or consolidated into that of the husband, under whose wing and protection she performs everything."); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 109 (Bernard D. Reams, Jr., ed. 1984) (1827) ("The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost and suspended during the existence of the matrimonial union."); 1 WILLIAM BLACKSTONE, COMMENTARIES *442 (same). By contrast, "[s]tates today recognize the ability of a wife to establish a domicile separate from that of her husband for divorce purposes." ROBERT A. LEFLAR, AMERICAN CONFLICTS LAW § 11, at 19 (1977).

The question of who can legally be a citizen is complex. See, e.g., PETER H. SCHUCK & ROGERS M. SMITH, CITIZENSHIP WITHOUT CONSENT: ILLEGAL ALIENS IN THE AMERICAN POLITY 9-41 (1985) (comparing "ascriptive" citizenship, which arises from circumstances like birth, to "consensual" citizenship created by agreement); JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 49-61 (1991) (examining efforts to extend citizenship to slaves, women, people without property, and young people); Peter H. Schuck, *Membership in the Liberal Polity: The Devaluation of American Citizenship*, 3 GEO. IMMIGR. L.J. 1 (1989) (considering how equality and due process principles affected the meaning of United States citizenship). The above citations are culled from Resnik, *supra* note 10, at 1738 n.293.

²⁰ See *Barber*, 62 U.S. at 592.

²¹ See *id.* The assertion that federal court jurisdiction was coterminous with English practice at the time of the Constitution's adoption was a common basis for denying jurisdiction. For example, in the years prior to the *Barber* decision in the nineteenth century, the Court often interpreted the scope of federal court jurisdiction under the Judiciary Act by referring to English judicial authority. See, e.g., *Story v. Livingston*, 38 U.S. (13 Pet.) 359, 368-69 (1839) (striking down rule made by the District Court of Louisiana, abolishing chancery practice); *Robinson v. Campbell*, 16 U.S. (3 Wheat.) 212, 221-23 (1818) (rights to hold legal title to land followed those under English law). This was also the explanation given to justify the exception from federal jurisdiction of probate matters. See, e.g., *Fontain v. Ravenel*, 58 U.S. (17 How.) 369, 384-85 (1854) (*parens patriae* power to allocate a charitable trust same as that established in Elizabethan England).

²² Because the appeal came from a district court located in what is referred to in the case as a "territory," there is the danger of erroneously viewing *Barber* as the same type of "territorial" case discussed *infra* text accompanying notes 35-43. See Resnik, *supra* note 10, at 1742 n.314 (making the above admonition). In fact, Wisconsin was admitted to the Union 10 years prior to the *Barber* decision. See An Act for the Admission of the State of Wisconsin into the Union, ch. 50, § 1, 9 Stat. 233, 233 (1848). By an earlier act, Congress had established a federal district court

consistent with the New York holding.²³ The Court began its opinion with the famous pronouncement, unsupported by either precedent or authority,²⁴ that would become the "fountainhead"²⁵ of the domestic relations exception: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce . . ." ²⁶ Having thus eschewed any jurisdiction over the grant of either divorce or alimony, the Court explicitly rejected Hiram's arguments, reasoning that, although a suit for the allowance of divorce or alimony exceeded the boundaries of English and, therefore, its own jurisdiction, a suit to enforce a divorce or alimony decree lay fully within both English and federal court equity jurisdiction.²⁷ The Court also rejected Hiram's argument that marriage

in Wisconsin empowered to hear "suits of a civil nature at common law or in equity." See Act of Aug. 6, 1846, ch. 89, § 4, 9 Stat. 56, 57.

²³ See *Barber*, 62 U.S. at 599-600.

²⁴ "The domestic relations exception did not originate in an unequivocal holding by the United States Supreme Court; rather it evolved from dicta in two Supreme Court cases." Mark Stephen Poker, Comment, *A Proposal for the Abolition of the Domestic Relations Exception*, 71 MARQ. L. REV. 141, 144 (1987); see Note, *Domestic Relations—Federal Courts Held to Have Jurisdiction to Declare Divorce Invalid*, 44 N.Y.U. L. REV. 631, 634 (1969) [hereinafter Note, *Domestic Relations*] ("[I]n dictum, for no apparent reason and without citing any authority, the Court disclaimed any jurisdiction . . ."); Linda A. Ouellette, Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation*, 24 B.C. L. REV. 661, 684 (1983) ("The domestic relations exception has its source in dicta."); Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824, 1830 (1983) ("The exception, a judicial creation, originated in early Supreme Court dicta."); see also Allan D. Vestal and David L. Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1 (1956); Rebecca E. Swenson, Note, *Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction*, 1983 DUKE L.J. 1095 (1983).

²⁵ Michael L. Corrado, Comment, *Enforcing State Domestic Relations Decrees in Federal Courts*, 50 U. CHI. L. REV. 1357, 1360 (1983); see also Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 573-74 (1984) ("The reluctance to entertain domestic relations cases originated in nineteenth century Supreme Court dicta concerning the scope of the federal court's law and equity jurisdiction."); Sharon Elizabeth Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 1 (1984) ("Although the Court announced the disclaimer only in dicta, and no authoritative analysis of its validity exists, federal courts have adamantly declared that the domestic relations exception divests them of jurisdiction over divorce, alimony, and child custody."); Bonnie Moore, Comment, *Federal Jurisdiction and the Domestic Relations Exception: A Search for Parameters*, 31 UCLA L. REV. 843, 848 (1984) ("This dictum has since been cited as authority for the domestic relations exception in most of the cases dealing with the exception."); Ouellette, *supra* note 24, at 668 n.62 ("That the Supreme Court's dicta is unsupported by authority is, in fact, a primary focus of the doctrine's critics."); Poker, *supra* note 24, at 146 ("The Supreme Court, through its dicta in *Barber* . . . laid the foundation for the domestic relations exception.").

²⁶ *Barber*, 62 U.S. at 584.

²⁷ See *id.* at 589.

precluded diversity of citizenship between the parties. Instead, the Court held that Huldah's divorce decree entitled her to her own domicile. It also recognized women's individual domiciles when acting as plaintiffs in their own divorce suits.²⁸ Accordingly, Huldah Barber had satisfied the jurisdictional requirements to bring suit.²⁹

Three Justices dissented, taking issue with the majority for affirming the district court's jurisdiction. The dissenters asserted first that a married woman could never have a domicile separate from her husband, because legally they were considered one person.³⁰ They next asserted that federal courts totally lacked jurisdiction over domestic relations matters, because English law empowered the ecclesiastic courts, not the courts of equity, to adjudicate all such cases.³¹ Finally, the dissenters ruminated that domestic relations matters as a whole were special enclaves of state governance.³²

The use of the *Barber* dicta as precedent for a domestic relations exception was bolstered thirty years later in *In re Burrus*.³³ In that case,

²⁸ *Id.* at 589, 591. The Court's ruling has been characterized as a "stunning victory for the relatively small number of wives who could first obtain recognition of their separate legal status." Resnik, *supra* note 10, at 1741; see also Rogers Smith, "One United People": *Second Class Female Citizenship and the American Quest for Community*, 1 *YALE J.L. & HUMAN.* 229, 254 (1989) (*Barber* "remains the closest the Supreme Court came to enunciating a liberal egalitarian view of the status of women during the antebellum years.").

²⁹ The only other hurdle to obtaining jurisdiction was satisfying the jurisdictional amount. At the time of *Barber*, the minimum amount in controversy requirement was the original \$500 fixed by the Judiciary Act of 1789. See Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. The amount has since been steadily increased. See Act of Mar. 3, 1887, ch. 373, § 1, 24 Stat. 552, 552 (to \$2,000 in 1887); Act of Mar. 3, 1911, ch. 231, § 24, 36 Stat. 1087, 1091 (to \$3,000 in 1911); Act of July 25, 1958, Pub. L. No. 85-554, § 1, 72 Stat. 415, 415 (to \$10,000 in 1958); Act of Nov. 19, 1988, Pub. L. No. 100-702, § 201, 102 Stat. 4640, 4646 (codified at 28 U.S.C. § 1332 (1988)) (to \$50,000 in 1988). The use of the minimum amount in controversy requirement as a bar to jurisdiction over domestic relations cases is discussed *infra* note 279 and accompanying text.

³⁰ See *Barber*, 62 U.S. at 600-02 ("[H]ow can it be conceived that pending the existence of this relation the unity it creates can be reconciled with separate and independent capacities in that unity, such as belong to beings wholly disconnected?").

³¹ *Id.* at 605. In so arguing, the dissent did not specifically mention the Judiciary Act of 1789 or any other legislative provision.

³² The rhetoric employed by the dissent offers insight into the nineteenth-century political mindset that inspired the domestic relations exception and is worth quoting at length:

It is not in accordance with the design and operation of a Government having its origin in causes and necessities, political, general, and external, that it should assume to regulate the domestic relations of society; should, 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 affectations or antipathies of the members of every household. . . . The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse.

Id. at 602.

³³ 136 U.S. 586 (1890).

a father brought an action for a writ of habeas corpus seeking to regain custody of his daughter after she had been unlawfully detained by her grandparents. Citing *Barber*, the Supreme Court denied jurisdiction on the grounds 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.”³⁴ The Court did not, however, make any mention of a principled basis for this lack of subject matter jurisdiction.

Adding to the confusion in this area, two succeeding Supreme Court decisions held that federal courts had jurisdiction to hear appeals of core cases when they originated in federal territorial courts.³⁵ In *Simms v. Simms*,³⁶ the Court held that, although it may “be assumed as indubitable” that the federal courts have no jurisdiction over core cases, the Court did have jurisdiction to review divorce decrees appealed from the Supreme Court of the Arizona Territory.³⁷ The Court justified its exercise of jurisdiction on the grounds that the divorce had been granted in a territorial (albeit federal) court, rather than an Article III court.³⁸ As observed, however, by Professor Elizabeth Rush, “the *Simms* Court did not address the [odd] fact that the Supreme Court was itself an article III court, even when reviewing a territorial court’s alimony award.”³⁹

Seven years later, in *De La Rama v. De La Rama*,⁴⁰ an appeal of an alimony decree from the Supreme Court of the Philippine Islands, the Court, citing *Barber*, explained the historical reasons why diversity jurisdiction did not extend to core actions.⁴¹ Conspicuously absent from the rationales offered were the “common law or equity” distinctions made by the *Barber* dissent. This absence is particularly difficult to understand given that the appellate jurisdictional statute at issue,

³⁴ *Id.* at 593–94.

³⁵ Congressional legislation provided for Supreme Court review of cases appealed from the Supreme Courts of the territories and the Philippine Islands as long as they met a minimum jurisdictional amount-in-controversy requirement. See Act of Sept. 9, 1850, ch. 51, § 9, 9 Stat. 453, 455–56 (Utah); Act of Mar. 2, 1861, ch. 86, § 9, 12 Stat. 239, 241–42 (Dakota); Act of Feb. 24, 1863, ch. 56, § 2, 12 Stat. 664, 665 (Arizona); Act of July 1, 1902, ch. 1369, § 10, 32 Stat. 691, 695 (Philippine Islands).

³⁶ 175 U.S. 162 (1899).

³⁷ *Id.* at 167–68.

³⁸ *Id.* at 168.

³⁹ See Rush, *supra* note 25, at 4 n.16.

⁴⁰ 201 U.S. 303 (1906).

⁴¹ The *De La Rama* Court explained that the exception was supported “both by reasons of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues, and for the further reason that a suit for divorce in itself involves no pecuniary value.” *Id.* at 307. In addition, two cases from the District of Columbia Orphan’s

extending to "all actions, cases, causes, and proceedings,"⁴² freely allowed the Court to distinguish this case from the "common law or equity" limitation of the diversity statute. The *De La Rama* Court, distancing itself from *Barber*, instead chose to reaffirm explicitly the curious and circumspect *Simms* rationale.⁴³

A quarter century later, in *Ohio ex rel. Popovici v. Alger*,⁴⁴ the Court held that a federal statute granting exclusive federal court jurisdiction over "all suits and proceedings against . . . consuls or vice-consuls"⁴⁵ did not preclude state adjudication of divorce decrees involving such officials. *Popovici* involved an appeal by a Romanian vice-consul from a state divorce decree based upon the state court's apparent lack of authority to adjudicate the matter. In disclaiming exclusive federal jurisdiction, Justice Holmes did not cite the diversity statute. Instead, he traced the absence of jurisdiction directly to the Constitution: if the Framers contemplated that states would preside exclusively over domestic relations matters, then construing the Constitution accordingly is easy; construing the statute accordingly is not much harder.⁴⁶ Thus, Justice Holmes reasoned, the phrase "suits and proceedings against . . . consuls and vice-consuls" necessarily referred to "ordinary civil proceedings" and not to domestic matters, which formally would have been the province of ecclesiastical courts.⁴⁷

Court reached the Supreme Court in which parties sought guardianship over infants. Both times the Court held that the monetary value of guardianship failed to satisfy the required amount in controversy. See *De Krafft v. Barney*, 67 U.S. (2 Black) 704, 714 (1862); *Ritchie v. Mauro*, 27 U.S. (2 Pet.) 243, 244 (1829). In another child case between two parents, the Court held that custody was a matter "utterly incapable of being reduced to any pecuniary standard of value." The Supreme Court's appellate jurisdiction could therefore not be exercised, and the lower court decision went unchallenged. See *Barry v. Mercein*, 46 U.S. (5 How.) 103, 120 (1847).

⁴² § 10, 32 Stat. at 695.

⁴³ See *De La Rama*, 201 U.S. at 308; *Simms v. Simms*, 175 U.S. 162, 167 (1899).

⁴⁴ 280 U.S. 379 (1930).

⁴⁵ See Federal Judicial Code, Act of Mar. 3, 1911, ch. 231, §§ 24, 233, 256, 36 Stat. 1087, 1091-94, 1156, 1160-61. The Judicial Code interpreted Article II, § 2, cl. 1 of the Constitution, providing in pertinent part that "[t]he judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . ." U.S. CONST. art. II, § 2. The Judicial Code sections have been revised and codified as follows:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of all civil actions and proceedings against—

(1) consuls or vice consuls of foreign states; or
 (2) members of a mission or members of their families . . .

28 U.S.C. § 1351 (1988).

⁴⁶ *Ohio ex rel. Popovici*, 280 U.S. at 383.

⁴⁷ *Id.* at 384.

Given the inconsistencies of the Supreme Court's approach in this area, it is not surprising that, throughout the history of federal court adjudication of domestic relations cases, judges and scholars have debated the existence and scope of an exception to federal court jurisdiction. With one notable exception,⁴⁸ district courts agree that their jurisdiction does not extend to core suits.⁴⁹ Beyond this initial agreement, however, the approach taken by federal courts to non-core actions may be most charitably described as chaotic.⁵⁰ Inter-circuit

⁴⁸ See *Spindel v. Spindel*, 283 F. Supp. 797 (E.D.N.Y. 1968) (federal courts authorized to determine validity of foreign divorce decrees). Although Judge Jack B. Weinstein's opinion was the first to hold explicitly that jurisdiction existed over a core case, a handful of cases have raised core issues only to dispose of them on other grounds. See, e.g., *Southard v. Southard*, 305 F.2d 730 (2d Cir. 1962) (issue already litigated); *Harrison v. Harrison*, 214 F.2d 571 (4th Cir.), cert. denied, 348 U.S. 896 (1954) (issue already litigated); *Cohen v. Randall*, 137 F.2d 441 (2d Cir.), cert. denied, 320 U.S. 796 (1943) (failure to state a claim); *McNeil v. McNeil*, 78 F. 834 (C.C.N.D. Cal. 1897), aff'd, 170 F. 289 (9th Cir. 1909) (laches); see also Note, *Domestic Relations*, supra note 24, at 633 (optimistically yet erroneously interpreting *Spindel* as opening "the door for reexamination of the whole question of federal jurisdiction in divorce and domestic relations cases").

⁴⁹ "As a general rule, federal courts refuse to hear 'suits for divorce and alimony, child custody actions, disputes over visitation rights, suits to establish paternity and to obtain child support, and actions to enforce separation or divorce decrees still subject to state court modification.'" *Congleton v. Holy Cross Child Placement Agency*, 919 F.2d 1077, 1078 (5th Cir. 1990) (citing *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978) (citations omitted)); see also *Vaughan v. Smithson*, 883 F.2d 63, 64 (10th Cir. 1989) ("It is now well established that federal courts do not have diversity jurisdiction to grant a divorce or annulment, determine support payments, or award custody of a child."); *Wasserman v. Wasserman*, 671 F.2d 832, 834 (4th Cir. 1982) ("[T]he federal courts have long held that diversity jurisdiction does not include the power to grant divorces, determine alimony or support obligations, or determine child custody rights."); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968) ("[E]ven though there is diversity of citizenship and a sufficient amount in controversy to satisfy the technical jurisdictional requirements, the federal courts have no jurisdiction of suits to establish paternity and child support." (citing *Albanese v. Richter*, 161 F.2d 688 (3d Cir.), cert. denied, 332 U.S. 782 (1947))).

Federal courts also have declined to decide child custody disputes on the grounds that no amount in controversy could be established because the dispute cannot be "reduced to monetary value." See JOHN W. DWYER, *THE LAW AND PROCEDURE OF THE UNITED STATES COURTS* 193 (1901) ("[I]n such a case there is no pecuniary standard of value, as it rises superior to money considerations."); see also CHARLES P. WILLIAMS, *JURISDICTION AND PRACTICE OF FEDERAL COURTS: A HANDBOOK FOR PRACTITIONERS AND STUDENTS* 100 (1917) ("[T]he inestimable privilege of civil liberty, the value of the custody of the child, or of a severance of the marriage relation, are too imponderable to be weighed and calculated in the ordinary method of business transactions.").

⁵⁰ See, e.g., Moore, supra note 25, at 850 ("[W]hile the domestic relations exception has become well established, it has not become well defined." (footnote omitted)); Ouellette, supra note 24, at 663 ("[T]he domestic relations exception has grown into a well-established, but inconsistent and confusing doctrine . . ."); Poker, supra note 24, at 142 ("The breadth of the exception . . . remain[s] unclear."); Swenson, supra note 24, at 1100 ("A confused and inconsistent domestic relations exception doctrine has emerged . . ."); Ullman, supra note 24, at 1824 ("[W]hile all courts have adhered to the domestic relations exception, the breadth of the exception, as well as justifications for it, remain unclear." (footnotes omitted)).

conflicts exist over the propriety of hearing core enforcement, domestic tort, and domestic federal question cases. For example, while the Fourth,⁵¹ Fifth,⁵² Sixth⁵³ and Eleventh⁵⁴ Circuits have held that federal courts may exercise jurisdiction over core enforcement suits, the Second,⁵⁵ Third⁵⁶ and Seventh⁵⁷ Circuits have reached the opposite conclusion. Federal courts have likewise diverged over the extent of an exception for domestic tort actions. For example, the District of Columbia,⁵⁸ Fourth,⁵⁹ Fifth,⁶⁰ Sixth⁶¹ and Seventh⁶² Circuits will entertain these suits, whereas the First⁶³ and Eleventh⁶⁴ will not.

An inter-circuit conflict also exists over whether domestic federal question suits may properly be heard in federal fora. The Second,⁶⁵

⁵¹ See, e.g., *Keating v. Keating*, 542 F.2d 910 (4th Cir. 1976) (where state alimony and support decree is in force, district court has authority to enforce both past and future violations).

⁵² See, e.g., *Ersparn v. Badgett*, 647 F.2d 550, 551 (5th Cir. 1981) (holding that the district court did not err in asserting jurisdiction in diversity action to enforce terms of Texas divorce decree awarding plaintiff former wife one half of defendant former husband's accumulated right under United States Army retirement benefits program).

⁵³ See, e.g., *Drewes v. Ilnicki*, 863 F.2d 469, 471 (6th Cir. 1988) ("Federal courts will also exercise jurisdiction over the enforcement of support arrearages.")

⁵⁴ See, e.g., *Kirby v. Mellenger*, 830 F.2d 176 (11th Cir. 1987) (district court abused its discretion in dismissing suit to obtain share of husband's military retirement benefits).

⁵⁵ See, e.g., *Hernstadt v. Hernstadt*, 373 F.2d 316, 317 (2d Cir. 1967) ("[F]ederal courts do not adjudicate cases involving the custody of minors and, a fortiori, rights of visitation.")

⁵⁶ See, e.g., *Solomon v. Solomon*, 516 F.2d 1018 (3d Cir. 1975) (separation or support agreements are treated as ordinary enforceable contracts).

⁵⁷ See, e.g., *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982) (suit for interference with custody).

⁵⁸ See, e.g., *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982) (allowing tort suit based on parental kidnapping).

⁵⁹ See, e.g., *Wasserman v. Wasserman*, 671 F.2d 832, 834 (4th Cir. 1982) (permitting a district court to proceed with an action for the torts of child enticement and intentional infliction of emotional distress).

⁶⁰ See, e.g., *Goins v. Goins*, 777 F.2d 1059, 1061 (5th Cir. 1985) (noting that "even when domestic relation matters are involved, a federal court may be a proper forum where the claims arise from tortious conduct").

⁶¹ See, e.g., *Drewes v. Ilnicki*, 863 F.2d 469 (6th Cir. 1988) (holding that the exception does not apply to a tort suit for intentional infliction of emotional distress).

⁶² See, e.g., *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982) (holding that the exception does not apply to a tort claim for interference with the custody of a child).

⁶³ See, e.g., *Sutter v. Pitts*, 639 F.2d 842 (1st Cir. 1981) (refusing to decide tort of malicious frustration of exercise of civil rights).

⁶⁴ See, e.g., *Ingram v. Hayes*, 866 F.2d 368 (11th Cir. 1988) (exception divests federal courts of jurisdiction over tort actions for intentional infliction of emotional distress).

⁶⁵ See, e.g., *Hernstadt v. Hernstadt*, 373 F.2d 316, 317-18 (2d Cir. 1967) ("When a pure question of constitutional law is presented, this court has suggested that the District Court may assume jurisdiction even if the question arises out of a domestic relations dispute . . .").

Fourth,⁶⁶ Fifth⁶⁷ and Eleventh⁶⁸ Circuits have held that district courts may assume jurisdiction over constitutional actions even though they arise from a domestic context, contrary to the holdings of the Third⁶⁹ and Ninth⁷⁰ Circuits. Adding to this confusion, the First,⁷¹ Sixth⁷² and Eighth⁷³ Circuits have intra-circuit conflicts over the propriety of adjudicating federal question domestic cases.

With this tremendous conflict within and among the circuits as a backdrop, the *Ankenbrandt* Court revisited the domestic relations exception to federal jurisdiction in 1992,⁷⁴ more than sixty years after its decision in *Popovici*. In 1989, Missouri citizen Carol Ankenbrandt sued her former husband and his female companion, who were Louisiana

⁶⁶ See, e.g., *Kelser v. Anne Arundel County Dep't of Social Servs.*, 679 F.2d 1092 (4th Cir. 1982) (remanding a § 1983 claim to proceed on the merits).

⁶⁷ See, e.g., *Rowell v. Oesterle*, 626 F.2d 437 (5th Cir. 1980) (allowing habeas corpus petition seeking "release" of petitioner's two children).

⁶⁸ See, e.g., *Ingram*, 866 F.2d at 370 ("The district court properly exercised jurisdiction over this federal question despite its domestic relations genesis.")

⁶⁹ See, e.g., *Magaziner v. Montemuro*, 468 F.2d 782 (3d Cir. 1972) (abstaining from deciding a claim brought under 42 U.S.C. §§ 1981, 1983 on grounds of domestic relations exception).

⁷⁰ See, e.g., *Tree Top v. Smith*, 577 F.2d 519 (9th Cir. 1978) (disallowing habeas petition).

⁷¹ Compare *Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 23 (1st Cir. 1991) (domestic relations exception to federal jurisdiction did not apply to habeas petition challenging Puerto Rico's alimony statute) with *Hemon v. Office of Pub. Guardian*, 878 F.2d 13, 14 (1st Cir. 1989) ("It is settled law that federal habeas corpus jurisdiction does not extend to state court disputes over child custody.") and *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1113 (1st Cir. 1978) (child custody rulings by themselves are not sufficient to trigger a federal habeas remedy on behalf of a dissatisfied mother).

⁷² Compare *Agg v. Flanagan*, 855 F.2d 336, 336-37 (6th Cir. 1988) (holding that district court had subject matter jurisdiction over § 1983 civil rights class action brought on behalf of all male litigants of particular state family court who would be subject to certain wage assignments, garnishments, or wage attachments) and *Hooks v. Hooks*, 771 F.2d 935, 935-36 (6th Cir. 1985) (former wife's complaint alleging that former husband and others conspired to wrongfully deprive her of physical custody of her children without due process stated a cause of action under 42 U.S.C. § 1983) with *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981) ("Even when brought under the guise of a federal question action, a suit whose substance is domestic relations generally will not be entertained in a federal court.") and *Huynh Thi Anh v. Levi*, 586 F.2d 625, 627 (6th Cir. 1978) (disallowing a habeas petition).

⁷³ Compare *Ruffalo ex rel. Ruffalo v. Civiletti*, 702 F.2d 710, 711 (8th Cir. 1983) (domestic relations exception to federal jurisdiction did not apply to mother's constitutional action against federal officials seeking return of minor son) and *Overman v. United States*, 563 F.2d 1287, 1292 (8th Cir. 1977) (stating that "[t]here is, and ought to be, a continuing federal policy to avoid handling domestic relations cases in federal court in the absence of important concerns of a constitutional dimension") with *Bergstrom v. Bergstrom*, 623 F.2d 517, 520 (8th Cir. 1980) ("Where a constitutional issue arises out of a custody dispute . . . the proper course is to dismiss the case and remand to the state court.")

⁷⁴ *Ankenbrandt v. Richards*, 112 S. Ct. 2206 (1992).

citizens, on behalf of the Ankenbrandt children for damages caused by their alleged sexual and physical abuse. Carol Ankenbrandt brought suit in the United States District Court for the Eastern District of Louisiana and asserted federal jurisdiction under the diversity of citizenship provision of 28 U.S.C. § 1332. The defendants moved to dismiss for lack of jurisdiction, contending that the subject matter of the case, although itself a tort action, necessarily placed it within the domestic relations exception to federal jurisdiction. The district court granted the defendants' motion, citing *In re Burrus*⁷⁵ for the proposition that "[t]he whole subject of the domestic relations . . . belongs to the laws of the States and not to the laws of the United States."⁷⁶ As an alternative basis for its holding, the district court concluded that, because adjudication of the raised issues would require it to "become overly involved in the state court's determination"⁷⁷ of the underlying abuse and custody determinations⁷⁸—which themselves fell squarely within the domestic relations exception—*Younger* abstention principles required it to decline jurisdiction.⁷⁹ On appeal, the Fifth Circuit affirmed the district court in an unpublished opinion holding that the lower court "correctly declined to exercise jurisdiction over this case by invoking the domestic relations exception to federal jurisdiction" as well as general abstention principles.⁸⁰

Carol Ankenbrandt appealed, and the Supreme Court granted certiorari. The Court limited review to the following questions: "(1) Is there a domestic relations exception to federal jurisdiction? (2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages? (3) Did the District Court in this case err in abstaining from exercising jurisdiction under the doctrine of *Younger v. Harris*?"⁸¹ In reviewing the Fifth Circuit decision, the Supreme Court held that the domestic relations exception did not

⁷⁵ 136 U.S. 586 (1890).

⁷⁶ *L.R. v. Richards*, No. 89-4244, 1990 U.S. Dist. LEXIS 17068, at *2-3 (E.D. La. Dec. 10, 1990) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890)), *aff'd without opinion sub nom.*, *Ankenbrandt v. Richards*, 934 F.2d 1262 (5th Cir. 1991), *rev'd*, 112 S. Ct. 2206 (1992).

⁷⁷ *L.R.*, 1990 U.S. Dist. LEXIS 17068, at *3.

⁷⁸ Carol Ankenbrandt continuously represented that, because of the alleged abuse, a Louisiana juvenile court had terminated her former husband's parental rights and had also permanently enjoined him from contact with the children. In reaching a determination on the merits, none of the reviewing courts found it necessary to address the accuracy or implications of her representations.

⁷⁹ *L.R.*, 1990 U.S. Dist. LEXIS 17068, at *3-5 (citing *Younger v. Harris*, 401 U.S. 37 (1971)). For a detailed discussion of *Younger v. Harris*, see text *infra* accompanying notes 164-66.

⁸⁰ *Ankenbrandt v. Richards*, No. 91-3037 (5th Cir. May 31, 1991) (unpublished opinion on file with the author), *rev'd*, 112 S. Ct. 2206 (1992).

⁸¹ See *Ankenbrandt v. Richards*, 112 S. Ct. 855, 855 (citation omitted).

bar the district court from accepting jurisdiction over the suit and that the Eastern District of Louisiana had therefore erred in abstaining.⁸²

The Court said that, although "technically dicta," the statements made in *Barber* formed the basis for exempting divorce, alimony, and custody decree cases from federal diversity jurisdiction.⁸³ The Court observed that the *Barber* Court did not rely on the constitutional boundaries of Article III, Section 2⁸⁴ in justifying the exception. Instead, the *Barber* majority had grounded the limitation upon the narrower language of the Judiciary Act of 1789,⁸⁵ whose defining phrase "all suits of a civil nature at common law or in equity" remained a "key element" demarcating the terms of diversity jurisdiction prior to congressional replacement of the operative language in 1948 with the term "all civil actions."⁸⁶ Because the amendment was presumed to have been enacted "with full cognizance" of the Court's nearly century-long exception for core cases, the Court held that the extended passage of time without expression of congressional dissatisfaction reflected con-

⁸² On remand from the Supreme Court, the Fifth Circuit vacated and remanded the case to the district court for further proceedings. See *Ankenbrandt v. Richards*, No. 91-3037 (5th Cir. Aug. 13, 1992) (unpublished opinion on file with the author).

⁸³ See *Ankenbrandt*, 112 S. Ct. at 2208. The diversity statute as enacted in 1789 read as follows: "[T]he circuit courts shall have original cognizance, concurrent with the courts of several states, of all suits of a civil nature at common law or in equity . . ." Act of Sept. 24, 1789, § 11, 1 Stat. 73, 78. The federal diversity statute was amended in 1948 to provide that diversity jurisdiction extends to "all civil actions." Act of June 25, 1948, ch. 646, § 1332, 62 Stat. 930 (codified as amended at 28 U.S.C. § 1332 (1988)). The present diversity statute, 28 U.S.C. § 1332, provides in pertinent part that:

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state . . .

28 U.S.C. § 1332 (1988).

⁸⁴ In pertinent part, Article III, § 2 of the Constitution provides that: "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 . . . between Citizens of different States . . ." U.S. CONST. art. III, § 2. Much has been written about what exactly these phrases mean. See generally Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Lawrence G. Sager, *Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). A more complete bibliography is set forth *infra* note 300. Extensive literature also exists on the history of Article III. See generally Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Wythe Holt, "To Establish Justice": *Politics, the Judiciary Act of 1789, and the Invention of the Federal Courts*, 1989 DUKE L.J. 1421 (1989).

⁸⁵ Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78.

⁸⁶ *Ankenbrandt*, 112 S. Ct. at 2212 (citing 1948 Judicial Code and Judiciary Act, ch. 646, 62 Stat. 930 (1948) (codified as amended at 28 U.S.C. § 1332 (1988))).

gressional approval of a domestic relations exception for such actions.⁸⁷ Although the Court acknowledged that the *Barber* majority had not expressly referred to the diversity statute's limitation on "suits of a civil nature at common law or in equity,"⁸⁸ it reasoned that the *Barber* majority's silence as to the dissent's reasoning could fairly be inferred to mean that the majority's reasoning rested on the same basis.⁸⁹ With respect to Carol Ankenbrandt, however, the Court allowed her to pursue a tort action in federal court because her lawsuit did not seek a divorce, alimony or custody decree.⁹⁰ The Court did not, however, enunciate any guiding principles for lower courts to follow in making future determinations.⁹¹

Finally, the Court ruled that the district court erred in positing the doctrine of *Younger* abstention as an alternative ground for its holding, "because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" ⁹² The Court also surmised that future cases involving elements of the domestic relationship, even when the parties do not seek divorce, alimony or child custody, might implicate *Burford* abstention. For example, this occurs when a case presents "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case then at bar."⁹³ Under such circumstances, "it may be appropriate for the court to retain jurisdiction to insure prompt and just disposition of the matter upon the determination by the state court of the relevant issue."⁹⁴

⁸⁷ *Id.* at 2215; see also *Sutter v. Pitts*, 639 F.2d 842, 843 (1st Cir. 1981) ("[T]he exception has endured for too long for us to abandon it in the absence of contrary action by Congress or the Supreme Court."); *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.").

Professor Martin Redish has criticized this approach to federal jurisdiction by commenting that it "often seems irrelevant that something is being done incorrectly, as long as it has been done incorrectly long enough." Martin H. Redish, *Federal Common Law, Political Legitimacy, and the Interpretive Process: An "Institutionalist" Perspective*, 83 NW. U. L. REV. 761, 801-03 (1989). Although I share Professor Redish's frustration, barring either Supreme Court reversal or congressional revision, lower courts are bound by such declarations.

⁸⁸ *Ankenbrandt*, 112 S. Ct. at 2206.

⁸⁹ *Id.* at 2213.

⁹⁰ *Id.* at 2215.

⁹¹ *Id.*

⁹² *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)). Specifically, the district court had erred in relying on abstention principles because the Supreme Court had never before applied notions of comity under circumstances "when no state proceeding was pending nor any assertion of important state interests made." *Id.* at 2216 (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

⁹³ *Ankenbrandt*, 112 S. Ct. at 2216 (quoting *Colorado River*, 424 U.S. at 814).

⁹⁴ *Id.* at 2216 n.8.

Justice Blackmun concurred in the result reached by the majority while strenuously criticizing its reasoning.⁹⁵ Addressing the majority's statutory interpretation, Justice Blackmun stated that, despite the majority holding that § 1332 provides an exception for cases involving divorce, alimony, or child custody, "no such exception appears in the statute."⁹⁶

Justice Blackmun reasoned instead that the statute unambiguously extended district court jurisdiction to "all civil actions" between diverse parties meeting the requisite amount in controversy requirement. He said that he had "great difficulty" with the majority's approach because statutory language is ordinarily "conclusive" absent a "clearly expressed" intention to the contrary.⁹⁷ He could, therefore, "not see how a language change that, if anything, expands the jurisdictional scope of the statute can constitute evidence of approval of a prior narrow construction."⁹⁸ Congressional failure to refer expressly to domestic relations matters when amending the diversity statute proved at most that Congress did not realize § 1332 contained a domestic relations exception.⁹⁹

In addition, Justice Blackmun expressed the view that the "long-standing" federal court practice of refusing to hear core domestic relations cases is "precedent at most for continued discretionary abstention,"¹⁰⁰ which would provide a more "principled basis" for federal court disinclination to entertain domestic relations matters.¹⁰¹ He did not, however, elaborate on the circumstances in which abstention might apply in the future. Finally, Justice Blackmun cautioned that given the Court's construction of the phrase "common law or equity" to exclude divorce, alimony, and custody matters, the majority "casts grave doubts" upon the viability of such cases arising under Article III's grant of federal question jurisdiction over cases "in Law and Equity."¹⁰²

⁹⁵ *Id.* at 2217 (Blackmun, J., concurring).

⁹⁶ *Id.*

⁹⁷ *Id.* at 2217 (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980)).

⁹⁸ *Ankenbrandt*, 112 S. Ct. at 2217 (Blackmun, J., concurring).

⁹⁹ *Id.*; see also Daniel J. Meltzer, *The Judiciary's Bicentennial*, 56 U. CHI. L. REV. 423, 435 (1989) (noting that Congress ordinarily "has not been very attentive to legislation concerning the judiciary. It took nearly eight years for Congress to relieve the Justices of their circuit riding duties.").

¹⁰⁰ *Ankenbrandt*, 112 S. Ct. at 2217 (Blackmun, J., concurring).

¹⁰¹ *Id.* at 2221; see also *id.* at 2221 n.9 ("As this Court has previously observed that the various types of abstention are not 'rigid pigeonholes,' there is no need to affix a label to the abstention principles I suggest." (quoting *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 11 n.9 (1987))).

¹⁰² *Id.* at 2221 n.8 (citing U.S. CONST. art. III, § 2).

Also concurring in the Court's judgment, Justice Stevens noted that, regardless of individual views of the scope or application of the domestic relations exception, *Ankenbrandt* "should be an exceedingly easy case" because none of the Justices believed that the exception applied to the case at bar.¹⁰³ Accordingly, Justice Stevens stated that, he "would leave for another day consideration of whether any domestic relations cases necessarily fall outside of the jurisdiction of the federal courts and of what, if any, principle would justify such an exception to federal jurisdiction."¹⁰⁴

While the Supreme Court's decision in *Ankenbrandt* failed to establish sufficiently clear standards for federal courts to address domestic relations cases and resolve their conflicting approaches, logical extension of *Ankenbrandt's* reasoning indicates that federal court jurisdiction extends to all cases not expressly included in its interdiction. Regardless of what may be read from Justice Stevens's concurrence, the Court granted certiorari to explore the question of a domestic relations exception to federal jurisdiction and proceeded to exclude only certain core cases.

The Court's reaffirmation of a domestic relations exception to federal jurisdiction is also a narrowing one, prohibiting only "grants of divorce, alimony and child custody decrees." This concentration divides the category of core cases into two subcategories: (1) the granting of divorce, alimony, and child custody decrees ("primary core cases") and (2) all other cases in the core category ("secondary core cases"). Secondary core cases include proceedings for guardianship, affiliation, emancipation, truancy, neglect, abuse, adoption, and delinquency, as well as applications for name change and orders of protection. The *Ankenbrandt* opinion is entirely silent about the viability of federal adjudication of core enforcement cases. This silence is surprising in light of the fact that *Barber* itself is a core enforcement case. By not including secondary core and core enforcement cases among those prohibited by its interpretation of the Judiciary Act of 1789 and its subsequent amendments, the Court's ruling strongly implies that federal courts will have jurisdiction over these two categories of cases, provided they meet diversity or other jurisdictional requirements.

The Court's remand of Carol Ankenbrandt's tort suit to the Eastern District of Louisiana on the grounds that it did not seek a primary core determination clearly demonstrates federal jurisdiction over domestic tort cases, even though the Court declined to delineate any

¹⁰³ *Id.* at 2222 (Stevens and Thomas, J.J., concurring).

¹⁰⁴ *Id.*

guidelines for future lower court review. Moreover, even if the phrase "in Law and Equity" in the constitutional context has the same force as does "common law or equity" in the statutory context, such a limitation at most serves only to exclude primary core determinations from federal review. Hence, federal jurisdiction exists for all other suits seeking redress for violations of constitutional rights. Finally, although the Court suggested that *Burford* abstention could be appropriate in future domestic relations cases, it did not explain how such abstention would apply. A proposal for this type of abstention is set forth below.¹⁰⁵

The majority of the domestic relations cases rendered after *Ankenbrandt* have cited that decision for the proposition that core cases are excluded from federal jurisdiction.¹⁰⁶ At the same time, a small number of cases relying upon *Ankenbrandt* have discretely applied abstention principles.¹⁰⁷ Yet, to date, no court has attempted to explain the parameters of the domestic relations exception following *Ankenbrandt*. This lack of explanation is especially glaring as to *Ankenbrandt's* abstention components. Indeed, individual courts—even within the same circuit—seem confused regarding the application of abstention principles in this context. For example, one district court judge dismissed a child custody determination because it was beyond the court's jurisdiction,¹⁰⁸ while a second judge of the same court both abstained from and dismissed the same type of action for lack of jurisdiction.¹⁰⁹ A

¹⁰⁵ See *infra* notes 169–224 and accompanying text.

¹⁰⁶ See, e.g., *Wright v. Long*, No. 93-1727, 1994 U.S. App. LEXIS 2431 (7th Cir. Feb. 7, 1994) (precluding core cases under domestic jurisdictional exception); *Gragg v. Nebraska*, No. 93-4191-SAC, 1994 U.S. Dist. LEXIS 7330 (D. Kan. May 17, 1994) (determination of child custody decree was within domestic relations exception to jurisdiction); *Mitchell v. Cronin*, 92 Civ. 7360 (KMW), 1993 U.S. Dist. LEXIS 14590 (S.D.N.Y. Oct. 19, 1993) (only applying domestic relations exception to core cases and thus allowing plaintiff to amend her complaint in order to prosecute § 1983 action); *Ernst v. Children & Youth Servs. of Chester County*, Civ. Action No. 91-3735, 1993 U.S. Dist. LEXIS 12173 (E.D. Pa. Sept. 3, 1993) (interpreting domestic relations exception as only excepting core cases from federal jurisdiction); *Cahanin v. Tobias*, Civ. Action No. 92-4097 Sec. "D" (6), 1993 U.S. Dist. LEXIS 1111 (E.D. La. Feb. 3, 1993) (domestic relations exception precludes reevaluation of child support judgment).

¹⁰⁷ See, e.g., *Minot v. Eckhardt-Minot*, 13 F.3d 590 (2d Cir. 1994); *Nwankwo v. Nwankwo*, No. 92-1624, 1992 U.S. App. LEXIS 32222 (1st Cir. Dec. 9, 1992); *Lannan v. Maul*, 979 F.2d 627, 630–31 (8th Cir. 1992); *Tierra Child v. Stangler*, No. 92-0850-CV-W-6, 1992 U.S. Dist. LEXIS 19954 (W.D. Mo. Dec. 28, 1992).

¹⁰⁸ See *Greig v. Supreme Court of New York*, 93 Civ. 8210 (MBM), 1993 U.S. Dist. LEXIS 17114 (S.D.N.Y. Dec. 7, 1993).

¹⁰⁹ See *Durr v. Mobley*, 92 Civ. 8349 (SS), 1993 U.S. Dist. LEXIS 4601 (S.D.N.Y. April 12, 1993). The approach taken in *Greig* has met with favor in other circuits. See, e.g., *Kahn v. Kahn*, 21 F.3d 859 (8th Cir. 1994) (federal suit between former spouses based on former marital assets was precluded on basis of domestic relations exception rather than deferred on abstention principles); *Lee v. Washington*, No. 91-36277, 1993 U.S. App. LEXIS 2687 (9th Cir. Oct. 7, 1992)

proposal setting the parameters of a coherent abstention doctrine modelled after *Ankenbrandt* is set forth below in Part II.C.

II. SETTING THE PARAMETERS OF JURISDICTION AND ABSTENTION IN DOMESTIC RELATIONS CASES

This Part considers the issue of whether and how federal courts might exercise jurisdiction in non-primary core cases. Section A reviews the debate between advocates of mandatory jurisdiction and scholars who support judicially created exceptions to the assertion of federal court jurisdiction. Section B sets forth the existing abstention doctrines and considers their applicability to domestic relations matters. Section C proposes a new form of abstention based on the *Ankenbrandt* decision.

A. *The Debate Between Mandatory Jurisdiction and Equitable Restraint*

If federal district courts have jurisdiction over non-primary core cases, are they required to exercise the full extent of that authority? In other words, must federal courts hear all cases that fulfill statutorily created jurisdictional requirements, or may they decline jurisdiction through the equitable doctrine of abstention?¹¹⁰ This issue is the subject of a significant and unresolved debate among several august federal courts scholars. Although definitive resolution of that controversy is beyond the scope of this Article, it is a question that must be addressed if the new form of abstention proposed below is to be considered.

Over a century ago, in *Cohens v. Virginia*,¹¹¹ Chief Justice John Marshall observed that: "We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."¹¹² This

(holding that lack of jurisdiction rather than abstention was appropriate reason for district court's dismissal of suit based on child custody).

¹¹⁰ The discussion in this Section excludes subject matter areas where Congress has specifically prohibited federal court adjudication. *See, e.g.*, 28 U.S.C. § 1341 (1988) (Tax Injunction Act) ("The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."); 28 U.S.C. § 1342 (1988) (Johnson Act) ("The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility . . ."); 28 U.S.C. § 2283 (1988) (Anti-Injunction Act) ("A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.").

¹¹¹ 19 U.S. (6 Wheat.) 264 (1821).

¹¹² *Id.* at 404.

premise, which has gained standing through repetition,¹¹³ is the mainstay of a federal courts philosophy of mandatory jurisdiction whose followers believe that federal courts must adjudicate all cases within their jurisdictional purview.

The chief proponent of the mandatory jurisdiction theory is Professor Martin Redish, who utilizes a separation-of-powers model.¹¹⁴ Professor Redish argues that our constitutional democracy vests the unrepresentative judiciary with the power to invalidate statutes enacted by a representatively elected legislature. By extension, those democratic principles "clearly prohibit"¹¹⁵ federal courts from "openly ignor[ing] a legislative judgment on any ground other than unconstitutionality."¹¹⁶ Consequently, discretionary jurisdictional doctrines such as abstention amount to insupportable "usurpations" of legislative authority.¹¹⁷

In addition to Professor Redish, Professors Robert Clinton,¹¹⁸ Donald Doernberg¹¹⁹ and Donald Zeigler¹²⁰ support the mandatory jurisdiction theory. Professor Clinton exhaustively surveys the legislative

¹¹³ See, e.g., *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) (where plaintiff invokes federal jurisdiction federal court is "bound to take the case and proceed to judgment"); *Mondou v. New York, N.H. & H.R.R.*, 223 U.S. 1, 58 (1912) ("existence of jurisdiction creates an implication of duty to exercise it"); *Board of Comm'rs v. Aspinwall*, 65 U.S. (24 How.) 376, 385 (1861) (federal courts may not turn away claimants who have satisfied jurisdiction and process requirements); *Hyde v. Stone*, 61 U.S. (20 How.) 170, 175 (1857) (district courts cannot abdicate their duty to adjudicate all properly brought actions). For a recent, non-Supreme Court case, see *Burns v. Water*, 931 F.2d 140, 145 (1st Cir. 1991) ("Turning to the merits, we begin by noting that the principle that federal courts are obligated to determine a case once federal subject matter jurisdiction has been properly invoked was established early in the history of our system of courts."). An equally famous extension of Justice Marshall's statement in *Cohens* was announced in the abstention context. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (Federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."); see also *Deakins v. Monaghan*, 484 U.S. 193 (1988) (quoting *Colorado River*, 424 U.S. 800).

¹¹⁴ See Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984) [hereinafter Redish, *Separation of Powers*]. See generally Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and the "Martian Chronicles"*, 78 VA. L. REV. 1769 (1992) [hereinafter Redish, *Martian Chronicles*]; Martin H. Redish, *Judge-Made Abstention and the Fashionable Art of "Democracy Bashing"*, 40 CASE W. RES. L. REV. 1023 (1990) [hereinafter Redish, *Democracy Bashing*]; Martin H. Redish, *The Doctrine of Younger v. Harris: Deference in Search of a Rationale*, 63 CORNELL L. REV. 463 (1978) [hereinafter Redish, *Younger Deference*].

¹¹⁵ Redish, *Separation of Powers*, *supra* note 114, at 73.

¹¹⁶ *Id.* at 74.

¹¹⁷ See *id. passim*.

¹¹⁸ See generally Clinton, *supra* note 84.

¹¹⁹ See generally Donald L. Doernberg, "You Can Lead A Horse to Water . . .": *The Supreme Court's Refusal to Allow the Exercise of Original Jurisdiction Conferred by Congress*, 40 CASE W. RES. L. REV. 999 (1990).

¹²⁰ See generally Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J. 987 (1983).

history of Article III to prove that the Framers contemplated mandatory jurisdiction.¹²¹ Also relying on legislative history, in this case of the Civil Rights Act of 1871¹²² as interpreted by the Supreme Court in *Mitchum v. Foster*,¹²³ Professor Zeigler asserts that federal courts occupy a position of "primacy" in the adjudication of cases arising under their auspices.¹²⁴ Professor Doernberg, in turn, emphasizes the lack of textual and historical support for the Supreme Court's refusal to exercise its original jurisdiction.¹²⁵

In contrast to the mandatory jurisdiction school of federal courts theory, several federal courts scholars argue that federal courts are empowered with the necessary discretion to assert or decline jurisdiction. The most renowned of these commentators, Professor David Shapiro,¹²⁶ maintains that discretion is a time-honored component of grants of jurisdiction, with roots in both common law and equity. Thus, rather than being an untenable usurpation of the legislative function, "open acknowledgement of reasoned discretion is wholly consistent with the Anglo-American legal tradition"¹²⁷ and lends itself to effectual rules for governing federal court jurisdiction.¹²⁸

¹²¹ See Clinton, *supra* note 84, *passim*.

¹²² Ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1988)).

¹²³ 407 U.S. 225, 242 (1972).

¹²⁴ See Zeigler, *supra* note 120, *passim*; see also David P. Currie, *Res Judicata: The Neglected Defense*, 45 U. CHI. L. REV. 317 (1978) ("There was no excuse for the *Mitchum* decision."); Aviam Soifer & H.C. Macgill, *The Younger Doctrine: Reconstructing Reconstruction*, 55 TEX. L. REV. 1141, 1170-72 (1977) (intimating that Justices Marshall and Story were skeptical about state court ability to protect federal rights); Robert C. Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of Michigan v. Long*, 59 NOTRE DAME L. REV. 1118 (1984) (same). Other commentators take the position that the Constitution is inherently neutral as to forum. See, e.g., Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645 (1991); Martin H. Redish, *Supreme Court Review of State Court "Federal" Decisions: A Study in Interactive Federalism*, 19 GA. L. REV. 861 (1985); Michael Wells, *Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts*, 71 B.U. L. REV. 609 (1991).

¹²⁵ See Doernberg, *supra* note 119, *passim*.

¹²⁶ See David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543 (1985) [hereinafter Shapiro, *Jurisdiction and Discretion*]; see also David L. Shapiro, *Reflections on the Allocation of Jurisdiction Between State and Federal Courts: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts"*, 78 VA. L. REV. 1839 (1992) [hereinafter Shapiro, *Reflections*].

¹²⁷ See Shapiro, *Jurisdiction and Discretion*, *supra* note 126; see also Gene R. Shreve, *Federal Injunctions and the Public Interest*, 51 GEO. WASH. L. REV. 382, 388-98 (1983) (offering traditional reasons for denying equitable relief).

¹²⁸ Professor Shapiro proposes that (1) equitable discretion, (2) federalism and comity, (3) separation of powers, and (4) judicial administration provide the "appropriate criteria for channeling discretion in matters of jurisdiction." See Shapiro, *Jurisdiction and Discretion*, *supra* note 126, at 579 & *passim*.

In addition to Professor Shapiro, Professors Ann Althouse,¹²⁹ Jack Beermann,¹³⁰ Barry Friedman¹³¹ and Michael Wells¹³² have argued for the necessity of discretion. Professor Althouse points out that mandatory jurisdiction theory both neglects and relies upon statutory interpretation by the judiciary to argue that it is "treasonous" for federal courts to decline jurisdiction.¹³³ Professor Beermann suggests that Professor Redish's thesis is grounded in outdated notions regarding the separation of powers that fail to account for the modern "shared powers" view.¹³⁴ Contrary to Professor Clinton, Professor Friedman asserts that Article III lacks sufficient textual support to maintain a theory of mandatory jurisdiction.¹³⁵ Finally, Professor Wells maintains that, contrary to Professor Ziegler's view, Congress left the boundaries of § 1983 to the judiciary.¹³⁶

In addition to the above criticisms of mandatory jurisdiction offered by these academic scholars, three insightful criticisms of the theory have been offered by attorney James Rehnquist.¹³⁷ First, Mr. Rehnquist points out that Chief Justice Marshall's statement in *Cohens* is dictum:¹³⁸ the Court in *Cohens* was deciding the appellate jurisdiction of the Supreme Court and not original district court jurisdiction. Thus, if the *Cohens* Court created any "obligation" to hear cases, that obligation only applied to the Supreme Court itself and not to the lower federal courts. Second, Mr. Rehnquist observes that the logical extension of Professor Redish's theory would make "treasonous" any federal court exercise of jurisdiction not explicitly authorized by Congress.¹³⁹

¹²⁹ See Ann Althouse, *The Humble and the Treasonous: Judge-Made Jurisdiction Law*, 40 CASE W. RES. L. REV. 1035, 1041-46 (1990).

¹³⁰ See Jack M. Beermann, "Bad" Judicial Activism and Liberal Federal-Courts Doctrine: A Comment on Professor Doernberg and Professor Redish, 40 CASE W. RES. L. REV. 1053, 1061-66 (1990).

¹³¹ See Barry Friedman, *A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction*, 85 NW. U. L. REV. 1 (1990).

¹³² See Michael Wells, *Why Professor Redish is Wrong About Abstention*, 19 GA. L. REV. 1097 (1985).

¹³³ See Althouse, *supra* note 129, *passim*.

¹³⁴ See Beermann, *supra* note 130, *passim*.

¹³⁵ See Friedman, *supra* note 131, *passim*.

¹³⁶ See Wells, *supra* note 132, *passim*.

¹³⁷ The reasoning is set forth in Mr. Rehnquist's excellent article. See James C. Rehnquist, *Taking Comity Seriously: How To Neutralize The Abstention Doctrine*, 46 STAN. L. REV. 1049, 1102-03 & n.303 (1994).

¹³⁸ It seems profoundly ironic that in both the *Barber* and *Cohens* decisions it was dicta that engendered so much difficulty.

¹³⁹ See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809) ("The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it, where it is not conferred, are of equal obligation.").

Such a view would have invalidated pendent jurisdiction prior to enactment of § 1367,¹⁴⁰ as well as the ability of federal courts to dispose of various collateral issues after their jurisdiction has technically expired.¹⁴¹ Third, Professor Redish's assertions to the contrary, Congress does in fact delegate jurisdictional discretion to the district courts. One instance of this delegation occurs whenever Congress enacts legislation without explicitly setting forth a limitations period.¹⁴²

B. *Recognized Abstention Doctrines*

Attractive as the purity of mandatory jurisdiction may be in the abstract, abstention is very much a reality. The Supreme Court has recognized four¹⁴³ primary abstention doctrines,¹⁴⁴ each of which is

¹⁴⁰ See *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715 (1966); see also *Moore v. New York Cotton Exch.*, 270 U.S. 593, 607-10 (1926) (ancillary jurisdiction).

¹⁴¹ See *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393-98 (1990).

¹⁴² See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143 (1987) (applying a four-year limitation period to civil RICO claims).

¹⁴³ See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813-17 (1976). See generally *Law Enforcement Ins. Co. v. Corcoran*, 807 F.2d 38, 40 (2d Cir. 1986); *Bethpage Lutheran Servs., Inc. v. Weicker*, 777 F. Supp. 1093, 1098 n.5 (D. Conn. 1991), *aff'd*, 965 F.2d 1239 (2d Cir. 1992); *Colorado Interstate Gas Co. v. Oklahoma ex rel. Comm'rs. of Land Office*, 760 F. Supp. 1466, 1474 (D. Okla. 1991); 17A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4241, at 28 (2d ed. 1988). Not all courts agree with this categorization, and a good deal of intellectual energy has been spent attempting to identify the actual number of abstention doctrines. See, e.g., *Cox v. Planning Dist. I Community Mental Health & Mental Retardation Serv. Bd.*, 669 F.2d 940, 942 (4th Cir. 1982); *Smith v. Metropolitan Property and Liab. Ins. Co.*, 629 F.2d 757 (2d Cir. 1980); *Sederquist v. City of Tiburn*, 590 F.2d 278, 280 (9th Cir. 1978); *Empire Distribs. of N.C. v. Schiefflin & Co.*, 677 F. Supp. 847, 854 (D.N.C. 1988).

¹⁴⁴ See generally AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, OFFICIAL DRAFT AND COMMENTARY* (1969); Ann Althouse, *The Misguided Search for State Interest in Abstention Cases: Observations on the Occasion of Pennzoil v. Texaco*, 63 N.Y.U. L. REV. 1051 (1988) [hereinafter Althouse, *Misguided Search*]; Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485 (1987) [hereinafter Althouse, *Separate Sphere*]; Committee on Federal Courts of the New York State Bar Association, *Report on the Abstention Doctrine: The Consequences of Federal Court Deference to State Court Proceedings*, 122 F.R.D. 89 (1988); Martha A. Field, *Abstention in Constitutional Cases: The Scope of the Pullman Abstention Doctrine*, 122 U. PA. L. REV. 1071 (1974); Barry Friedman, *A Revisionist Theory of Abstention*, 88 MICH. L. REV. 530 (1989); Philip B. Kurland, *Toward a Co-operative Judicial Federalism: The Federal Court Abstention Doctrine*, 24 F.R.D. 481 (1959); Linda S. Mullenix, *A Branch Too Far: Pruning the Abstention Doctrine*, 75 GEO. L.J. 99 (1986); Redish, *Separation of Powers*, *supra* note 114; Rehnquist, *supra* note 137; David L. Shapiro, *Abstention and Primary Jurisdiction: Two Chips Off the Same Block?—A Comparative Analysis*, 60 CORNELL L. REV. 75 (1974); Wells, *supra* note 132; Kelly D. Hickman, Note, *Federal Court Abstention in Diversity of Citizenship Cases*, 62 S. CAL. L. REV. 1237 (1989); Patrick J. Smith, Note, *The Preemption Dimension of Abstention*, 89 COLUM. L. REV. 310 (1989). Although a complete bibliography of abstention articles is beyond the space constraints of this Article, the above list represents some of the more significant contributions to the field.

named after the case in which its principles were first enunciated:¹⁴⁵ (1) *Railroad Commission v. Pullman Co.* ("Pullman abstention"),¹⁴⁶ (2) *Burford v. Sun Oil Co.* ("Burford abstention"),¹⁴⁷ (3) *Younger v. Harris* ("Younger abstention"),¹⁴⁸ and (4) *Colorado River Water Conservation District v. United States* ("Colorado River abstention").¹⁴⁹ Each of these seminal cases, discussed in chronological order below, has been followed in turn by secondary cases which have sought, with varying degrees of success, to explicate and apply the jurisdictional boundaries

¹⁴⁵ There are also equitable precursors to the formal abstention doctrine cases. See, e.g., *Spielman Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935) (barring exceptional circumstances a federal court sitting in equity will not interfere with a state criminal prosecution); *Pennsylvania v. Williams*, 294 U.S. 176 (1935) (federal equity court will not appoint a liquidating receiver when state procedure existed); *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159 (1929) (federal court deference to state court interpretation of complex regulatory scheme); *Fenner v. Boykin*, 271 U.S. 240 (1926) (only exceptional circumstances warrant federal court staying state officials from commencing criminal prosecution). For a more complete collection of these cases, see *Burford v. Sun Oil Co.*, 319 U.S. 315, 333 n.29 (1943); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500-01 (1941).

¹⁴⁶ 312 U.S. at 501. See generally Thomas G. Buchanan, *Pullman Abstention: Reconsidering the Boundaries*, 59 TEMP. L.Q. 1243 (1986); Julie A. Davies, *Pullman and Burford Abstention: Clarifying the Roles of State and Federal Courts in Constitutional Cases*, 20 U.C. DAVIS L. REV. 1 (1986); Theodore B. Eichelberger, *Certification Statutes: Engineering a Solution to Pullman Abstention Delay*, 59 NOTRE DAME L. REV. 1339 (1984); Field, *supra* note 144; Keith Werhan, *Pullman Abstention After Pennhurst: A Comment on Judicial Federalism*, 27 WM. & MARY L. REV. 449 (1986).

¹⁴⁷ 319 U.S. at 334. See generally MARTIN H. REDISH, *FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER* 243-49 (1980); Davies, *supra* note 145; David M. Liebenthal, *A Dialogue on England: The England Case, Its Effect on the Abstention Doctrine, and Some Suggested Solutions*, 18 CASE W. RES. L. REV. 157 (1966); Charles S. Treat, *Abstention by Federal Courts in Suits Challenging Administrative Decisions: The Scope of the Burford Doctrine*, 46 U. CHI. L. REV. 971 (1979); Gordon G. Young, *Federal Court Abstention and State Administrative Law From Burford to Ankenbrandt: Fifty Years of Judicial Federalism Under Burford v. Sun Oil Co. and Kindred Doctrines*, 42 DEPAUL L. REV. 859 (1993). Professor Gordon Young's article is by far the most comprehensive of the above cited references.

¹⁴⁸ 401 U.S. 37 (1971). See generally George D. Brown, *Dealing With Younger Abstention as a Part of Federal Courts Reform: The Role of the Vanishing Proposal*, 1991 B.Y.U. L. REV. 987 (1991); George D. Brown, *When Federalism and Separation of Powers Collide: Rethinking Younger Abstention*, 59 GEO. WASH. L. REV. 114 (1990); David Mason, *Slogan or Substance? Understanding "Our Federalism" and Younger Abstention*, 73 CORNELL L. REV. 852 (1988); Redish, *Younger Deference*, *supra* note 114; Howard B. Stravitz, *Younger Abstention Reaches A Civil Maturity: Pennzoil Co. v. Texaco Inc.*, 57 FORDHAM L. REV. 997 (1989); Georgene M. Vairo, *Making Younger Civil: The Consequences of Federal Court Deference to State Court Proceedings—A Response to Professor Stravitz*, 58 FORDHAM L. REV. 173 (1989); Zeigler, *supra* note 120.

¹⁴⁹ 424 U.S. 800, 817-19 (1976). See generally Robert H. Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111 (1978); Charles M. Elliott & Kenneth Balcomb, *Deference to State Courts in the Adjudication of Reserved Water Rights*, 53 DEN. L.J. 643 (1976); Mullenix, *supra* note 144; David A. Sonenshein, *Abstention: The Crooked Course of Colorado River*, 59 TUL. L. REV. 651 (1985);

of abstention.¹⁵⁰ *Burford* abstention has propagated corollaries in *Alabama Public Service Commission v. Southern Railway*,¹⁵¹ *Louisiana Power & Light Co. v. City of Thibodaux*,¹⁵² *New Orleans Public Service, Inc. v. Council of New Orleans*,¹⁵³ and most recently, *Ankenbrandt*.¹⁵⁴ Because this Article will show that *Burford* type abstention is the most pertinent to domestic relations matters, each of the *Burford* corollaries is addressed at length in Section C below.¹⁵⁵

1. *Pullman* Abstention

In *Pullman*, the Supreme Court first coined the term "abstention" to describe a district court's refusal to exert its jurisdiction.¹⁵⁶ Under *Pullman*, federal courts may postpone hearing cases over which they have jurisdiction if resolution of an unclear or unconstrued state issue might avoid a constitutional question,¹⁵⁷ even in the absence of a

Comment, *Federal Court Stays and Dismissals in Deference to Parallel State Court Proceedings: The Impact of Colorado River*, 44 U. CHI. L. REV. 641 (1977).

¹⁵⁰ See, e.g., *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 361 (1989) (delineating *Burford's* administrative prong); *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627-28 (1986) (extending the scope of *Younger* abstention to state administrative proceedings); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983) (establishing a six prong balancing test for determining the existence of "exceptional circumstances" under *Colorado River* abstention); *Judice v. Vail*, 430 U.S. 327 (1977) (applying *Younger* to state civil contempt proceedings); *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415-17 (1964) (allowing *Pullman*-abstained cases to return to federal court for post-state court resolution of remaining federal issues); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135-36 (1962) (extending *Pullman* abstention to suits at law); *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 29-30 (1959) (applying *Burford* abstention to a state court proceeding); *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988) (adding an additional four factors for consideration of *Colorado River* abstention).

¹⁵¹ 341 U.S. 341, 345-50 (1951).

¹⁵² 360 U.S. at 29-30.

¹⁵³ 491 U.S. at 361.

¹⁵⁴ See *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2215-16 (1992).

¹⁵⁵ See *infra* text accompanying notes 169-213.

¹⁵⁶ See *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 501 (1941); see also *Zwickler v. Koota*, 389 U.S. 241, 248 (1967) (describing abstention as a "judge-made doctrine . . . first fashioned" in *Pullman*). The term "abstention" appears in Supreme Court opinions eight times prior to the *Pullman* decision, but never in the context of jurisdictional refusal. See *Young*, *supra* note 147, at 869 n.45.

¹⁵⁷ See *Pullman*, 312 U.S. at 501. In *Pullman*, black porters challenged the constitutionality of a Texas Railroad Commission order requiring railway sleeper cars to be supervised by conductors, who were all white. The Court held that the district court should have abstained from the case so it could be resolved by a Texas state court. See *id.* at 497-98. As Professor Martha Field has aptly noted, the underlying rationale of *Pullman* is questionable at best, because the state law question was neither complex nor unclear. See *Field*, *supra* note 144, at 1078 nn.22-23. In addition, *Pullman* marked a departure from general federal courts practice that when issues are

pending state proceeding.¹⁵⁸ Although originally applied to a request for equitable relief,¹⁵⁹ *Pullman* has been enlarged to include suits at law.¹⁶⁰ Under *Pullman*, unless a litigant voluntarily submits her federal claims for state court determination, she reserves the right to submit or relitigate federal issues of law with the abstaining district court.¹⁶¹

2. *Burford* Abstention

Although delineated in greater detail below, the basic tenet of *Burford* abstention is that federal courts will not adjudicate complex state law questions that are related to state administrative procedures.¹⁶² The outer boundaries of the *Burford* abstention doctrine are unclear, because subsequent cases extend *Burford* to state judicial proceedings. Like *Pullman* abstention, *Burford* does not require a pending parallel state action. Unlike *Pullman*, when jurisdiction is ceded to the state court system under *Burford*, litigants are usually barred from returning to federal fora.¹⁶³

decided on nonconstitutional grounds—a fairly routine occurrence—the alternative resolution is determined by the federal court. See, e.g., *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288 (1936); *Siler v. Louisville & N.R.R.*, 213 U.S. 175 (1909).

Federal court avoidance of constitutional issues has been debated by several august scholars. See generally ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962); Gerald Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Shapiro, *Jurisdiction and Discretion*, *supra* note 126.

¹⁵⁸ See *Pullman*, 312 U.S. at 501–02 (holding that, in the absence of a pending state action, one should be brought while the federal court retained jurisdiction over the federal claim).

¹⁵⁹ See *id.* at 497.

¹⁶⁰ See *Fornaris v. Ridge Tool Co.*, 400 U.S. 41 (1970) (contract action); *United Gas Pipe Line Co. v. Ideal Cement Co.*, 369 U.S. 134, 135–36 (1962) (contest over municipal sales tax); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207 (1960) (contract suit).

¹⁶¹ See *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 415–17 (1964). The underlying rationale of the *England* decision is peculiar enough to warrant attention. The district court ordered the federal plaintiff to adjudicate his federal claim in state court under opaque state law rather than in federal court under fairly well established constitutional principles. The claimant was then given the option of returning to federal court if he was still dissatisfied with the result of state adjudication after exhausting all available appellate avenues. See *id.* at 414–17. It was perhaps for this reason that Justice William O. Douglas, a member of the unanimous *Pullman* Court, mused, while concurring in the result, that "*Pullman* from the start seemed to have some qualities of a legal research luxury." *Id.* at 425.

The stalling of proceedings has been a major criticism aimed at the *Pullman* doctrine. See, e.g., David P. Currie, *The Federal Courts and the American Law Institute: Part II*, 36 U. CHI. L. REV. 268, 317 (1969); Kurland, *supra* note 144, at 489. For a general evaluation of *England*, see Liebenthal, *supra* note 147.

¹⁶² See *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943).

¹⁶³ See, e.g., *American Bank & Trust Co. v. Dent*, 982 F.2d 917, 922 n.5 (5th Cir. 1993); *Brandenburg v. Seidel*, 859 F.2d 1179, 1195 n.18 (4th Cir. 1988); *Griffin Hosp. v. Commission on Hosps. & Health Care*, 782 F.2d 24, 25 n.1 (2d Cir. 1986).

3. *Younger* Abstention

The *Younger* abstention doctrine originally prohibited federal courts from enjoining ongoing state court criminal proceedings.¹⁶⁴ It has now been expanded, in certain instances, to both civil and administrative actions brought by states in their own tribunals.¹⁶⁵ Subsequent to *Younger* abstention, criminal defendants may use habeas corpus proceedings to return to federal court after their state court convictions.¹⁶⁶

4. *Colorado River* Abstention

In *Colorado River*, the United States Supreme Court held that federal courts may abstain from hearing cases when the parties seek coterminous resolution in the respective state courts and the federal courts are presented with "truly unusual" facts.¹⁶⁷

¹⁶⁴ See *Younger v. Harris*, 401 U.S. 37, 41 (1971).

¹⁶⁵ See, e.g., *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 627-28 (1986) (state administrative proceedings); *Judice v. Vail*, 430 U.S. 327 (1977) (state civil contempt proceedings); see also *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1 (1987); *Middlesex County Ethics Comm'n v. Garden State Bar Ass'n*, 457 U.S. 423 (1982).

¹⁶⁶ See, e.g., *Brown v. Allen*, 344 U.S. 443, 463-65 (1965); *Fay v. Noia*, 372 U.S. 391, 420-22 (1963). Professor Young has noted that, "given recent limitations on federal habeas corpus actions, the consequences of *Younger* abstention" preclude federal reevaluation. See Young, *supra* note 147, at 872 & n.70 (citing *Teague v. Lane*, 489 U.S. 288, 311-12, 316, 318-21 (1989); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Stone v. Powell*, 428 U.S. 465, 495 (1976)). See generally Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963); Robert M. Cover & T. Alexander Aleinikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Larry W. Yackle, *Explaining Habeas Corpus*, 60 N.Y.U. L. REV. 991 (1985); *Developments in the Law—Federal Habeas Corpus*, 83 HARV. L. REV. 1038 (1970).

¹⁶⁷ See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817-19 (1976). In *Colorado River*, the United States brought an action against some 1,000 water users seeking a declaration of its rights to Colorado river water under both federal and state statutory law. Shortly afterward, one of the defendants attempted to join the United States in a pending state administrative proceeding wherein the United States's rights could be determined. See *id.* at 806. When the United States was joined in the state proceeding, the federal defendants succeeded in persuading the district court to abstain from hearing the case. The Tenth Circuit reversed the district court only to be reversed in turn by the Supreme Court. See *id.* To assist future lower court consideration of whether abstention was warranted, the Court listed six factors for consideration, including the "clear federal policy" of "avoiding piecemeal adjudication." See *id.* at 819.

In *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1983), the Court revisited its *Colorado River* decision. This time, the Court held that abstention was not warranted due to the absence of "exceptional circumstances." *Id.* at 16. In an attempt to clarify its ruling, the Court set forth a balancing test that included the following six factors: (1) assertion of jurisdiction; (2) federal forum inconvenience; (3) avoidance of piecemeal litigation; (4) temporal primacy of jurisdiction; (5) applicability of the forum's law; and (6) state court ability to protect federal rights. See *id.* at 15-16.

Colorado River abstention normally precludes federal forum re litigation.¹⁶⁸

C. Applying Abstention Principles to Non-Primary Core Domestic Relations Cases

1. Applying *Burford* Abstention to Domestic Relations Cases

When examining the validity of abstaining from domestic relations cases, federal courts have relied upon each of the *Pullman*,¹⁶⁹ *Burford*,¹⁷⁰ *Younger*¹⁷¹ and *Colorado River*¹⁷² abstention doctrines. Several courts have also abstained from hearing domestic relations matters without referring to a specific abstention doctrine, relying instead on a general principle that federal courts decline jurisdiction over domestic relations cases.¹⁷³ Although cases arising under any of the individual abstention doctrines may present valid reasons for federal court abstention, the *Burford* line of cases is the most pertinent to the domestic relations context because it allows federal courts to defer to state courts

Professor Linda Mullenix has been highly critical of the Court's approach, commenting that the Court's articulation of factors "amounts to little more than a laundry list. . . . Virtually no meaning, analysis, or content is given to these factors." See Mullenix, *supra* note 144, at 119. By contrast, the Seventh Circuit has added four additional factors for consideration, increasing the complexity of the *Colorado River/Moses H. Cone* balancing test. See *Interstate Material Corp. v. City of Chicago*, 847 F.2d 1285, 1288 (7th Cir. 1988).

¹⁶⁸ *But see* *Mahaffey v. Bechtel Assocs. Professional Corp.*, 699 F.2d 545 (D.C. Cir. 1983); *Evans Transp. Co. v. Scullin Steel Co.*, 693 F.2d 715 (7th Cir. 1982); *Kelser v. Anne Arundel County Dep't of Social Servs.*, 679 F.2d 1092, 1094 (4th Cir. 1982).

¹⁶⁹ See, e.g., *Lynk v. LaPorte Superior Court*, 789 F.2d 554, 567-69 (7th Cir. 1986).

¹⁷⁰ See, e.g., *Wasserman v. Wasserman*, 671 F.2d 832 (4th Cir.), *cert. denied*, 459 U.S. 1014 (1982); *Bennett v. Bennett*, 682 F.2d 1039 (D.C. Cir. 1982); *Lloyd v. Loeffler*, 694 F.2d 489 (7th Cir. 1982); *Diaz v. Diaz*, 568 F.2d 1061, 1062 (4th Cir. 1977); *Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel*, 490 F.2d 509, 515-16 (2d Cir. 1973); *Bell v. Bell*, 411 F. Supp. 716, 718 (W.D. Wash. 1976).

¹⁷¹ See, e.g., *Parker v. Turner*, 626 F.2d 1, 8 (6th Cir. 1980); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 633 (6th Cir. 1978); *Williams v. Williams*, 532 F.2d 120, 122 (8th Cir. 1976); *Neustein v. Orbach*, 732 F. Supp. 333, 341-42 (E.D.N.Y. 1990); *DeWyse v. Smith*, 535 F. Supp. 952, 956 (W.D. Mich. 1982); *Brown v. Jones*, 473 F. Supp. 439, 447-52 (N.D. Tex. 1979).

¹⁷² See, e.g., *Friends of Children, Inc. v. Matava*, 766 F.2d 35, 36-37 (1st Cir. 1985); *Kelser*, 679 F.2d at 1094; *Acord v. Parsons*, 551 F. Supp. 115 (W.D. Va. 1982); *Zaubi v. Hoehme*, 530 F. Supp. 831, 834 (W.D. Pa. 1980).

¹⁷³ See, e.g., *Congleton v. Holy Cross Child Placement Agency, Inc.*, 919 F.2d 1077, 1079 (5th Cir. 1990); *Ingram v. Hayes*, 866 F.2d 368, 369-70 (11th Cir. 1988); *Goins v. Goins*, 777 F.2d 1059, 1063 (5th Cir. 1985); *Peterson v. Babbitt*, 708 F.2d 465, 466 (9th Cir. 1983); *Wilkins v. Rogers*, 581 F.2d 399, 404 (4th Cir. 1978); *Bossom v. Bossom*, 551 F.2d 474, 475-76 (2d Cir. 1976); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968); *Short ex rel. Oosterhous v. Short*, 730 F. Supp. 1037, 1039-40 (D. Colo. 1990); *Smith v. Pension Plan of Bethlehem Steel Corp.*, 715 F. Supp. 715, 718 (W.D. Pa. 1989); *Daniels v. Stovall*, 660 F. Supp. 301, 304 (S.D. Tex. 1987); *Beliveau v. Beliveau*, 655 F. Supp. 478, 479 (D. Me. 1987); *Cook v. Winters*, 645 F. Supp. 158, 159-60 (S.D.

in areas of traditional state court expertise.¹⁷⁴ In the remainder of this Article, I will first explain why the Court's reasoning in *Ankenbrandt* demonstrates that *Burford* abstention principles may apply to non-primary core domestic suits, and will then delineate the parameters for *Burford*-type abstention in this area.¹⁷⁵

2. A Closer Examination of *Burford* and Its Progeny

In 1943, only two years after *Pullman*, the Texas Railroad Commission was once more a principal in an abstention case before the

Tex. 1986); *Bates v. Bushen*, 407 F. Supp. 163, 164 (D. Me. 1976); *LaMontagne v. LaMontagne*, 394 F. Supp. 1159, 1160-61 (D. Mass. 1975); *Bacon v. Bacon*, 365 F. Supp. 1019, 1021 (D. Or. 1973). Two Fifth Circuit cases have even upheld this principle in strongly worded dicta when the facts of the individual suits did not themselves merit abstention. See *Jagiella v. Jagiella*, 647 F.2d 561, 566 (5th Cir. 1981); *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978).

¹⁷⁴ See *Ankenbrandt v. Richards*, 112 S. Ct. 2206, 2216 (1992); see also *Nasser v. City of Homewood*, 671 F.2d 432, 439-40 (11th Cir. 1982) (describing *Burford* abstention as "perhaps the most potent device" for declining jurisdiction). The scope of *Burford* abstention is not, however, unlimited. For example, *Burford* abstention has been held not to bar civil rights litigation. See, e.g., *Association for Retarded Citizens of N. Am. v. Olson*, 713 F.2d 1384, 1391 (8th Cir. 1983) ("Cases involving questions of civil rights are the least likely candidates for abstention."); *United States v. Puerto Rico*, 764 F. Supp. 220, 226 (D.P.R. 1991) (holding abstention "particularly inappropriate in civil rights cases" (quoting *Association of Relatives & Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 102 (D.P.R. 1990))).

¹⁷⁵ Before explicating the relevance of *Burford* abstention, it bears noting why the other abstention doctrines are less appropriate than *Burford* in the domestic relations context.

Pullman abstention requires federal courts to abstain from hearing cases that state courts can resolve by applying state law in a manner that relieves federal courts from making constitutional determinations. However, because federal question cases usually raise constitutional issues that are beyond the scope of related core issues, a federal court abstaining under the *Pullman* doctrine will not ordinarily be able to have constitutional issues resolved through other means by a state court. At best, a district court may abstain in order to facilitate state adjudication of everything *but* the constitutional issues. Although such action is entirely valid—indeed it parallels the proposal set forth below—it is not in accord with the goals established by *Pullman*.

Similarly, although it is often mentioned, *Younger* abstention is not germane to the domestic relations exception because it generally prohibits federal courts from enjoining ongoing state court criminal, civil, and administrative proceedings. The thrust of domestic relations cases is therefore inapposite to *Younger* abstention. Federal courts are more than willing to allow state courts to resolve cases with domestic underpinnings and are thus unlikely to hinder state court litigation in favor of their own determination. *But see Parker v. Turner*, 626 F.2d 1, 8 (6th Cir. 1980); *Neustein v. Orbach*, 732 F. Supp. 333, 341-42 (E.D.N.Y. 1990); *DeWise v. Smith*, 535 F. Supp. 952, 956 (W.D. Mich. 1982).

Finally, because *Colorado River* abstention is contingent upon "exceptional circumstances" presenting "truly unusual" facts which in the past have focused on the geographical disparity of large numbers of parties, *Colorado River* issues are unlikely to arise in the context of domestic disputes. *But see Friends of Children, Inc. v. Matava*, 766 F.2d 35, 36-37 (1st Cir. 1985); *Kelser v. Anne Arundel County Dep't of Social Servs.*, 679 F.2d 1092, 1094 (4th Cir. 1982); *Acord v. Parsons*, 551 F. Supp. 115 (W.D. Va. 1982); *Zaubi v. Hojme*, 530 F. Supp. 831, 834 (W.D. Pa. 1980).

Supreme Court. In *Burford*,¹⁷⁶ the Sun Oil Company filed suit in federal court challenging the legitimacy of a Texas Railroad Commission ruling that allowed a rival oil company to drill and pump oil wells on a commonly held oil field.¹⁷⁷ Sun Oil's claim could have been brought in Travis County court, which routinely exercised review over the Commission's rulings.¹⁷⁸ Instead, a federal action was brought under both diversity and federal question jurisdiction, asserting the invalidity of the Commission's ruling on both state statutory and federal constitutional grounds.¹⁷⁹ The three-judge district court dismissed the suit, and Sun Oil appealed.

Upholding the district court, the Supreme Court described the Texas courts as "working partners with the Railroad Commission in the business of creating a regulatory system for the oil industry" that should be allowed unimpeded exercise of their expertise.¹⁸⁰ Although the Court did not characterize the Texas courts' judicial input into the Commission's decisions as either judicial or legislative,¹⁸¹ by affirming the district court the Supreme Court directed any further action by Sun Oil to the Travis County court.¹⁸²

While the Court did not elaborate on the abstention principles set forth in the *Pullman* decision, it did cite *Pullman* as support for denying injunctive relief in order to defer to a state's public policy interest:

Equity's discretion to decline to exercise its jurisdiction may be applied when judicial restraint seems required by considerations of general welfare. "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved."¹⁸³

Although some courts have interpreted *Burford* to apply only to administrative cases, commentators have pointed out that the Court

¹⁷⁶ *Burford v. Sun Oil Co.*, 319 U.S. 315, 334 (1943).

¹⁷⁷ *See id.* at 315-17.

¹⁷⁸ *See id.* at 325-26.

¹⁷⁹ *See id.* at 316-17.

¹⁸⁰ *See id.* at 326.

¹⁸¹ *See Burford*, 319 U.S. at 325-26.

¹⁸² In fact, following district court dismissal of its suit, Sun Oil obtained the exact relief in state court that it had sought from the federal forum. *See Burford v. Sun Oil Co.*, 186 S.W.2d 306 (Tex. Civ. App. 1944).

¹⁸³ *Id.* at 333 n.29 (quoting *Virginian Ry. v. System Fed'n*, 300 U.S. 515, 552 (1937)); *see also Silverman v. Barry*, 727 F.2d 1121, 1124 n.4 (D.C. Cir. 1984) (stressing sensitivity to state policy as justifying abstention).

has not clearly delineated the circumstances under which *Burford* abstention is appropriate.¹⁸⁴ Professor Gordon Young posits that, although state interest justified abstention in *Burford*, "the administrative nature of the state law . . . tipped the scales."¹⁸⁵ I believe Professor Young's conclusion is correct. As Justice Felix Frankfurter observed, even scholars at the time of the *Burford* decision treated administrative law as "exotic."¹⁸⁶ The Court may have therefore been inclined to let states sort out this "exotic" area of law on their own.

Moreover, the bright line drawn by requiring the presence of administrative action in order to invoke *Burford* abstention is no longer operative. The fine work of Professors Richard Fallon and Daniel Meltzer has demonstrated that the line between law making and law application is now severely blurred.¹⁸⁷ The opinions of several courts reflect this blurring. For example, in *Planned Parenthood League v. Bellotti*,¹⁸⁸ the First Circuit held that *Burford* suggests abstention even when the state agency is the judiciary,¹⁸⁹ and at least two other First Circuit decisions have followed that reasoning.¹⁹⁰ Similarly, the Second Circuit seems to have abrogated any connection with state administrative proceedings for *Burford* abstention.¹⁹¹ The Fifth Circuit has determined in *DuBroff v. DuBroff* that *Burford* abstention is appropriate in domestic relations cases because "there is perhaps no state administra-

¹⁸⁴ See WRIGHT ET AL., *supra* note 143, at § 4241, pp. 10–11; see also Field, *supra* note 144, at 1157 (writing prior to both the *NOPSI* and *Ankenbrandt* decisions that lower courts were not limiting *Burford* abstention to cases in which there was a single avenue of state judicial review).

¹⁸⁵ See Young, *supra* note 147, at 886.

¹⁸⁶ See Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 615 (1927).

¹⁸⁷ See Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1756–64 (1991).

¹⁸⁸ 868 F.2d 459 (1st Cir. 1989). Citations in this and the immediately following footnotes are based upon Professor Young's research. See Young, *supra* note 147, at 901–02 and accompanying notes.

¹⁸⁹ See *Planned Parenthood*, 868 F.2d at 464 (emphasizing "a federal court's responsibility to avoid usurping a state's authority to supervise its own administrative body, in this case the state judiciary as it implements regulations of minors' abortions").

¹⁹⁰ See *Kartell v. Blue Shield of Mass. Inc.*, 592 F.2d 1191, 1194–95 (1st Cir. 1979) (*Burford* abstention appropriate from antitrust suit where state agency proceeding in question was state insurance commission approval of medical supply contract); *Barry v. St. Paul Fire & Marine Ins. Co.*, 555 F.2d 3, 13 (1st Cir. 1977) (*Burford* abstention fitting in consumer suit over insurance premiums because the action "would affect the state's ratemaking machinery and policies").

¹⁹¹ See, e.g., *West v. City of Morrisville*, 728 F.2d 130, 134–35 (2d Cir. 1983) (deferring to an administrative order that had not been directly challenged); *Pineman v. Oechslein*, 637 F.2d 601, 602 (2d Cir. 1981) (challenge to state employees benefit statute); *Smith v. Property & Liab. Ins. Co.*, 629 F.2d 757, 758–61 (2d Cir. 1980) (insurance policy beneficiary's attempt to recover proceeds); *Brown v. First Nat'l City Bank*, 503 F.2d 114, 118 (2d Cir. 1974) (abstaining in dispute regarding banking statute despite lack of any administrative scheme).

tive scheme in which federal court intrusions are less appropriate than domestic relations law."¹⁹²

The Supreme Court revisited *Burford* eight years after its original decision in yet another case involving a railroad litigant. In *Alabama Public Service Commission v. Southern Railway*, the Court reversed a district court exercise of jurisdiction on abstention grounds.¹⁹³ In *Alabama Public Service*, the Southern Railway Company challenged a state commission decision denying its petition to discontinue a certain service line. As in *Burford*, although a state court remedy existed, the railroad sought to enjoin the state commission in federal court.¹⁹⁴ Emphasizing the "primary authority" of the states over intrastate rail operations, the Court reversed the district court in favor of abstention.¹⁹⁵ The Court's ruling evoked not only sensitivity to a peculiarly local concern, but also deference to the state court that would ultimately resolve the railroad's challenge. *Alabama Public Service* therefore acceded not only to administrative law concerns, but also to the province of state court determination of an issue of state public policy.

After another eight-year interval, the Supreme Court, in *Louisiana Power & Light Co. v. City of Thibodaux*,¹⁹⁶ revisited the *Burford* line of abstention cases.¹⁹⁷ In *Thibodaux*, the Court upheld a district court's decision to abstain from hearing an eminent domain proceeding that also could have been initiated in state court.¹⁹⁸ In an opinion authored by Justice Frankfurter, the Court reasoned that issues of unclear state law so "intimately involved with sovereign prerogative" justified the district court's abstention.¹⁹⁹

¹⁹² 833 F.2d 557, 561-62 (5th Cir. 1987). This decision was apparently (and ironically) overlooked by the *Ankenbrandt* appellate decisions.

¹⁹³ 341 U.S. 341, 345-51 (1951).

¹⁹⁴ See *id.* at 342-43.

¹⁹⁵ See *id.* at 345.

¹⁹⁶ 360 U.S. 25, 29-30 (1959). See generally Note, *Louisiana Power & Light Co. v. City of Thibodaux*, 69 YALE L.J. 643 (1960); Note, *Louisiana Power & Light Co. v. City of Thibodaux*, 44 MINN. L. REV. 1015 (1944).

¹⁹⁷ See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976) (suggesting that *Thibodaux* abstention is a subset of *Burford* abstention). Professor Young has posited the inverse. Namely, that *Burford* (and by implication, *Ankenbrandt*) are subsets of the generally larger *Thibodaux* doctrine. See Young, *supra* note 147, at 940-46. My position is that *Burford* abstention really has two prongs, one requiring administrative action and the other which does not require administrative action, and that the gap between the two, paralleling the gap between law-making and law-finding, has narrowed considerably.

¹⁹⁸ See *Thibodaux*, 360 U.S. at 28-29.

¹⁹⁹ *Id.* Justice Frankfurter performed a leading role in the development of abstention theory. See generally Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967).

Thibodaux reinforced the *Alabama Public Service* Court's expansion of *Burford* abstention to include deference to state courts outside the administrative context because of sensitivity to state public policy concerns. While *Alabama Public Service* deferred to the "primary authority" of states,²⁰⁰ *Thibodaux* yielded to an area "intimately involved with sovereign prerogative."²⁰¹ In both of these cases—as in *Burford*—the Court recognized that the underlying actions could have been initiated in state court and that each of these cases had the practical effect of returning the matters to the respective state courts.²⁰²

Thirty years after *Burford*, the Supreme Court re-examined abstention from cases involving state administrative agency action in *New Orleans Public Service, Inc. v. Council of New Orleans ("NOBSI")*.²⁰³ In *NOPSI*, the plaintiffs challenged a ratemaking decision of the New Orleans City Council in federal court, asserting that an earlier Federal Energy Regulatory Commission ruling preempted the Council's ruling. The district court refused to exercise jurisdiction for several reasons, including *Burford* abstention. The Fifth Circuit affirmed and the plaintiffs appealed.²⁰⁴

The Supreme Court reversed the Fifth Circuit, declining to apply *Burford* abstention because, inter alia, federal adjudication of the preemption claim "would not disrupt the State's attempt to ensure uniformity in the treatment of an 'essentially local problem.'"²⁰⁵ The Court explained that, pending available state court review, *Burford* abstention was proper:

(1) when there are "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar;" or (2) where the "exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."²⁰⁶

NOPSI, therefore, stands for the proposition that "talismanic connections between a federal case and a state's administrative process will

²⁰⁰ See *Alabama Pub. Serv. Comm'n v. Southern Ry.*, 341 U.S. 341, 345 (1951).

²⁰¹ See *Thibodaux*, 360 U.S. at 28–29.

²⁰² See *Thibodaux*, 360 U.S. at 29; *Alabama Pub. Serv.*, 341 U.S. at 342–43.

²⁰³ 491 U.S. 350 (1989).

²⁰⁴ *Id.* at 358.

²⁰⁵ *Id.* at 362 (quoting *Alabama Pub. Serv.*, 341 U.S. at 347).

²⁰⁶ *Id.* at 361 (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

no longer justify abstention under *Burford*.²⁰⁷ Supporting this reading is the fact that when *NOPSI* describes the second prong under which *Burford* abstention is possible—"state efforts to establish a coherent policy with respect to a matter of substantial public concern"²⁰⁸—it is in fact using the same language that the *Colorado River* Court used when describing the state court proceedings in *Thibodaux*.²⁰⁹

Finally, in *Ankenbrandt*,²¹⁰ the Supreme Court continued this pattern of expansion when it held that *Burford* abstention principles could apply to federal suits presenting "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result of the case then at bar"²¹¹ or "involving elements of the domestic relationship" which "depended on a determination of the status of the parties."²¹² In a footnote, the Court added that when applying *Burford* abstention "it may be appropriate" for the district court to retain jurisdiction over the case in order "to [e]nsure prompt and just disposition of the matter" after state court determination.²¹³ *Ankenbrandt* therefore signifies another solidification of the line of cases under *Burford* in which administrative action is not a prerequisite for federal court deferral to state interests.

3. Applying *Ankenbrandt* Abstention to Domestic Relations Cases

The majority of cases to cite the *Ankenbrandt* decision do so for the proposition that primary core cases are excluded from federal jurisdiction.²¹⁴ At the same time, a small number of cases relying upon *Ankenbrandt* have separately applied discrete principles of that case. Although none of these courts has attempted to explain the parameters of the domestic relations exception, each may be understood to develop a different aspect of the decision. The relevant cases in this group are:

²⁰⁷ Young, *supra* note 147, at 909.

²⁰⁸ *New Orleans*, 491 U.S. at 361.

²⁰⁹ See *Colorado River*, 424 U.S. at 814.

²¹⁰ *Ankenbrandt v. Richards*, 112 S. Ct. 2206 (1992).

²¹¹ *Id.* at 2216 (quoting *Colorado River*, 424 U.S. at 814).

²¹² *Id.* at 2216.

²¹³ *Id.* at 2216 n.8.

²¹⁴ See, e.g., *Wright v. Long*, No. 93-1727, 1994 U.S. App. LEXIS 2431 (7th Cir. Feb. 7, 1994) (precluding core cases under the domestic jurisdictional exception); *Gragg v. Nebraska*, No. 93-4191-SAC, 1994 U.S. Dist. LEXIS 7330 (D. Ks. May 17, 1994) (determination of a child custody decree was within the domestic relations exception to jurisdiction); *Mitchell v. Cronin*, 92 Civ. 7360 (KMW), 1993 U.S. Dist. LEXIS 14590 (S.D.N.Y. Oct. 19, 1993) (only applying the domestic relations exception to core cases and thus allowing a plaintiff to amend her complaint in order to prosecute a § 1983 action); *Ernst v. Children & Youth Servs. of Chester County*, Civ. Action

- (1) *Greig v. Supreme Court of New York*,²¹⁵ dismissing an action for child custody and a protection order for lack of subject matter jurisdiction;²¹⁶
- (2) *Nwankwo v. Nwankwo*,²¹⁷ holding that domestic tort actions could proceed in federal court "unless abstention is otherwise required . . . to avoid interference with . . . important questions of state policy;"²¹⁸
- (3) *Lannan v. Maul*,²¹⁹ declaring a breach of contract action not sufficiently enmeshed in either domestic relations or ongoing state controversy to invoke the core exception or the proper use of abstention;²²⁰
- (4a) *Minot v. Eckhardt-Minot*,²²¹ upholding a district court's decision under *Burford* to abstain from and remand a case involving the tort of custodial interference, on the ground that it was a difficult area of law not yet developed by the state courts;²²² and
- (4b) *Farkas v. D'Oca*,²²³ abstaining under *Burford* from a core matrimonial action while also maintaining jurisdiction over a

No. 91-3735, 1993 U.S. Dist. LEXIS 12173 (E.D. Pa. Sept. 3, 1993) (interpreting the domestic relations exception as only excepting core cases from federal jurisdiction); *Cahanin v. Tobias*, Civ. Action No. 92-4097 Sec. "D" (6), 1993 U.S. Dist. LEXIS 1111 (E.D. La. Feb. 3, 1993) (domestic relations exception precludes reevaluation of child support judgment).

²¹⁵ No. 93 Civ. 8210 (MBM), 1993 U.S. Dist. LEXIS 17114 (S.D.N.Y. Dec. 7, 1993).

²¹⁶ *Id.*; see also *Kahn v. Kahn*, 21 F.3d 859 (8th Cir. 1994) (federal suit between former spouses based on former marital assets was precluded on basis of domestic relations exception rather than deferred on abstention principles); *Lee v. Washington*, No. 91-36277, 1993 U.S. App. LEXIS 2687 (9th Cir. Oct. 7, 1992) (holding that lack of jurisdiction rather than abstention was appropriate reason for district court's dismissal of suit based on child custody). *But see Durr v. Mobley*, 92 Civ. 8349 (SS), 1993 U.S. Dist. LEXIS 4601 (S.D.N.Y. April 12, 1993) (both abstaining from and dismissing because of lack of jurisdiction, a child custody and support action).

²¹⁷ No. 92-1624, 1992 U.S. App. LEXIS 32222 (1st Cir. Dec. 9, 1992).

²¹⁸ *Id.*

²¹⁹ 979 F.2d 627 (8th Cir. 1992).

²²⁰ *Id.* at 630-31. *But see* Carla K. Heathershaw, Note, *A New Interpretation of the Domestic Relations Exception in the Eighth Circuit*: *Lannan v. Maul*, 27 CREIGHTON L. REV. 853, 873 (1994) (arguing that the Eighth Circuit erred in the *Lannan* decision because "it found that the [domestic relations] exception could not apply in a contract case"). Ms. Heathershaw's assertion is based on a flawed reading of the *Lannan* decision. The Eighth Circuit never held that contracts were exempt from the federal court adjudication. Instead, the *Lannan* court held that the particular facts of the case at bar were not themselves enmeshed sufficiently in either the former spouses' domestic relations or an ongoing state controversy to invoke the core exception. See *Lannan*, 979 F.2d at 630-31.

²²¹ 13 F.3d 590 (2d Cir. 1994).

²²² *Id.* at 594. The Second Circuit asserted that "the only significant recent New York State case even considering these sorts of claims is *Harley v. Harley*, 565 N.Y.S.2d 625 (1991), appeal dismissed, 584 N.Y.S.2d 441 (1992), and it does not illuminate the status under New York law of the torts alleged" in the case at bar. *Id.* at 594 n.2.

²²³ 857 F. Supp. 300 (S.D.N.Y. 1994).

related RICO claim based on a fraudulent scheme to defraud the former spouse of marital assets.²²⁴

Collectively, the principles that emerge from these cases are that:

- (1) primary core cases lack jurisdiction and should be dismissed;
- (2) non-primary core cases raising secondary core case issues have jurisdiction, but are appropriate for abstention;
- (3) non-primary core cases that raise standard state law questions have jurisdiction and should be heard;
- (4) when non-primary core cases raise both primary core and non-primary core issues, the court should dismiss the primary core issue and (a) abstain from the non-primary core issue raising unique state law questions, and (b) adjudicate the standard law issues.

In sum, under *Ankenbrandt* abstention, federal courts would abstain from hearing all secondary core cases as well as actions raising difficult issues of unresolved state law. The reasons justifying the jurisdictional contours of *Ankenbrandt* abstention are explicated in the next Part.

III. POLICY CONSIDERATIONS FOR HEARING NON-PRIMARY CORE DOMESTIC RELATIONS CASES

Federal courts have offered several policy reasons for declining to hear domestic relations cases arising under the diversity statute.²²⁵ These rationales include special state interest and expertise, disdain toward family law, and federal docket congestion. As demonstrated below, countervailing policies favoring federal court adjudication of non-primary core actions outweigh each of these considerations. These countervailing policy considerations include the growing national nature of family law, traditional diversity concerns of averting prejudice toward out-of-state claimants, the general institutional duty of courts to adjudicate cases within their purview, and the protection of federal rights. Interwoven with this analysis are prudential concerns of federalism, comity and parity.

²²⁴ *Id.*

²²⁵ See generally *Poker*, *supra* note 24, at 149 ("Although many courts doubt the validity of the constitutional and statutory rationales for the domestic relations exception, they frequently offer policy considerations to justify the exception . . ."); Note, *Federal Jurisdiction—Diversity of Citizenship—Validity of a Foreign Divorce Decree*, 54 *IOWA L. REV.* 390, 394–95 (1968) (approving considerations that decline jurisdiction).

A. *Non-Primary Core Diversity Cases*

1. Special State Interest and Expertise

One policy reason proffered by federal courts for not hearing domestic relations cases is that states have developed a special interest and expertise in their adjudication.²²⁶ Specifically, district courts maintain that domestic relations cases address "local" concerns²²⁷ of special interest to the individual states,²²⁸ and that because of this interest the states have provided their judiciaries with attendant social service agencies.²²⁹ As a result, federal courts claim that state courts have developed an expertise for domestic cases²³⁰ which are thus "peculiarly unsuited

²²⁶ Cases are repeated in the following footnotes as a way of illustrating that district courts rely upon the same rationales, often citing them verbatim from other jurisdictions. This illustrates that the exception is more a rote maxim than a well thought out doctrine. See generally *Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198 (1980).

²²⁷ See, e.g., *Drewes v. Ilnicki*, 863 F.2d 469, 471 (6th Cir. 1988) (noting that the exception "continues to the present day because the field of domestic relations involves local problems"); *Lloyd v. Loeffler*, 694 F.2d 489, 493 (7th Cir. 1982) (federal courts "are not local institutions"); *Ellis v. Hamilton*, 669 F.2d 510, 515-16 (7th Cir.), cert. denied, 459 U.S. 1069 (1982) (recognizing that family law is peculiarly local, the federal courts continue to adhere tenaciously to the judge-made rule that excepts most domestic relations cases from the diversity jurisdiction); *McCullough ex rel. Jordan v. McCullough*, 760 F. Supp. 613, 616 (E.D. Mich. 1991) ("The field of domestic relations involves local problems . . ."); *Taylor v. Wettstein*, 746 F. Supp. 713, 716 (S.D. Ohio 1989) ("It is axiomatic that the field of domestic relations involves local problems . . ."); *Yelverton v. Yelverton*, 614 F. Supp. 528, 529 (N.D. Ind. 1985) ("[D]omestic relations matters, being of local concern, are best left to the jurisdictional province of state courts.").

²²⁸ See, e.g., *Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 22 (1st Cir. 1991) (crediting "the strong state interest in domestic relations"); *Vaughan v. Smithson*, 883 F.2d 63, 65 (10th Cir. 1989) ("the states have a strong interest in domestic relations matters"); *Raftery v. Scott*, 756 F.2d 335, 343 (4th Cir. 1985) ("the state through its courts has a stronger and more direct interest in the domestic relations of its citizens than does the federal court"); *Ruffalo ex rel. Ruffalo v. Civiletti*, 702 F.2d 710, 717 (8th Cir. 1983) ("federal courts have consistently refused to entertain diversity suits involving domestic relations" because of "the strong state interest in domestic relations matters"); *CSIBI v. Fustos*, 670 F.2d 134, 136-37 (9th Cir. 1982) ("States have an interest in family relations superior to that of the federal government . . ."); *Ellison v. Sadur*, 700 F. Supp. 54, 55 (D.D.C. 1988) ("This exception is largely grounded in the belief that state courts have a particularly strong interest . . . in resolving disputes involving family relationships."); *Tuerffs v. Tuerffs*, 117 F.R.D. 674 (D. Colo. 1987) (noting the "state's strong interest in domestic relations cases").

²²⁹ See, e.g., *Fernos-Lopez*, 929 F.2d at 22 (acknowledging the state courts' "ability to provide ongoing supervision, the availability there of professional support services"); *Vaughan*, 883 F.2d at 65 (domestic "disputes often require ongoing supervision"); *Rykers v. Alford*, 832 F.2d 895, 899-900 (5th Cir. 1987) (domestic "disputes often require ongoing supervision"); *Lloyd*, 694 F.2d at 493 (the federal courts "do not have staffs of social workers"); *Donnelly v. Donnelly*, 515 F.2d 129, 130 (1st Cir. 1975) (yielding to "the power and the resources of state family courts"); *McCullough ex rel. Jordan*, 760 F. Supp. at 616 (because of administrative machinery, domestic cases are "peculiarly suited to state regulation and control").

²³⁰ See, e.g., *Fernos-Lopez*, 929 F.2d at 22 (praising "the relative expertise of state courts"); *Vaughan*, 883 F.2d at 65 (the states "have developed an expertise in settling family disputes");

to control by the federal courts.²³¹ Moreover, district courts disavowing jurisdiction caution that federal adjudication raises the danger of conflicting federal and state decrees.²³²

The reasoning of courts averring special state interest in domestic relations is flawed in a number of respects. First, it rests on the notion that "neither the Constitution nor laws of the United States [are] seen as affecting the family unit."²³³ This view cannot be countenanced in light of the reality of federal law's involvement with the family. Indeed, "a complex mosaic of federal regulation of economic and social relations now overlays state laws" of domestic relations.²³⁴ To be convinced of this assertion, one need only view the plethora of federal legislation²³⁵ and constitutional litigation²³⁶ that affects members of the familial unit and their respective rights.

Next, to the extent that special state interest extends to domestic relations cases, this interest exists only for primary and secondary core

Rykers, 832 F.2d at 899-900 ("the state courts have greater expertise and interest in domestic matters"); *Ruffalo ex rel. Ruffalo*, 702 F.2d at 717 (federal courts should yield to "the competence of state courts in settling family disputes"); *Lloyd*, 694 F.2d at 493 ("[T]he normal responsibilities of federal judges [do not] give them the experience they would need to be able to resolve domestic disputes with skill and sensitivity."); *Fustos*, 670 F.2d at 136-37 ("[S]tate courts have more expertise in the field of domestic relations."); *McCullough ex rel. Jordan*, 760 F. Supp. at 616 ("state courts have developed a proficiency and expertise in these cases"); *Ellison*, 700 F. Supp. at 55 (recognizing that the state courts "have developed special competence" in domestic matters); *Tuerffs*, 117 F.R.D. at 675 ("the competence of state courts to settle [domestic] disputes").

²³¹ *Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981); see also *Vaughan*, 883 F.2d at 65 (adjudicating domestic disputes is "a task for which the federal courts are not suited"); *Lloyd*, 694 F.2d at 493 ("the federal courts are not, as a matter of fact, competent tribunals to handle" domestic relations cases); *Donnelly*, 515 F.2d at 130 ("the federal court is ill equipped to determine family obligations").

²³² See, e.g., *Fernos-Lopez*, 929 F.2d at 22 (fearing "the undesirability of potentially incompatible federal and state decrees in this area"); *Vaughan*, 883 F.2d at 65 ("federal adjudication of such disputes increases the chances of incompatible or duplicative federal and state court decrees"); *Rykers*, 832 F.2d at 899-900 ("piecemeal adjudication of such disputes increases the chance of different court systems handing down incompatible decrees"); *Ruffalo ex rel. Ruffalo*, 702 F.2d at 717 (cautioning against "the possibility of incompatible federal and state court decrees"); *Tuerffs*, 117 F.R.D. at 675 ("the possibility of conflicting federal and state court decrees preclude this court from assuming jurisdiction").

²³³ *Flood v. Braaten*, 727 F.2d 303, 307 n.17 (3d Cir. 1984).

²³⁴ *Resnik*, *supra* note 10, at 1750.

²³⁵ See, e.g., Parental Kidnapping Prevention Act of 1980 § 8(a), 28 U.S.C. § 1738A (1988); Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-28, 670-79a (1988); Child Abuse and Treatment Act, 42 U.S.C. §§ 5101-06 (1988); Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 42 U.S.C. §§ 5111-14 (1988); Family Violence Prevention and Services Act, 42 U.S.C. §§ 10401-15 (1988 & Supp. V 1993); Victims of Child Abuse Act of 1990, 42 U.S.C. §§ 13001-41 (1988 & Supp. V 1993).

²³⁶ See, e.g., *Orr v. Orr* 440 U.S. 268, 274-84 (1979) (ruling that gender-specific alimony statute was unconstitutional); *Zablocki v. Redhail*, 434 U.S. 374, 380 (1978) (holding unconstitutional a state statute that restricted people with child support obligations from marrying); *Loving*

cases that comprise the state regulation abstained from under *Ankenbrandt*, i.e., the granting of divorce, alimony or custody decrees. Beyond core issues, unless a case raises a difficult issue of unresolved state law—also abstained from under *Ankenbrandt*—it cannot be distinguished from other areas concurrently adjudicated by federal and state courts. Additionally, if state expertise exists in non-primary core matters, it is only because federal courts have not been given the opportunity to hear such cases. At the same time, because “federal courts have acquired a considerable expertness in the interpretation and application of federal law,”²³⁷ it can be argued that a concurrent federal expertise exists over certain domestic cases.

Finally, after *Guaranty Trust Co. v. York*,

[i]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court.²³⁸

Thus, federal judges should apply state domestic law in as uniform a manner as state judges, while also ensuring the preservation of a uniform state system of regulation.

2. Bias Against Hearing “Family Law” Matters

Also underlying federal court reluctance to adjudicate domestic relations matters is a bias against “family law” issues,²³⁹ which are often perceived as being “beneath” the proper scope of federal considera-

v. Virginia, 388 U.S. 1, 7–12 (1967) (striking down state ban of interracial marriages); *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925) (recognizing right of parents to “direct [their children’s] destiny” and “the liberty . . . to direct [their] upbringing and education” even when those decisions deviate from cultural norms); *Meyer v. Nebraska*, 262 U.S. 390 (1922) (acknowledging parental right to “bring up children”); see also *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Parents have a Fourteenth Amendment protected fundamental liberty interest in the care, custody and management of their children. See *Santosky v. Kramer*, 455 U.S. 745, 753 (1982); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977); *Smith v. Org. of Foster Families*, 431 U.S. 816, 845 (1977); see also *Stanley v. Illinois*, 405 U.S. 645, 651–52 (1972) (parental rights outweigh those “liberties which derive merely from shifting economic arrangements” (quoting *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurter, J., concurring))); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (“[T]he custody, care and nurture of the child reside first in the parents whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.”).

²³⁷ AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 164–68 (1965).

²³⁸ 326 U.S. 99, 109 (1945).

²³⁹ Professor Barbara Wand first made the assertion that federal courts have a “distaste” for

tion.²⁴⁰ For example, federal courts that have declined jurisdiction over domestic relations matters have described them as "vexatious,"²⁴¹ "little family quarrel[s],"²⁴² "intra-family feuds,"²⁴³ and "imbroglio[s]"²⁴⁴ that "embroil"²⁴⁵ and "enmesh"²⁴⁶ the courts in cases that require their delving into "sordid evidence"²⁴⁷ and "trading in wares from the foul rag-and-bone shop of the heart."²⁴⁸ Indeed, at least one judge has openly acknowledged that domestic relations cases are "particularly distasteful,"²⁴⁹ and that "exploring a thicket of state decisional law" is a "waste" of time²⁵⁰ of which federal courts should allow state courts the "dubious honor exclusively."²⁵¹

In her study of the interrelationship between women and federal courts and the role that gender plays in allocating work between the state and federal court systems,²⁵² Professor Judith

domestic matters in 1985. See Barbara Freedman Wand, *A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction*, 30 VILL. L. REV. 307, 385-86 (1985).

²⁴⁰ Federal judicial elitism extends beyond the realm of family law. See, e.g., Robert Bork, *Dealing with the Overload in Article III Courts*, 70 F.R.D. 231, 238-39 (1976) (addressing the National Conference of Causes of Popular Dissatisfaction with Administration of Justice, Pound Conference) ("someone far less qualified than a judge" can adjudicate cases about social security, food stamps, federal employers' liability, consumer products, and other federal legislation).

²⁴¹ *Thrower v. Cox*, 425 F. Supp. 570, 573 (D.S.C. 1976).

²⁴² *Hinton v. Hinton*, 436 F.2d 211, 212 (D.C. Cir. 1970).

²⁴³ *Bacon v. Bacon*, 365 F. Supp. 1019, 1020 (D. Or. 1975).

²⁴⁴ *Overman v. United States*, 563 F.2d 1287, 1292 (8th Cir. 1977).

²⁴⁵ *LaMontagne v. LaMontagne*, 394 F. Supp. 1159, 1161 (1975) (quoting *Hernstadt v. Hernstadt*, 373 F.2d 316, 318 (2d Cir. 1967)).

²⁴⁶ *Eberhardt v. Eberhardt*, 672 F. Supp. 464, 465 (D. Colo. 1987) (quoting *Rogers v. Platt*, 814 F.2d 683, 691 (D.C. Cir. 1987)).

²⁴⁷ *Thrower v. Cox*, 425 F. Supp. 570, 573 (D.S.C. 1976).

²⁴⁸ *Cole v. Cole*, 633 F.2d 1083, 1089 (4th Cir. 1980).

²⁴⁹ See *id.* at 1087-88; see also *Atwood*, *supra* note 25, at 627 ("The domestic relations exception . . . saves the courts from a distasteful category of litigation.").

²⁵⁰ Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973).

²⁵¹ *Thrower*, 425 F. Supp. at 573. Unfortunately, state courts are as likely to be prejudiced against women as are their federal counterparts. As reported by the New York Task Force on Women in the Courts:

[G]ender bias against women . . . is a pervasive problem with grave consequences. . . . Cultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility.

Report of the New York Task Force on Women in the Courts, 15 FORDHAM URB. L.J. 11, 17-18 (1986-1987).

²⁵² See generally JOAN WALLACH SCOTT, *GENDER AND THE POLITICS OF HISTORY* 2 (1988) ("[G]ender . . . means knowledge about sexual difference . . . produced by cultures and societies of human relationships . . ."); BARRIE THORNE ET AL., *LANGUAGE, GENDER, AND SOCIETY: OPENING A SECOND DECADE OF RESEARCH*, IN *LANGUAGE, GENDER AND SOCIETY* 7, 12-15 (1983) ("gender is not a unitary, or 'natural' fact, but takes shape in concrete, historically changing social

Resnik²⁵³ posits that underlying federal court disinterest is the association of family law with "private" state controlled law and a corresponding association of federal courts with "public" law such as commerce, constitutional law, and federal statutory enforcement.²⁵⁴ The assumption that federal courts perform duties central to the nation and thus beyond the realm of local family law "reiterates the marginalization of the lives and work of [family issues] in national culture."²⁵⁵ It also bears noting that the indifference of the federal courts to domestic relations is reflected by the almost complete absence of the topic from casebooks compiled by federal court commentators.²⁵⁶

Bias of federal court judges against domestic relations cases does not provide a valid reason for excising these cases from federal pur-

relationships"); Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15 (1991) (pointing out some of the shortcomings of gender-neutral language).

²⁵³ See generally Resnik, *supra* note 10, *passim*. Much of what follows in this Section is derived from Professor Resnik's excellent work and is indebted to her insight.

²⁵⁴ See *id.* at 1749, 1696.

²⁵⁵ *Id.* at 1669. Professor Resnik's assertion is borne out not only in the cases cited above, but also in her description of the attempts to enact the Violence Against Women Act, S. 15, 102d Cong., 1st Sess. (1991). Although the Act was enacted after Professor Resnik's article was published, the points she makes are still pertinent. In 1991, Congress reviewed legislation intended to respond to the "national tragedy" that makes women the victims of violence in homes, workplaces, and on the street." See Sen. Comm. on the Judiciary, THE VIOLENCE AGAINST WOMEN ACT OF 1991, S. REP. NO. 197, 102d Cong., 1st Sess. 39 (1991). The Act contained two jurisdictional provisions that would have conferred federal court review. The first provided federal civil rights remedies to any person who was victimized by a "crime of violence, motivated by gender." See S. 15 at § 301. The second made it a federal crime to travel interstate "to injure, harass, or intimidate a spouse or intimate partner." See *id.* at § 2261. The Judicial Conference of the United States opposed enactment of the civil rights provisions of the Act, because it felt that conferring federal jurisdiction would "embroil the federal courts in domestic relations disputes" and "flood [federal courts] with cases that have been traditionally within the province of the state courts." REPORT OF THE JUDICIAL CONFERENCE ACT AD HOC COMMITTEE ON GENDER-BASED VIOLENCE 1, 7 (1991). The Chief Justice also opposed the Act and recommended that Congress heed the Judicial Conference's advice so that limited federal court time and resources could be "reserved for issues where important national interests predominate." William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THE THIRD BRANCH 1, 2 (1992).

Although I tend to agree with Professor Resnik, one could argue the opposite position with much confidence, i.e., that the general tendency to "federalize" local crimes, which are essentially local activities, removes from the states an area over which they should retain exclusive authority. Such an assertion would allow federal financial or technological assistance when necessary but prevent the federal courts from being transformed into police courts, as they already have in the drug area.

²⁵⁶ See DAVID P. CURRIE, FEDERAL COURT CASES AND MATERIALS (4th ed. 1990); RAY FOR-ESTER & JOHN E. MOYE, FEDERAL JURISDICTION AND PROCEDURE: CASES AND MATERIALS (3d ed. 1977); PETER W. LOW & JOHN CALVIN JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS (2d ed. 1989); CHARLES T. MCCORMICK ET AL., CASES AND MATERIALS ON FEDERAL COURTS (8th ed. 1988). As Professor Resnik has admonished, the

[a]ttitudes of the federal judiciary towards family law and towards women's roles in the federal courts will not shift without self-conscious decisions to reconsider both

view. The integrity of the judicial system is called into question if judges may state, when presented with domestic matters, simply that they have more important matters to consider. Moreover, any federal bias is at least mirrored if not magnified at the state court level²⁵⁷ so that excising domestic cases from federal review will not abrogate prejudice. Also, traditional reasons for federal court adjudication support diversity jurisdiction.²⁵⁸ In addition to notions of comity and federalism set forth below, the protection of out-of-state litigants from local bias bolsters the need for federal adjudication.²⁵⁹

Two venerable commentators have questioned the extent of prejudice against out-of-state litigants both at the time of the adoption of the Constitution²⁶⁰ as well as in modern times.²⁶¹ Specifically, Judge Henry Friendly argues that protecting creditors from pro-debtor state courts was an equally strong incentive for the adoption of diversity

past and present. The federal judiciary and its commentators must reclaim the history heretofore denied about the ongoing relations of the federal courts with family life.

Resnik, *supra* note 10, at 1767.

²⁵⁷ See, e.g., JUDICIAL COUNCIL ADVISORY COMMITTEE ON GENDER BIAS IN THE COURTS, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS, DRAFT REPORT, § 4, at 55 (1990) ("Judges rate the family law assignment as their lowest preference by a wide margin . . ."); REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 77 (1990) (reporting judges' strong "dislike" of family law assignments); see also MARYLAND SPECIAL JOINT COMMITTEE, GENDER BIAS IN THE COURTS (1989) (recognizing that domestic relations law experience was less useful for becoming a judge than was jury trial and criminal prosecution experience); REPORT OF THE CONNECTICUT TASK FORCE, GENDER, JUSTICE AND THE COURTS 39 (1991) ("Some attorneys felt that because women attorneys . . . practiced juvenile or domestic law," they were less likely to be selected by Judicial Selection Commission for judgeships).

²⁵⁸ See Resnik, *supra* note 10, at 1761 ("Today's 'buzz' word 'diversity' may have special meaning within debates about the breadth and role of 'diversity jurisdiction' in that excluding cases in which domestic relations issues are raised is a way to make 'diversity jurisdiction' less 'diverse.'").

²⁵⁹ See *Bank of the United States v. DeVeaux*, 9 U.S. (5 Cranch) 61, 87 (1809); Erwin Chemerinsky & Larry Kramer, *Defining the Role of the Federal Courts*, 1990 B.Y.U. L. REV. 77, 82 (1990) ("The traditional explanation for this branch of federal jurisdiction is the fear that state courts will favor their citizens over nonresidents."); Cover, *supra* note 9, at 644 ("diversity jurisdiction is usually justified and explained as a device for avoiding partiality of local tribunals to local litigants"); John P. Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. ON LEGIS. 403, 406 (1979); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 83 (1937).

²⁶⁰ See Henry Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 493-95 (1928) [hereinafter Friendly, *Diversity Jurisdiction*]; see also HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 139-52 (1973) [hereinafter FRIENDLY, FEDERAL JURISDICTION]. But see Warren, *supra* note 259, at 52 (pointing out that Senate Bill 1, which later became the Judiciary Act of 1789, provided for diversity jurisdiction).

²⁶¹ See CURRIE, *supra* note 256, at 7; Larry Kramer, *Diversity Jurisdiction*, 1990 B.Y.U. L. REV. 97, 119-21 (1990) (concluding that the classic contention that diversity counterbalanced local bias is exaggerated).

jurisdiction.²⁶² Professor David Currie asserts that geographical prejudice has been replaced by more pertinent prejudices.²⁶³

Nevertheless, fear of local prejudice remains a real concern in domestic cases.²⁶⁴ As observed by the Third Circuit:

[Domestic relations] cases truly represent one of the contemporary essential functions of the diversity grant. Here the specter of local bias, a matter of some conjecture in 1787 and of presumptive dubiety now, surfaces with unfortunate frequency. . . . [They] relate to the interstate arbitral function for which the federal courts are well suited.²⁶⁵

The necessary enactment of uniform nationwide laws such as the Uniform Child Custody Jurisdiction Act²⁶⁶ and the Parental Kidnapping Prevention Act²⁶⁷ ("PKPA") prove the Third Circuit's allegations of bias. In *Thompson v. Thompson* the Supreme Court appeared to recognize the bias potentially inherent in domestic relations cases.²⁶⁸ The Court noted that jurisdictional deadlocks among states in child custody cases as well as a nationwide problem of parental kidnapping underlay a congressional aim in PKPA of extending the requirements of the Full Faith and Credit Clause to custody determinations.²⁶⁹ Ironically, the Court in *Thompson*, which addressed a contentious inter-circuit conflict, held that PKPA did not confer jurisdiction upon the federal district courts to arbitrate between conflicting state decrees.²⁷⁰ Such a ruling calls into question the usefulness of PKPA, as well as the federal practice of not enforcing decrees.²⁷¹

²⁶² See Friendly, *Diversity Jurisdiction*, *supra* note 260, at 495-97.

²⁶³ See CURRIE, *supra* note 256, at 7.

²⁶⁴ See generally William H. Rodgers, Jr. & Linda A. Rodgers, *The Disparity Between Due Process and Full Faith and Credit: The Problem of the Somewhere Wife*, 67 COLUM. L. REV. 1363, 1366 (1967) (demonstrating prejudice in enforcing divorce decrees); Barbara Stark, *Divorce Law, Feminism, and Psychoanalysis: In Dreams Began Responsibilities*, 38 UCLA L. REV. 1483, 1518-20 (1991) (noting concern about bias in domestic cases).

²⁶⁵ DiRuggiero v. Rodgers, 743 F.2d 1009, 1019 (3d Cir. 1984).

²⁶⁶ 9 U.L.A. 116 (1988). See generally Russell M. Coombs, *Interstate Child Custody: Jurisdiction, Recognition, and Enforcement*, 66 MINN. L. REV. 711 (1982); Henry H. Foster, *Child Custody Jurisdiction: UCCJA and PKPA*, 27 N.Y.L. SCH. L. REV. 297 (1981); John J. Sampson, *What's Wrong With the UCCJA? Punitive Decrees and Hometown Decisions Are Making a Mockery of This Uniform Act*, FAM. ADVOC., Spring 1981, at 28.

²⁶⁷ 28 U.S.C. §§ 1901-1963 (1988).

²⁶⁸ 484 U.S. 174 (1988).

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ See Chemerinsky & Kramer, *supra* note 259, at 81-83 (noting that one of the more important functions of the federal courts is to serve as an umpire in interstate disputes).

Two examples will suffice to illustrate the contention that out-of-state claimants are the targets of bias. In *Allen v. Allen*,²⁷² a husband brought suit against his wife in state court for breach of a postnuptial property settlement agreement. Because of the husband's position as a member of the bar association of the county where the state court action was initiated, the wife sought to remove the action to federal court. Despite the wife's apprehension over local bias, the federal court dismissed the case under the domestic relations exception.²⁷³ Similarly, in *Bennett v. Bennett*,²⁷⁴ a divorced father brought an action against his former wife seeking monetary damages and injunctive relief as a result of the former wife's alleged kidnapping of the parties' child. Preceding the federal suit were no less than three occasions in which state courts refused to enforce or declared void pre-existing custody decrees. Nevertheless, the district court held that although it could award damages, it could not grant injunctive relief.²⁷⁵

3. Federal Court Congestion

Finally, it is beyond dispute that the federal court workload is heavy and becoming increasingly more so at a rapid pace.²⁷⁶ Practically all federal judges agree that their dockets are overcrowded.²⁷⁷ Some suggested methods to reduce the burden on federal judges include expanding the federal judiciary,²⁷⁸ raising the minimum amount in

²⁷² 518 F. Supp. 1234 (E.D. Pa. 1981).

²⁷³ *Id.*

²⁷⁴ 682 F.2d 1039 (D.C. Cir. 1982).

²⁷⁵ *Id.*

²⁷⁶ The Federal Judicial Center reports that, in the 30-year period between 1958 and 1988, the annual number of civil cases commenced in the United States District Courts increased 257% from 67,115 annual cases to 239,634. See THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 88 (Cynthia Harrison & Russell R. Wheeler, eds., 1989); Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 387 (1983) (reporting "an enormously expanding caseload, both in the quantity of cases heard and the mix of substantive issues"). But see Marc S. Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986) (dismissing concerns about the litigation explosion by comparing gross percentage gains with per capita increases); Marc S. Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983) (same).

²⁷⁷ Chemerinsky & Kramer, *supra* note 259; see also Patricia Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887 (1987) ("American judges think of themselves as continuously besieged.").

²⁷⁸ Larry Kramer (Reporter), *A Minimal Model and Some Priorities for Federal Jurisdiction*, in 1 FEDERAL COURTS STUDY COMMITTEE, WORKING PAPERS AND SUBCOMMITTEE REPORTS 134 (July 1, 1990) (Committee's "controversial argument" of "disfavoring increasing the number of judges in the future as a long-term solution in favor of reducing the number of cases allowed in federal court").

controversy requirement,²⁷⁹ eradicating diversity jurisdiction,²⁸⁰ or limiting the types of actions entitled to be brought in²⁸¹ or removed to²⁸²

²⁷⁹ See, e.g., Redish, *Martian Chronicles*, *supra* note 114, at 1806 (proposing an increase in the minimum amount in controversy requirement); Charles B. Renfrew, *The Problem of Docket Control: A Response to "Reassessing the Allocation of Judicial Business Between State and Federal Courts"*, 78 VA. L. REV. 1833 (1992) (assessing Professor Redish's proposal). See generally William Wirt Blume, *Jurisdictional Amount in Representative Suits*, 15 MINN. L. REV. 501, 523 (1931) (discussing the considerations underlying the minimum amount requirement).

²⁸⁰ See, e.g., *Diversity of Citizenship Jurisdiction, 1982: Hearings on H.R. 6691 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 97th Cong., 2d Sess. 336-37 (1982).

The desirability of diversity jurisdiction is the focus of an on-going federal courts debate. In 1968, the American Law Institute ("ALI") proposed excepting domestic relations cases from federal court review by amending the diversity statute. The proposal was abandoned when ALI's members were unable to agree on what other areas should also be specifically excepted. See AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1330 (Tent. Draft No. 6, 1968). Because most domestic relations cases are grounded in diversity jurisdiction, see *supra* note 7, ALI's proposal would have precluded federal court review of the majority of non-primary core actions. Most recently, Professor Larry Kramer conducted a study of diversity jurisdiction as reporter for the Subcommittee on the Role of the Federal Courts and Their Relations to the States of the Federal Courts Study Committee. Professor Kramer concluded that "abolishing or curtailing diversity jurisdiction should be among the first steps Congress takes to alleviate workload problems." See Kramer, *supra* note 261, at 99; see also Robert C. Brown, *The Jurisdiction of the Federal Courts Based on Diversity of Citizenship*, 78 U. PA. L. REV. 179 (1929); Frank, *supra* note 259, at 403; John J. Parker, *Dual Sovereignty and the Federal Courts*, 51 NW. U. L. REV. 407 (1956); Thomas D. Rowe, Jr., *Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms*, 92 HARV. L. REV. 963 (1979); Robert J. Sheran & Barbara Isaacman, *State Cases Belong in State Courts*, 12 CREIGHTON L. REV. 1 (1978); Charles Alan Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317 (1967). For the opinions of one federal judge confronted with diversity cases, see Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 VA. L. REV. 1671 (1992).

²⁸¹ See, e.g., H.R. 72, H.R. 326, H.R. 408, H.R. 989, H.R. 1335, H.R. 2347, H.R. 4756, H.R. Con. Res. 97, S. 481, S. 1742, 97th Cong., 1st Sess. (1981) (eliminating federal court jurisdiction over public school prayer cases); H.R. 340, H.R. 761, H.R. 869, H.R. 1079, H.R. 1180, H.R. 2047, H.R. 3332, H.R. 5200, S. 528, S. 1005, S. 1147, S. 1647, S. 1743, S. 1760, 97th Cong., 1st Sess. (1981) (limiting federal court authority to issue school busing orders in school desegregation cases); H.R. 73, H.R. 867, H.R. 900, H.R. 3225, S. 158, S. 583, 97th Cong., 1st Sess. (1981) (confining federal court review of abortion laws); S. 917, 90th Cong., 2d Sess. (1968) (curtailing federal jurisdiction of state criminal convictions based on "voluntarily made" confessions); S. 3386, 85th Cong., 2d Sess. (1958) (eliminating district court review of state bar admissions); H.R. 10,839, 74th Cong., 2d Sess. (1935) (dislodging lower federal court power to declare congressional statutes unconstitutional). The above list was culled from Professor Clinton's article which contains an exhaustive list. See Clinton, *supra* note 84, at 744-45 & n.4.

²⁸² Congress has narrowed diversity jurisdiction by restricting removal from the state courts. Removal was originally limited to aliens and nonresident defendants. See Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79 (codified as amended at 28 U.S.C. § 1441(b) (1988)). In 1875, the right to remove was extended to all plaintiffs and defendants. See Act of Mar. 3, 1875, ch. 137, § 2, 18 Stat. 470, 470-71 (codified as amended at 28 U.S.C. § 1441(b) (1988)). Plaintiffs and resident defendants in diversity cases lost their removal rights in 1887. See Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552, 553, amended by Act of Aug. 13, 1888, ch. 866, § 2, 25 Stat. 433, 434-35

federal court. These options, beset with their own difficulties,²⁸³ depend in the first instance upon congressional action, consideration of which is beyond the scope of this Article.²⁸⁴

An alternative within judicial control is reducing the number of cases under federal review or, as Judge Friendly expresses it, finding a way to "avert the flood by lessening the flow."²⁸⁵ Accordingly, several courts have justified a general domestic relations exception in order to pare down their dockets.²⁸⁶ For example, in *Cherry v.*

(codified as amended at 28 U.S.C. § 1441(b) (1988)). The present day removal statute is essentially the same as the 1887 version. See 28 U.S.C. § 1441(a)-(b) (1988).

²⁸³ See, e.g., Chemerinsky & Kramer, *supra* note 259, at 74 ("[W]hile it may be possible to increase the size of the federal courts without causing the judicial system to collapse, adding many more judges may fundamentally change the nature of that system."). See generally Henry J. Abraham, *Limiting Federal Court Jurisdiction: A "Self-Inflicted Wound?"*, 65 JUDICATURE 179 (1981); Max Baucus & Kenneth R. Kay, *The Court Stripping Bills: Their Impact on the Constitution, the Courts, and Congress*, 27 VILL. L. REV. 988 (1982); Kenneth R. Kay, *Limiting Federal Court Jurisdiction: The Unforeseen Impact on Courts and Congress*, 65 JUDICATURE 185 (1981); Robert W. Meserve, *Limiting Jurisdiction and Remedies of Federal Courts*, 68 A.B.A. J. 159 (1982); Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761 (1989); Dolores K. Sloviter, *Introduction: Legislative Proposals to Restrict the Jurisdiction of the Federal Courts: Are They Wise? Are They Constitutional?*, 27 VILL. L. REV. 895 (1982); Laurence Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R.-C.L. L. REV. 129 (1981).

²⁸⁴ The scope of congressional power to regulate federal court jurisdiction has engendered a significant debate. See generally Carl A. Auerbach, *The Unconstitutionality of Congressional Proposals to Limit the Jurisdiction of Federal Courts*, 47 MO. L. REV. 47 (1982); Paul M. Bator, *Congressional Power over the Jurisdiction of the Federal Courts*, 27 VILL. L. REV. 1030 (1982); Rauol Berger, *Insulation of Judicial Usurpation: A Comment on Laurence Sager's "Court-Stripping" Polemic*, 44 OHIO ST. L.J. 611 (1983); Melvin A. Eisenberg, *Congressional Authority to Restrict Lower Federal Court Jurisdiction*, 83 YALE L.J. 498 (1974); Morris D. Forkosch, *The Exceptions and Regulations Clause of Article III and a Person's Constitutional Rights: Can the Latter be Limited by Congressional Power Under the Former?*, 72 W. VA. L. REV. 238 (1970); Henry M. Hart Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Martin H. Redish, *Constitutional Limitations on Congressional Power to Control Federal Jurisdiction: A Reaction to Professor Sager*, 77 NW. U. L. REV. 143 (1982); Martin H. Redish & Curtis E. Woods, *Congressional Power to Control the Jurisdiction of Lower Federal Courts: A Critical Review and a New Synthesis*, 124 U. PA. L. REV. 45 (1975); Charles E. Rice, *Limiting Federal Court Jurisdiction: The Constitutional Basis for the Proposals in Congress Today*, 65 JUDICATURE 190 (1981); Ronald D. Rotunda, *Congressional Power to Restrict the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839 (1976); Sager, *supra* note 84; Telford Taylor, *Limiting Federal Court Jurisdiction: The Unconstitutionality of Current Legislative Proposals*, 65 JUDICATURE 199 (1981).

²⁸⁵ Henry J. Friendly, *Averting the Flood by Lessening the Flow*, 59 CORNELL L. REV. 634 (1974).

²⁸⁶ See, e.g., *Vaughan v. Smithson*, 883 F.2d 63, 65 (10th Cir. 1989) (observing that domestic disputes "crowd the federal court docket"); *Kirby v. Mellenger*, 830 F.2d 176 (11th Cir. 1987) (bemoaning "the problem of congested dockets in federal courts"); *Rykers v. Alford*, 832 F.2d 895, 899-900 (5th Cir. 1987) (lamenting that "such cases serve no particular federal interest, while crowding the federal court docket"); *Ruffalo ex rel. Ruffalo v. Civiletti*, 702 F.2d 710, 717 (8th Cir. 1983) (ruing "the problem of congested dockets in federal courts"); see also *Congleton v. Holy Cross Child Placement Agency, Inc.*, 919 F.2d 1077, 1079 (5th Cir. 1990); *Ingram v. Hayes*,

Cherry,²⁸⁷ the District of Maryland declined jurisdiction over a case because it was "unwilling to increase the workload of this already overburdened Court."²⁸⁸

However sympathetic the plight of overburdened district court judges, federal court congestion does not justify refusing jurisdiction.²⁸⁹ To begin with, the number of domestic cases in federal court is now limited by the requirements of the diversity and federal question statutes. Moreover, those cases not culled from the docket by *Ankenbrandt* abstention are really contract, tort, and constitutional cases. Allowing district court judges to pick and choose cases because they are unattractive to their individual dockets would lend itself to abuse.²⁹⁰

More importantly, absent a principled exception such as abstention, institutional integrity requires federal courts to hear cases within their purview.²⁹¹ As Professor Shapiro notes, wholesale refusal by federal courts to adjudicate diversity cases simply because they have more

866 F.2d 368, 369-70 (11th Cir. 1988); *Goins v. Goins*, 777 F.2d 1059, 1063 (5th Cir. 1985); *Peterson v. Babbitt*, 708 F.2d 465, 466 (9th Cir. 1983); *Wilkins v. Rogers*, 581 F.2d 399, 404 (4th Cir. 1978); *Bossom v. Bossom*, 551 F.2d 474, 475-76 (2d Cir. 1976); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968); *Short ex rel. Oosterhous v. Short*, 730 F. Supp. 1037, 1039-40 (D. Colo. 1990); *Smith v. Pension Plan of Bethlehem Steel Corp.*, 715 F. Supp. 715, 718 (W.D. Pa. 1989); *Daniels v. Stovall*, 660 F. Supp. 301, 304 (S.D. Tex. 1987); *Beliveau v. Beliveau*, 655 F. Supp. 478, 479 (D. Me. 1987); *Cook v. Winters*, 645 F. Supp. 158, 159-60 (S.D. Tex. 1986); *Bates v. Bushen*, 407 F. Supp. 163, 164 (D. Me. 1976); *LaMontagne v. LaMontagne*, 394 F. Supp. 1159, 1160-61 (D. Mass. 1975); *Bacon v. Bacon*, 365 F. Supp. 1019, 1021 (D. Or. 1973). See generally *Ouellette*, *supra* note 24, at 689 ("Several courts have suggested that the doctrine is justified by the fact that federal dockets are overcrowded, and allowing domestic relations matters into the federal forum would only aggravate the problem."); *Poker*, *supra* note 24, at 149-50 ("[C]ourts have focused on the flood of litigation which would result from the repudiation of the exception.").

²⁸⁷ 438 F. Supp. 88 (D. Md. 1977).

²⁸⁸ *Id.* at 90. Courts have refused jurisdiction on the basis of convenience in other contexts. See, e.g., *Klein v. Walston & Co.*, 432 F.2d 936, 937 (2d Cir. 1970) (action for fraudulent securities transaction damages); *Aetna State Bank v. Alzheimer*, 430 F.2d 750, 755 (7th Cir. 1970) (claim for Securities Exchange Act violation).

²⁸⁹ See generally *Atwood*, *supra* note 25, at 599 ("Calendar control is not a valid reason for dismissal of a case within the court's assigned jurisdiction."); *Corrado*, *supra* note 25, at 1364 ("The problem of congested dockets . . . is not by itself a justification for cutting back in a particular area.").

²⁹⁰ *Vestal & Foster*, *supra* note 24, at 31 ("It appears that some very serious questions may be raised about the position adopted by the federal courts where they refused to exercise jurisdiction simply because of the individuals involved.").

²⁹¹ Several commentators have therefore criticized the Second Circuit's practice of abstaining for the purposes of docket control. See *Wilber F. Pell, Jr., Abstention—A Primrose Path by Any Other Name*, 21 DEPAUL L. REV. 926 (1972); Charles Alan Wright, *The Abstention Doctrine Reconsidered*, 37 TEX. L. REV. 815 (1959); Comment, *Contraction of Federal Jurisdiction: Convenience or Necessity?*, 19 U. CHI. L. REV. 361 (1952). But see Note, *Power to Decline the Exercise of Federal Jurisdiction*, 37

important things to do directly contravenes the congressional grant of authority under the diversity statute.²⁹²

This idea has been specifically endorsed by the Supreme Court. In *Thermtron Products, Inc. v. Hermansdorfer*,²⁹³ the Court held that federal courts may not dismiss cases properly filed in or removed to federal court "because the district court considers itself too busy to try" the matter.²⁹⁴ Similarly, in *Meredith v. Winter Haven*,²⁹⁵ the Court held that when federal jurisdiction is properly invoked, federal courts have a duty to decide those issues of state law necessary to render a judgment unless a recognized public policy or defined principle guiding the exercise of jurisdiction dictates, in an exceptional case, federal court abstention.²⁹⁶ It is precisely because picking and choosing among cases lacks a "defined principle" to guide the exercise of jurisdiction, that federal court congestion does not justify refusal to hear domestically related cases.

Central to federal courts jurisprudence is the question of the respective roles of federal and state courts.²⁹⁷ Because these court systems have concurrent or overlapping jurisdiction,²⁹⁸ the allocation of power between them is the focus of much federal courts jurisprudence. At the heart of this analysis²⁹⁹ reside the related and often

MINN. L. REV. 169 (1952); Note, *Power to Stay Federal Proceedings Pending Termination of Concurrent State Litigation*, 59 YALE L.J. 978 (1950).

²⁹² Shapiro, *Jurisdiction and Discretion*, *supra* note 126, at 587; see also Atwood, *supra* note 25, at 599 ("If the federal courts were allowed to choose among cases statutorily assigned to their jurisdiction on the basis of subjective appeal, Congress' constitutional role in establishing the jurisdiction of the lower federal courts would be abrogated."); Note, *Domestic Relations*, *supra* note 24, at 638 ("[I]t is questionable whether federal abstention can properly be invoked merely for administrative convenience to deprive otherwise qualified litigants of an alternative forum to which they are constitutionally and statutorily entitled.").

²⁹³ 423 U.S. 336 (1976).

²⁹⁴ *Id.* at 344; see also AMERICAN LAW INSTITUTE, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 49 (1969) (proposal to codify the abstention doctrine excluded federal court congestion from the conditions justifying abstention).

²⁹⁵ 320 U.S. 228 (1943).

²⁹⁶ *Id.*

²⁹⁷ See generally Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141 (1988); Akhil Reed Amar, *Law Story: Book Review of Hart and Wechsler's The Federal Courts and the Federal System*, 102 HARV. L. REV. 688 (1989) (book review). By comparison, scant attention is paid to the relationship among federal, tribal, and state courts. But see Judith Resnik, *Dependent Sovereigns: Indian Tribes, States, and the Federal Courts*, 56 U. CHI. L. REV. 671 (1989).

²⁹⁸ See generally Cover, *supra* note 9, at 640 (discussing the possibilities of "vertical" (state-federal) and "horizontal" (state-state) jurisdiction).

²⁹⁹ Shapiro, *Jurisdiction and Discretion*, *supra* note 126, at 581 ("[F]ederalism and comity concerns have been critical to the exercise of discretion in the federal courts and should remain so.").

indistinguishable notions of federalism³⁰⁰ and comity.³⁰¹ Professor Shapiro notes that the terms federalism and comity overlap in that both convey the need for respect between two entities—the state and federal governments—that are to some degree independent of each other.³⁰²

In practice, federalism and comity influence the way in which we arrange our dual system so that each conducts business central to its interests while still being respectful of the interests of the other. Nor is there an absolute answer as to where those lines should be drawn;

³⁰⁰ See generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* (1985); REDISH, *supra* note 147, at 2–3; Althouse, *supra* note 144; Amar, *supra* note 84; Amar, *supra* note 297, at 1425–26; Paul M. Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605 (1988); Chemerinsky & Kramer, *supra* note 259; Fallon, *supra* note 297, at 1143–46; Carl A. McGowan, *Federalism—Old and New—and the Federal Courts*, 70 GEO. L.J. 1421, 1431 (1982); Meltzer, *supra* note 99, at 433; see also Martha A. Field, *The Differing Federalism of Canada and the United States*, 55 LAW & CONTEMP. PROBS. 107 (1992).

³⁰¹ Professor Wells argues that the Court's comity opinions fail to delineate when comity is to apply as a general principle. This is because the Court uses a vague description of comity to shield its seemingly arbitrary decisions. See Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59 (1981); see also Shirley M. Hufstедler, *Comity and the Constitution: The Changing Role of the Federal Judiciary*, 47 N.Y.U. L. REV. 841 (1972); Larry Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 9 (1966); Note, *"The New Federal Comity" Pursuit of Younger Ideas In a Civil Context*, 61 IOWA L. REV. 784 (1976). Similarly, Mr. Rehnquist contends that comity "is a toothless abstraction, not a rule, invoked in an infinite variety of contexts to justify one governmental body's deference to another." See Rehnquist, *supra* note 137, at 1066–67.

³⁰² Shapiro, *Jurisdiction and Discretion*, *supra* note 126, at 583. Two other well known and accurate explanations are worth quoting at length. Judge Carl McGowan said that:

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

McGowan, *supra* note 300, at 1431. In *Younger*, the Court defined "comity" as:

a proper respect for state functions, recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger v. Harris, 401 U.S. 37, 44 (1971).

I agree with Professor Shapiro and other commentators that federalism and comity often overlap and are at times indistinguishable. Consequently, I have linked these concepts. It should be noted, however, that not all federal courts scholars so freely blur the distinction between federalism and comity. For example, Dean Aviam Soifer and Professor H.C. Macgill argue eloquently in their seminal article that the two terms embody different notions of how federal and state courts have historically related to each other. Thus, according to their understanding, comity embodies deference, while federalism embraces uniformity of federal rights. See Soifer & Macgill, *supra* note 124 at 1188–91.

in fact, different judicial systems have reached different accommodations of the national and local judicial systems. For example, Professor Martha Field notes that in Canada, as opposed to the United States, the central government controls marriage and divorce while the provincial governments jealously guard their control over labor law.³⁰³

Where we choose to draw jurisdictional lines is based on perspective and theory. For example, Judge Richard Posner's theory of federalism uses the economic analysis of "optimal allocations" to determine federal/state jurisdictional boundaries.³⁰⁴ In contrast to Judge Posner's economic approach, Professors Erwin Chemerinsky and Larry Kramer begin with certain "value choices" that correspond with functions that the federal government attempts to perform through its litigation agenda.³⁰⁵ Similarly, Professor Redish offers a list of normative aspirations for which federal courts should strive.³⁰⁶ Professor Wells believes that "the most important issue" in jurisdictional allocation is "whether the state's interest in sustaining its regulation or the individual's interest in constitutional constraints on state power should receive the litigating edge."³⁰⁷ Professor Fallon characterizes the traditionally opposite approaches to the assertion of power by federal courts over state courts as an ideological struggle between the advocates of "Federalist" and "Nationalist" theories.³⁰⁸

The vision of our system offered in this Article requires federal courts to hear cases within their jurisdiction unless a principled and

³⁰³ Field, *supra* note 300, at 108.

³⁰⁴ POSNER, *supra* note 300, at 172. In his analysis, Judge Posner uses terms "costs," "benefits" and "externalities" to draw jurisdictional lines. For example, he assumes that judges "act in accordance with their rational self-interest" and that that interest differs from federal to state. State court judges are dependant on popular approval and so more sensitive to claims by in-state residents. Federal judges who have life tenure are more likely to vindicate rights of people who are locally prejudiced. *See id.*

³⁰⁵ *See* Chemerinsky & Kramer, *supra* note 259, at 77. The six major functions that are identified are: "Enforcing the United States Constitution;" "Protecting the interests of the federal government as a sovereign;" "Serving as an umpire in interstate disputes;" "Assuring uniform interpretation and application of federal law;" "Developing federal common law;" "Hearing appeals." *Id.*

³⁰⁶ *See* Redish, *Martian Chronicles*, *supra* note 114. Professor Redish's factors are: "intersystemic cross-pollination, systemic representativeness, litigant choice, litigation efficiency, fundamental fairness, institutionalism, and logical consistency." *Id.* at 1770 (citations omitted).

³⁰⁷ Wells, *supra* note 124, at 612.

³⁰⁸ *See* Fallon, *supra* note 297, at 1143-46. Under the Federalist model, "states emerge as sovereign entities against which federal courts should exercise only limited powers, and state courts, which are presumed to be as fair and competent as federal courts, stand as the ultimate guarantors of constitutional rights." *Id.* at 1143-44 (citations omitted). By contrast, the Nationalist model posits that "state sovereignty interests must yield to the vindication of federal rights and that, because state courts should not be presumed as competent as federal courts to enforce constitutional liberties, rights to have federal issues adjudicated in a federal forum should be

well defined exception supports abstention. One such exclusion would be a well marked area of state expertise and interest, such as secondary core cases. Another exemption would be cases in any category that raise difficult questions of unresolved state law. Declining to hear these cases would be a matter of systemic courtesy, not a reflection on judicial competence.

B. *Domestic Federal Question Cases*

Federal courts have restricted their proffered policy reasons for not hearing domestic relations cases to those arising under diversity jurisdiction, because of the commonly held view that constitutional issues were prohibited on jurisdictional rather than jurisprudential grounds.³⁰⁹ Nevertheless, I wish to assert that allowing federal courts to adjudicate domestic federal questions has the added benefit of protecting federal rights. Federal courts will more likely vindicate federal rights and so dispense a "juster justice,"³¹⁰ and, therefore, "parties with federal questions belong in federal court."³¹¹ Implicit in this assertion is the proposition that federal courts are superior to state courts as guardians of constitutional rights. This is certainly not an uncontroversial proposition, and in fact lies at the center of a federal courts debate over parity.³¹²

construed broadly." *Id.* at 1145 (citation omitted). According to Professor Fallon, Federalist jurists include Chief Justices Rehnquist and Burger and Justices Harlan, Frankfurter and Powell, while Nationalist jurists include Justices Brennan and Marshall and Judge Julia Smith Gibbons. *See id.* at 1146.

³⁰⁹ *But see supra*, note 6.

³¹⁰ Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 513 (1954); *see also* FRIENDLY, FEDERAL JURISDICTION, *supra* note 260, at 12.

³¹¹ Meltzer, *supra* note 99, at 431; *see also* England v. Louisiana State Bd. of Medical Examiners, 375 U.S. 411, 416 (1964) ("Limiting the litigant to review here would deny him the benefit of a federal trial court's role in constructing a record and making fact findings. How the facts are found will often dictate the decision of federal claims.").

In addition to the reasons set forth above, scholars have extrapolated various justifications for future federal review of certain domestic relations cases. For example, Professor Akhil Amar has argued with his usual acumen following the Supreme Court decision in *Deshaney* that allegations of child abuse should be construed as thirteenth amendment violations because of the indicia of slavery involved in the power structure of the parent-child relationship. *See* Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to Deshaney*, 105 HARV. L. REV. 1359, 1372 (1992). Although not intended as the direct consequence of his assertion, Professor Amar is averring *inter alia* that some secondary domestic cases call into play federal questions and therefore merit federal court review. *See id.*

³¹² How one sides in this debate is dependant on perspective. I am persuaded by the federal superiority arguments, but this is because of my experiences litigating in both federal and state courts. Of course, such an assertion, while empirical, is purely anecdotal.

Federal courts scholars have asserted the superiority of federal courts to state courts on both theoretical and practical grounds. Professor Redish, for example, has averred that "the arguments that federal courts are superior are overwhelming."³¹³ Those arguments include the shifted balance of power between federal and state courts during Reconstruction, the subsequent increase in federal expertise,³¹⁴ and the lack of structural independence of the state judiciaries.³¹⁵ Professor Burt Neuborne argues that, beyond theoretical considerations, state and federal courts lack parity.³¹⁶ To support this contention, he offers a number of reasons why federal courts are more sympathetic to constitutional claimants. These factors include greater technical competence, the "psychological set" of the court, and insulation from majoritarian pressures.³¹⁷

Claims of federal superiority do not go unchallenged. Professor Paul Bator, for example, is a very outspoken critic of these assumptions.³¹⁸ Professor Bator argues that allowing state court judges to hear constitutional claims helps "to assure optimal performance by the state courts" while, conversely, directing constitutional claims to federal courts evinces "a narrow and partisan vision of what constitutional values are."³¹⁹ At the same time, Professor Althouse argues the existence of a strong federal interest in allowing states to adjudicate federal issues, and that this interest should govern the allotment of jurisdiction.³²⁰

³¹³ See Redish, *Separation of Powers*, *supra* note 114, at 73.

³¹⁴ The thesis is worth quoting at length:

The dramatic changes in the philosophy of federalism, culminating in the Civil War and enactment of the post-Civil War constitutional amendments and statutes limiting state power to interfere with federal rights, dictated a corresponding shift in the balance of judicial power between state and federal courts. . . . Since that time federal courts have developed a vast expertise in dealing with the intricacies of federal law, while the state judiciary has, quite naturally, devoted the bulk of its efforts to the evolution and refinement of state law and policy.

REDISH, *supra* note 147, at 2-3.

³¹⁵ See Redish, *supra* note 284, at 161-66; see also Redish, *Younger Deference*, *supra* note 114 (federal courts are superior protectors of federal rights); Martin H. Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction and Constitutional Rights*, 36 UCLA L. REV. 329 (1988) (same); Amar, *supra* note 84 (arguing that the superiority of federal judges is advanced by the text of Article III); Amar, *supra* note 124 (same).

³¹⁶ See Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977).

³¹⁷ See *id.* at 1118-28.

³¹⁸ See Bator, *supra* note 300.

³¹⁹ *Id.* at 623-35; see also Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213 (1983) (finding that state courts are as likely as federal courts to uphold constitutional rights).

³²⁰ See generally Althouse, *Misguided Search*, *supra* note 144; Althouse, *Separate Sphere*, *supra*

Professor Chemerinsky suggests an alternative rationale to federal superiority for federal court disposition of domestic federal question cases.³²¹ Professor Chemerinsky argues that the debate over parity cannot be resolved, because such a determination ultimately depends upon a nonexistent standard by which to compare empirically the competing judicial systems.³²² Because he finds it "desirable to define a role for the federal courts without evaluating the comparative abilities of the federal and state courts,"³²³ he "proposes that litigants with federal constitutional claims should generally be able to choose the forum, federal or state, in which to resolve their disputes."³²⁴ Professor Chemerinsky demonstrates that allowing litigant choice maximizes the opportunity to protect individual rights, enhances litigants' autonomy, and enhances federalism.³²⁵ Using this standard also avoids a choice between competing notions of parity, because allowing the litigants to choose their own venues negates a value judgment by commentators.

IV. CONCLUSION

In this Article, I have examined the skewed development of the domestic relations exception to federal jurisdiction from *Barber v. Barber* to the contemporary decision of *Ankenbrandt v. Richards*. Although definitive Supreme Court resolution of the conflicts in this area must await another day, this Article has shown that following *Ankenbrandt*, federal court jurisdiction exists over all non-primary core actions properly arising under either the diversity or federal question jurisdiction statutes. This Article then addressed the issue of whether the existence of jurisdiction compelled federal court adjudication of all domestic related disputes within their purview, or instead permitted abstention. This Article asserted the propriety of abstention principles and proposed a new form of abstention whose application would exclude from federal consideration primary core cases and suits raising

note 144; Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 DUKE L.J. 979 (1993).

³²¹ See Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233 (1988).

³²² Erwin Chemerinsky, *Ending the Parity Debate*, 71 B.U. L. REV. 593 (1991); see also Chemerinsky & Kramer, *supra* note 259, at 79 ("The parity debate is ultimately unresolvable because parity is an empirical question and we lack a meaningful standard by which to judge decisions in competing judicial systems."); Michael Wells, *Is Disparity a Problem?*, 22 GA. L. REV. 283 (1988) (asserting that focusing on parity merely obfuscates substantive issues); Wells, *supra* note 124 (parity unresolvable). *But see* Solimine & Walker, *supra* note 319 (submitting an empirical study).

³²³ Chemerinsky, *supra* note 321, at 236.

³²⁴ *Id.* at 236-37.

³²⁵ *Id.* at 302-10.

difficult issues of unresolved state law. It then evaluated the competing policy concerns informing a federal court's decision whether or not to exert jurisdiction over non-primary core actions, concluding that prudential considerations support the jurisdictional lines drawn in the proposed *Ankenbrandt* abstention doctrine.