

# Congress, Federal Courts, and Domestic Relations Exceptionalism

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## I. INTRODUCTION

Family law is often cited as a paradigmatic example of state law, and the Supreme Court has trumpeted the importance of limiting the federal government's reach into this area reserved for the states. Yet, it is also true that a variety of federal programs affect the family, so it is important to figure out which areas are reserved for the states and which are not. The federal courts have heard a variety of cases involving family matters, so it is not as if the courts never have jurisdiction to hear such cases. The jurisprudence in this area is confused and in great need of clarification.

The "domestic relations exception"<sup>1</sup> is offered as a justification for preventing federal involvement in family matters. One point that has been inadequately appreciated is that the exception is sometimes used to describe two different limitations: 1) that federal courts should not exercise jurisdiction in certain types of cases and 2) that Congress should not make certain kinds of laws absent sufficient justification for doing so. The tests for determining when the exception is triggered and what must be shown to override the exception differ depending upon the context in which the exception has been asserted. Regrettably, the Supreme Court has given mixed messages over which areas are beyond Congress's power to regulate and which kinds of cases cannot be heard by a federal court. Until the Court stops undercutting its own rationales, one can only expect further confusion in the courts and further misunderstandings about the extent of Congress's power to regulate.

## II. THE DOMESTIC RELATIONS EXCEPTION AND THE FEDERAL COURTS

Federal courts have long recognized a domestic relations exception, although there is no agreement about what triggers the exception or what it includes. Some circuits treat the exception as a bar to diversity jurisdiction

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<sup>1</sup>Barber v. Barber, 62 U.S. 582 (1858).

when certain matters are at issue,<sup>2</sup> whereas other circuits suggest that the exception bars jurisdiction in certain kinds of cases<sup>3</sup> even when a federal question is implicated.<sup>4</sup> Of the cases that suggest the exception is more than a bar to diversity jurisdiction, some circuits suggest that the substantive bar is rather narrow, only applying to certain kinds of domestic relations issues.<sup>5</sup> However, other circuits have construed the domestic relations exception more broadly.<sup>6</sup> This confusion is unsurprising, given the exception's uneven treatment in many of the cases in which it is discussed.

#### A. *The Genesis of the Exception*

The United States Supreme Court frequently offers mixed signals about the reach and application of the domestic relations exception.<sup>7</sup> This ambivalent treatment is well illustrated in the case often cited as establishing the exception, *Barber v. Barber*.

At issue in *Barber v. Barber* was the enforcement of a New York judgment of divorce *a mensa et thoro* where Hiram Barber was ordered to pay alimony to his spouse, Huldah Barber.<sup>8</sup> Shortly after the decree was issued, Hiram moved to Wisconsin without paying the ordered support.<sup>9</sup>

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<sup>2</sup> *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 945 (9th Cir. 2008) (“We hold that the ‘domestic relations exception,’ a doctrine divesting the federal courts of jurisdiction, applies only to the diversity jurisdiction statute, 28 U.S.C. § 1332.”).

<sup>3</sup> *Mosley v. Bowie Cnty. Texas*, 275 F. App’x 327, 329–330 (5th Cir. 2008) (“In deciding whether the domestic relations exception is to be applied, the crucial factor is the type of determination that the federal court must make in order to resolve the case . . . . ‘If the federal court must determine which parent should receive custody, what rights the noncustodial parent should have, how much child support should be paid and under what conditions, or whether a previous court’s determination on these matters should be modified, then the court should dismiss the case’ under the domestic relations exception.”) (citing *Rykers v. Alford*, 832 F.2d 895, 900 (5th Cir.1987)).

<sup>4</sup> Cf. Alan B. Morrison, *The Necessity of Tradeoffs in a Properly Functioning Civil Procedure System*, 90 OR. L. REV. 993, 998 (2012) (noting that “Article III of the Constitution allows federal courts to decide cases or controversies only in a limited set of circumstances—itsself a tradeoff—of which the most important are those cases ‘arising under this Constitution, the Laws of the United States, and Treaties made . . . under their Authority’ (federal question jurisdiction) and controversies ‘between Citizens of different States’ (diversity of citizenship jurisdiction)”).

<sup>5</sup> See *Norton v. McOsker*, 407 F.3d 501, 505 (1st Cir. 2005) (“Despite the breadth of the phrase ‘domestic relations exception’ and the potential reach of the exception’s aim, *Ankenbrandt* made clear that the exception is narrowly limited. In general, lawsuits affecting domestic relations, however substantially, are not within the exception unless the claim at issue is one to obtain, alter or end a divorce, alimony or child custody decree.”) (citing *Dunn v. Cometa*, 238 F.3d 38, 41 (1st Cir. 2001)).

<sup>6</sup> *Danforth v. Celebrezze*, 76 F. App’x. 615, 616 (6th Cir. 2003) (“Although this domestic relations exception to federal jurisdiction does not apply to a civil action that merely has domestic relations overtones, (citation omitted) federal courts lack jurisdiction where . . . the suit is actually concerned with domestic relations issues.”) (citing *Drewes v. Ilnicki*, 863 F.2d 469, 471 (6th Cir.1988)).

<sup>7</sup> *Barber*, 62 U.S. at 582.

<sup>8</sup> See *id.* at 584.

<sup>9</sup> *Id.* at 587.

He then filed for divorce *a vinculo* from his wife in Wisconsin<sup>10</sup> without disclosing to the Wisconsin court that there was a prior divorce proceeding in New York.<sup>11</sup>

The issues implicated in *Barber* are more easily understood in light of the difference between a divorce *a mensa et thoro* and a divorce *a vinculo*. The former is a divorce from bed and board, but does not end the marriage,<sup>12</sup> meaning that the divorce does not afford either member of the couple the possibility of remarriage while the other member of the couple is still alive.<sup>13</sup> In contrast, a *divorce a vinculo* ends the marriage,<sup>14</sup> which means that remarriage would be possible even before the former spouse had died.

Hiram Barber was rightly criticized for failing to inform the Wisconsin court of the New York proceeding.<sup>15</sup> If informed of the previous proceeding,<sup>16</sup> the Wisconsin court likely would not have been persuaded by Barber's claim that he was an innocent party.<sup>17</sup> That said, it should not be inferred that Barber's seeking a divorce *a vinculo* made no sense after he had already received a divorce *a mensa et thoro* in New York. On the contrary, if Barber wanted to remarry in Wisconsin, his New York divorce would not have afforded him the ability to do so,<sup>18</sup> he needed an absolute divorce to remarry in the future.<sup>19</sup>

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<sup>10</sup> *Id.*

<sup>11</sup> *See id.* at 588.

<sup>12</sup> *See Simpson v. T.D. Williamson Inc.*, 414 F.3d 1203, 1205 (10th Cir. 2005) (discussing “the common law’s divorce ‘mensa et thoro,’—or divorce ‘from bed and board,’—the forebearer of the modern day action for ‘legal separation.’” (citing *Holleyman v. Holleyman*, 78 P.3d 921, 932 n. 17) (Okla. 2003) (Opala, V.C.J., concurring)).

<sup>13</sup> *See id.* at 1206 (“[U]nlike a divorce decree, a decree of legal separation does not dissolve the marriage bond”). *See also* Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1466 n.117 (2006) (“An action for divorce *a mensa et thoro* (“from bed and board”) is equivalent to a legal separation in modern terms. Such a divorce entitled the award of alimony, but did not end the marriage, and the parties were not permitted to remarry.”).

<sup>14</sup> *See* John K. Matsumoto, *Why No Right to Jury Trial in Marital Dissolution Actions?* 11 J. CONTEMP. LEGAL ISSUES 202, 203 n.4 (2000) (discussing “absolute divorce, also designated divorce *a vinculo matrimonii* or a divorce from the bonds of marriage.”).

<sup>15</sup> *See Barber*, 62 U.S. at 588 (“[T]he defendant had made his application to the court in Wisconsin for a divorce *a vinculo* from Mrs. Barber, without having disclosed to that court any of the circumstances of the divorce case in New York.”).

<sup>16</sup> *See id.* at 585 (discussing “a declaration by the chancellor that the defendant had been guilty of cruel and inhuman treatment of his wife, and of such conduct towards her as to render it unsafe and improper for her to cohabit with him; and that he had abandoned, neglected, and refused to provide for her.”).

<sup>17</sup> *See id.* at 588 (“[T]he defendant ... contrary to the truth, verified by that record, ... asks for the divorce on account of his wife having willfully abandoned him.”).

<sup>18</sup> *See id.* at 585 (noting that the New York judgment decreed “that neither of the said parties shall be at liberty to marry any other person during the lifetime of the other party.”).

<sup>19</sup> *See* Sack, *supra* note 13, at 1466 n.117 (discussing “a divorce *a vinculo matrimonii* (“from the marriage ties”), which is an absolute divorce that severed the relationship and permitted remarriage.”).

The *Barber* Court's focus was not on whether either of the Barbers could remarry but, instead, on a different possible implication of the New York decree. New York law specified that "neither of the said parties shall be at liberty to marry any other person during the lifetime of the other party;"<sup>20</sup> the parties were still married in the eyes of the law, albeit living separately.<sup>21</sup> Traditionally, a married couple had only one domicile, namely, that of the husband.<sup>22</sup> However if that were so, then there would have been no diversity of citizenship between the parties and no basis for the federal court to assert diversity jurisdiction.<sup>23</sup> The *Barber* Court rejected that the general rule regarding the wife not having a separate domicile applied with respect to the "domicile of a wife divorced *a mensa et thoro*."<sup>24</sup>

Once it was established that a wife divorced from bed and board could have a domicile other than her husband's, diversity of citizenship was established in this case, because the wife remained in New York, while the husband had become a Wisconsin domiciliary.<sup>25</sup> But the fact of diversity of citizenship did not establish that this was the kind of case that could be heard in federal court.<sup>26</sup> A separate issue was whether federal court was the proper forum for a case involving the failure to pay spousal support, especially because an action to enforce the New York judgment could have been brought in Wisconsin state court.<sup>27</sup> Availability of another forum where Huldah Barber could have pressed her claim notwithstanding, the *Barber* Court reasoned that the mere fact that the action could have been brought elsewhere did not deprive the federal court of jurisdiction.<sup>28</sup>

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<sup>20</sup> *Barber*, 62 U.S. at 585.

<sup>21</sup> *See id.* at 601 (Daniel, J., dissenting) ("[T]he divorce *a mensa et thoro* does not sever the matrimonial tie; on the contrary, it recognizes and sustains that tie, and the allowance of alimony arises from and depends upon reciprocal duties and obligations involved in that connection.")

<sup>22</sup> *See id.* at 602 (Daniel, J., dissenting) ("[A] married woman cannot during the existence of the matrimonial relation, and during the life of the husband the wife cannot be remitted to the civil or political position of a *feme sole*, and cannot therefore become a *citizen* of a State or community different from that of which her husband is a member."); *see also id.* at 593 (noting the argument of "learned counsel" that "the legal domicile of the wife, until the marriage be dissolved, is the domicile of the husband, and is changed with a change of his domicile.")

<sup>23</sup> 28 U.S.C. § 1332(a) (2010).

<sup>24</sup> *Barber*, 62 U.S. at 593.

<sup>25</sup> *See id.* at 586 ("The complainants aver in their bill that they are citizens of the State of New York, and that the defendant is a citizen of the State of Wisconsin.")

<sup>26</sup> *See id.* at 603–04 (Daniel, J., dissenting) ("But, irrespective of the disability of the wife as a party, I hold that the courts of the United States, as courts of *chancery*, cannot take cognizance of cases of alimony")

<sup>27</sup> *See id.* at 588 (noting that the Wisconsin decree "has no effect to release the defendant there and everywhere else from his liability to the decree made against him in the State of New York, upon that decree being carried into judgment in a court of another State of this Union, ... where the defendant may be found, or where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him")

<sup>28</sup> *Id.* at 592 ("It is no objection to equity jurisdiction in the courts of the United States, that there is a remedy under the local law, for the equity jurisdiction of the Federal courts is the same in all of the

*Barber* held that a spousal support award could be enforced in federal court<sup>29</sup> in a different state if there was diversity of citizenship.<sup>30</sup> Thus:

[W]hen a court of competent jurisdiction over the subject-matter and the parties decrees a divorce, and alimony to the wife as its incident, and is unable of itself to enforce the decree summarily upon the husband,...courts of equity [including federal courts] will interfere to prevent the decree from being defeated by fraud.<sup>31</sup>

Essentially, the federal courts can exercise jurisdiction to enforce a judgment validly issued in a state court when the obligor has established a new domicile to avoid the obligations imposed by a court in his previous domicile.<sup>32</sup>

While upholding that full faith and credit guarantees could be enforced in such cases in federal court, the Court nonetheless “disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony.”<sup>33</sup> By this, the Court meant that federal courts do not have jurisdiction to grant a divorce or to determine how much spousal support should be paid.<sup>34</sup> This disclaimer was the basis for what was later recognized as the domestic relations exception.<sup>35</sup> Further, precisely because this domestic relations exception was merely alluded to in dicta,<sup>36</sup> the *Barber* Court left a number of issues unresolved, including whether the domestic relations exception is statutorily or constitutionally based.

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States, and is not affected by the existence or nonexistence of an equity jurisdiction in the State tribunals”).

<sup>29</sup> *Id.* (“[T]he jurisdiction of the court in the case before us cannot be successfully denied”).

<sup>30</sup> See *Barber v. Barber*, 62 U.S. 582, 588 (1858) (explaining that the New York judgment could be enforced “in a court of the United States ... where he may have acquired a new domicile different from that which he had in New York when the decree was made there against him”).

<sup>31</sup> *Id.* at 591.

<sup>32</sup> *Id.* at 588 (“It appears, from the testimony in the cause, that the defendant left the State of New York in a short time after the decree for the divorce and for alimony had been rendered, for the purpose of placing himself beyond the jurisdiction of the court which could enforce it, without having paid any part of the alimony due, or leaving any estate of any kind out of which it could be paid; for he gave no proof of any kind that he had real estate in the State of New York in support of that allegation in his answer.”).

<sup>33</sup> *Id.* at 584.

<sup>34</sup> *Id.*

<sup>35</sup> Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 233 (1999) (“*Barber*, nonetheless, has come to stand for the proposition that there is an exception to federal court jurisdiction under diversity for family matters, known as the ‘domestic relations exception.’”).

<sup>36</sup> See Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL’Y 175, 179 (2000) (discussing the *Barber* dicta that “gave birth to the hoary ‘domestic relations exception’ to federal diversity jurisdiction”).

### B. Further Development of the Domestic Relations Exception

The Court discussed the source of the exception in *Ankenbrandt v. Richards*.<sup>37</sup> At issue was a suit for tort damages brought by Carol Ankenbrandt on behalf of her daughters against the children's father, Jon Richards, and his companion, Debra Kesler.<sup>38</sup> The district court granted a motion to dismiss for lack of jurisdiction,<sup>39</sup> notwithstanding the diversity of citizenship.<sup>40</sup> The Supreme Court sought to explain why the domestic relations exception did not apply in this case.

The Court traced the domestic relations exception to federal jurisdiction to *Barber*,<sup>41</sup> noting that the *Barber* Court had announced that the federal courts did not have "jurisdiction over divorce and alimony decree suits"<sup>42</sup> without citing any authority or foundation for that assessment. After reviewing the applicable constitutional provision and case law, the *Ankenbrandt* Court concluded that "the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts"<sup>43</sup> and that the source of the domestic relations exception was federal statute.<sup>44</sup> That said, the Court affirmed the existence of the exception<sup>45</sup> and noted that it had been expanded to include child custody decrees as well.<sup>46</sup> However, that expansion was not open-ended; on the contrary, "the domestic relations exception encompasses *only* cases involving the issuance of a divorce, alimony, or child custody decree."<sup>47</sup>

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<sup>37</sup> *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

<sup>38</sup> *See id.* at 691.

<sup>39</sup> *Id.* at 691–92.

<sup>40</sup> *See id.* at 691 ("Petitioner Carol Ankenbrandt, a citizen of Missouri, brought this lawsuit on September 26, 1989, on behalf of her daughters L.R. and S.R. against respondents Jon A. Richards and Debra Kesler, citizens of Louisiana, in the United States District Court for the Eastern District of Louisiana.")

<sup>41</sup> *See id.* at 693 ("The domestic relations exception upon which the courts below relied to decline jurisdiction has been invoked often by the lower federal courts. The seeming authority for doing so originally stemmed from the announcement in *Barber v. Barber*, 21 How. 582 (1859), that the federal courts have no jurisdiction over suits for divorce or the allowance of alimony")

<sup>42</sup> *Id.* at 694.

<sup>43</sup> *Ankenbrandt*, 504 U.S. at 695.

<sup>44</sup> *Id.* at 699 ("[T]he jurisdictional limitation recognized by the Court rested on [a] statutory basis")

<sup>45</sup> *Id.* at 694–695 ("Because we are unwilling to cast aside an understood rule that has been recognized for nearly a century and a half, we feel compelled to explain why we will continue to recognize this limitation on federal jurisdiction"). *See also* *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930) ("[T]he jurisdiction of the Courts of the United States over divorces and alimony always has been denied")

<sup>46</sup> *Ankenbrandt*, 504 U.S. at 702 ("Subsequently, this Court expanded the domestic relations exception to include decrees in child custody cases")

<sup>47</sup> *Id.* at 704 (emphasis added). *See also* *Marshall v. Marshall*, 547 U.S. 293, 308 (2006) (reaffirming "that only 'divorce, alimony, and child custody decrees' remain outside federal jurisdictional bounds") (citing *Ankenbrandt*, 504 U.S. at 703, 704); *City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 190 n.6 (1997) (reaffirming limitation on *Ankenbrandt* exception).

As support for including child custody within the domestic relations exception, the *Ankenbrandt* Court cited *In Re Burrus*<sup>48</sup> for “its statement that ‘[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.’”<sup>49</sup> While *Burrus* “did not involve a construction of the diversity statute,” the *Ankenbrandt* Court noted that the case “has been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction.”<sup>50</sup>

The *Ankenbrandt* Court offered an important reason for leaving domestic matters to the state courts:

[S]tate courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over divorce, alimony, and child custody decrees. ... [A]s a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees.<sup>51</sup>

Essentially, the Court suggested that a public policy justification for the domestic relations exception is that federal judges do not have as much expertise in these matters as state judges.<sup>52</sup> Yet, the expertise justification applies with equal force whether jurisdiction is based on diversity or the presence of a federal question.<sup>53</sup>

Relative expertise is only one factor among many that might be considered when deciding whether to preclude federal courts from hearing domestic relations cases, especially since federal judges could acquire the relevant expertise.<sup>54</sup> Additional factors might include whether state courts would be more likely to be biased against particular people or families.<sup>55</sup>

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<sup>48</sup> *Ankenbrandt*, 504 U.S. at 703 (citing *In re Burrus*, 136 U.S. 586 (1890)).

<sup>49</sup> *Id.* (citing *In re Burrus*, 136 U.S. at 593–94).

<sup>50</sup> *Id.* (citing *Bennett v. Bennett*, 682 F.2d 1039, 1042 (D.C. Cir. 1982); *Solomon v. Solomon*, 516 F.2d 1018, 1025 (3rd Cir. 1975); *Hernstadt v. Hernstadt*, 373 F.2d 316, 317 (2nd Cir. 1967)).

<sup>51</sup> *Ankenbrandt*, 504 U.S. at 703–04 (citing *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982)).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See Sack, *supra* note 13, at 1484 (“The federal judiciary is surely capable of developing this proficiency and creating the necessary familiarity and connections with governmental agencies and other organizations that provide services and monitoring in family law cases”).

<sup>55</sup> See *id.* at 1487–88 (“The Supreme Court has repeatedly recognized the bias concerns that underlie the need for federal diversity jurisdiction. And, in family law, ‘local values’ can often translate

Nonetheless, it is surprising that some courts have looked at the *Ankenbrandt* discussion and concluded that its justification supported employing the domestic relations exception *only* in cases involving diversity jurisdiction.<sup>56</sup> This is especially striking because the *Ankenbrandt* Court itself noted that two distinct claims had been made in *Barber*: (1) lack of party diversity<sup>57</sup> and (2) lack of subject matter jurisdiction.<sup>58</sup>

In many domestic relations cases, federal courts do not have jurisdiction because both spouses are citizens of the same state<sup>59</sup> and the issues implicated involve state rather than federal law.<sup>60</sup> It is therefore unsurprising that most domestic relations cases are in state rather than federal courts.<sup>61</sup> The fact that most of these cases are in state court does not help resolve whether there is a domestic relations exception and, if so, whether that exception should be construed as only an exception to diversity jurisdiction.<sup>62</sup>

The *Ankenbrandt* Court confused matters by reaffirming the existence of the exception without offering an adequate explanation of why it is recognized or even when it can be invoked. The *Ankenbrandt* Court muddled the jurisprudence even more by referring to two cases without adequately explaining their import; the Court discussed two instances in which the United States Supreme Court addressed matters of divorce and spousal support in *Simms* and *De La Rama*<sup>63</sup>

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to local bias. The traditional argument that federal diversity jurisdiction reduces the potential for bias in litigation with out-of-state parties is particularly applicable in domestic relations cases, which often involve out-of-state plaintiffs in divorce or custody actions who have relocated after marital breakups”).

<sup>56</sup> See *Atwood v. Fort Peck Tribal Court*, 513 F.3d 943, 947 (9th Cir. 2008) (“Although *Ankenbrandt* did not address whether the exception applies to the *federal question* jurisdiction statute, 28 U.S.C. § 1331, the Court’s reasoning plainly does not apply to that statute”). *But see* *Rivers v. Hewitt*, No. 11-cv-00439, 2011 WL 1344231, at \*2 (D. Colo. Apr. 4, 2011) (suggesting that “the domestic relations exception relates to both diversity and federal question jurisdiction”); *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006) (suggesting that the domestic relations exception was “probably intended to apply to federal-question cases too”).

<sup>57</sup> *Ankenbrandt*, 504 U.S. at 693 (on appeal, the ex-husband has claimed that “there was no diversity of citizenship because although divorced, the wife’s citizenship necessarily remained that of her former husband”).

<sup>58</sup> *Id.* (ex-husband claimed that “the Constitution therefore placed the whole subject of divorce and alimony beyond the jurisdiction of the United States courts”).

<sup>59</sup> *See id.* at 696.

<sup>60</sup> See Meredith Johnson Harbach, *Is The Family a Federal Question?* 66 WASH. & LEE L. REV. 131, 173 (2009) (discussing “cases seeking divorce, alimony, or child custody- questions necessarily determined by state rather than federal law”).

<sup>61</sup> See George K. Walker, *Arbitrating Family Law Cases by Agreement*, 18 J. AM. ACAD. MATRIM. LAW. 429, 430 n.4 (2003) (noting that federal courts are limited by the domestic relations exception).

<sup>62</sup> See *Ankenbrandt*, 504 U.S. at 692 (describing “what has become known as the ‘domestic relations’ exception to diversity jurisdiction”).

<sup>63</sup> *See id.* at 696.



### 1. *The Court Modifies a Spousal Support Award*

In *Simms v. Simms*,<sup>64</sup> Charles Simms sought to divorce his wife, Hanna Simms, claiming desertion.<sup>65</sup> She denied the charge.<sup>66</sup> The trial court dismissed his complaint and ordered the husband to pay the wife “\$750 counsel fees, and \$150 a month for her maintenance from December 14, 1893, amounting in all to the sum of \$5,250, exclusive of costs.”<sup>67</sup> Hannah Simms then remitted \$250 as was authorized by law.<sup>68</sup> The Supreme Court of the Arizona Territory affirmed the district court ruling,<sup>69</sup> at which point Charles Simms appealed to the United States Supreme Court.<sup>70</sup> The husband died before the Court could issue a decision,<sup>71</sup> and the executors of his estate pressed for a resolution of the case on the merits,<sup>72</sup> presumably hoping that the Court would reverse so that Hannah would not be entitled to the benefits due a widow.<sup>73</sup>

The *Simms* Court addressed whether the suit should be dismissed under *Barber* because “the decree below concerned divorce and alimony only.”<sup>74</sup> While the federal courts “have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, or by an original proceeding in equity, before a decree for such alimony in a state court,”<sup>75</sup> this is so because the law to be applied is *state* rather than federal law. “Within the states of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the state, and not to the laws of the United States.”<sup>76</sup> However, an explanation emphasizing the importance of deferring to state law has “no application to the jurisdiction of the courts of a Territory, or to the appellate jurisdiction of this court over those courts.”<sup>77</sup> When the law of a territory rather than a state is at issue, “Congress has the entire dominion and sovereignty, national and local, Federal and state, and has full legislative power over all

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<sup>64</sup> *Simms v. Simms*, 175 U.S. 162 (1899).

<sup>65</sup> *Id.* at 163.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* at 164.

<sup>69</sup> *Id.* at 165.

<sup>70</sup> *Simms*, 175 U.S. at 165.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* (noting that the case “has been prosecuted by his [the husband’s] executors”).

<sup>73</sup> For example, were this a present-day, controversy, she might be entitled to a homestead allowance were she his surviving widow. *Cf.* ARIZ. REV. STAT. ANN. § 14-2402(A) (1996) (“A decedent’s surviving spouse is entitled to a homestead allowance of eighteen thousand dollars. If there is no surviving spouse each minor child and each dependent child of the decedent are entitled to a homestead allowance of eighteen thousand dollars divided by the number of minor and dependent children of the decedent.”).

<sup>74</sup> *Simms*, 175 U.S. 162, 167(1899).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (citing *In Re Burrus*, 136 U. S. 586, 593–94 (1890)).

<sup>77</sup> *Id.* at 167–68.

subjects upon which the legislature of a state might legislate within the state.<sup>78</sup> Thus, there was no question that Congress had the power to establish the domestic relations law of the territory or, in the alternative, “intrust [sic] that power to the legislative assembly of a Territory.”<sup>79</sup> Because the divorce at issue involved Arizona territorial law, there was no worry that federal involvement would somehow intrude upon a state prerogative.<sup>80</sup>

That Congress had the power to regulate the territories did not in addition establish that the federal courts would have jurisdiction to hear an appeal of a domestic relations matter. The Court explained that as a matter of statute the U. S. Supreme Court had appellate jurisdiction “to review and reverse or affirm the final judgments and decrees of the supreme court of a territory includes those cases, and those cases only, at law or in equity, in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.”<sup>81</sup> The Court then explained the implications of this jurisdictional limitation.

Suppose that the issue in *Simms* had solely involved a challenge to the denial of divorce, instead of an alimony award.<sup>82</sup> The Court explained that it would not have jurisdiction to hear such an appeal, both because marital status is “a matter the value of which [cannot] be estimated in money”<sup>83</sup> and because the refusal to grant a divorce is based on matters of fact rather than law.<sup>84</sup> However, the spousal support order was a different matter, because it involved “a distinct and severable final judgment in favor of the defendant for a sum of money.”<sup>85</sup> Further, the sum of money awarded at trial was “of a sufficient jurisdictional amount and [was] therefore good ground of appeal.”<sup>86</sup>

When affirming the trial court decision awarding \$5,250, the Arizona Territorial Supreme Court had not included the remittitur in its judgment,<sup>87</sup> perhaps suspecting that the remittitur was strategic<sup>88</sup> rather than an admission that the amount originally awarded was too great.<sup>89</sup> The U. S.

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<sup>78</sup> *Id.* at 168.

<sup>79</sup> *Id.*

<sup>80</sup> *Simms v. Simms*, 175 U.S. 162, 163 (1899).

<sup>81</sup> *Id.* at 167. The exceptions to this rule did not “include[s] the case at bar.” *See id.* at 166–67.

<sup>82</sup> *See id.* at 168 (“So far as the question of divorce was concerned, the matter in controversy was the continuance or the dissolution of the status or relation of marriage between the parties, and the decree cannot be reviewed on appeal.”).

<sup>83</sup> *Id.* at 168–69.

<sup>84</sup> *See id.* at 169.

<sup>85</sup> *Id.*

<sup>86</sup> *Simms*, 175 U.S. at 169.

<sup>87</sup> *See id.*

<sup>88</sup> *Simms v. Simms*, 81 P. 1128, 1130 (Ariz. 1897) (Rouse, J., dissenting) (“It is apparent that in the effort to remit the insignificant sum of \$250 it was the purpose of appellee to prevent the case from going to another tribunal for review, leaving the judgment reduced to just \$5,000.”).

<sup>89</sup> *See id.* (Rouse, J., dissenting) (“We contend that a remitter can only be made to correct an error

Supreme Court addressed whether the Territorial Supreme Court should have affirmed the trial court award minus the remittitur rather than the entire amount awarded by the trial court.<sup>90</sup> The *Simms* Court reasoned that the “making of a remittitur in this case did not depend upon the discretion of the court, but was authorized and regulated by the statutes of the Territory”<sup>91</sup> and then held that the Territorial Supreme Court should have given effect to the remittitur.<sup>92</sup> Had the Court done so, its judgment would have been unappealable.

The *Simms* Court held that “the Decree of the Supreme Court of the Territory of Arizona for \$5,250 [should] be modified so as to stand as a decree for \$5,000, and, as so modified, [is] affirmed, with costs.”<sup>93</sup> Perhaps a more felicitous way to have expressed this would have been for the Court to have affirmed in part and remanded in part, where the U. S. Supreme Court would have directed the Territorial Supreme Court to reduce the amount of the award to reflect the remittitur. Had the Court expressed it this way, there would have been no possible misunderstanding that the Court’s affirmation of the reduced award in this case implied that the Court would have had jurisdiction to hear the case had the Territorial Supreme Court affirmed the reduced award initially.

## 2. *The Court Reexamines the Facts Underlying a Divorce*

*De La Rama v. De La Rama* illustrates that the Court is not precluded by the Constitution from hearing an appeal of a divorce case.<sup>94</sup> At issue was a divorce issued in the Philippines. The applicable act governing the Court’s jurisdiction specified that “appeals from the Supreme Court of the Philippine Islands shall extend to all actions, cases, causes, and proceedings ‘in which the value in controversy exceeds \$25,000.’”<sup>95</sup> Esteban De La Rama<sup>96</sup> married Agueda Benedicto De La Rama, aged 23 and 14 respectively at the time of the marriage, in July, 1891.<sup>97</sup> They separated thirteen months later.<sup>98</sup> Esteban had adulterous relationships with three separate women, each resulting in a child.<sup>99</sup> The Court did not

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in the verdict or judgment by reason of the fact that the verdict or judgment is in excess of the amount claimed, or that the evidence does not support the verdict or judgment.”)

<sup>90</sup> See *Simms*, 175 U.S. at 169, 172.

<sup>91</sup> *Id.* at 169.

<sup>92</sup> *Id.* at 172 (“The just and appropriate way of disposing of the case appears to this court to be to affirm the validity of the release or remittitur which the supreme court of the territory erroneously ignored.”).

<sup>93</sup> *Id.*

<sup>94</sup> *De La Rama v. De La Rama*, 201 U.S. 303 (1906).

<sup>95</sup> *Id.* at 309.

<sup>96</sup> *Id.* at 312.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 312–13 (“His adultery, however, with three separate women and the birth of a child by each was proven to the satisfaction of both courts below, and was not attempted to be disproved by

address whether he had committed adultery but, instead, whether “the finding of the Court of First Instance, that the plaintiff [Agueda] had not committed adultery, was so manifestly against the weight of evidence that the supreme court was justified in reversing it.”<sup>100</sup>

The *De La Rama* Court noted that the *Simms* Court rejected the contention that the U. S. Supreme Court had the power to “reexamine questions of fact.”<sup>101</sup> However, that incapacity was based on statute,<sup>102</sup> and the *De La Rama* Court reasoned that its jurisdiction over Philippine judgments was based on a different statute; the statute provided that appeals from the Supreme Court of the Philippine Islands “are reviewable on appeal or writ of error by the party aggrieved, in the same manner as the final judgments and decrees of the circuit courts of the United States.”<sup>103</sup> After noting that appeals from the federal circuit courts “extend to an examination of the facts as well as the law,”<sup>104</sup> the Court then re-examined the evidence allegedly establishing the wife’s adultery. After engaging in this review, the Court concluded that the testimonial evidence was not credible<sup>105</sup> and that the written evidence allegedly establishing her guilt was more plausibly understood to establish the contrary.<sup>106</sup> Ultimately, the Court held that the Supreme Court of the Philippine Islands was not justified in setting aside the finding of the trial court that the wife was blameless<sup>107</sup> and that “the Supreme Court should have affirmed rather than reversed the action of the lower court.”<sup>108</sup>

*Barber, Ankenbrandt, Simms* and *De La Rama* all recognized that as a general matter, family law is a state rather than federal concern, although each case nonetheless involved a proper exercise of jurisdiction by federal courts in matters involving families. *Barber* and *Ankenbrandt* did not involve the core areas covered by the domestic relations exception because neither of those cases involved divorce, support, or custody. However, *Simms* and *De La Rama* did involve the core areas of spousal support and

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evidence on the part of the defendant.”).

<sup>100</sup> *De La Rama*, 201 U.S. at 313.

<sup>101</sup> *Id.* at 308; *Simms*, 175 U.S. at 169.

<sup>102</sup> *See De La Rama*, 201 U.S. at 309 (“Since that act was passed we have always held that the jurisdiction of this court on an appeal from the Supreme Court of a territory did not extend to a re-examination of the facts.”).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 316 (“The inference that this testimony was fabricated was so strong that the courts below were fully justified in disregarding it.”).

<sup>106</sup> *Id.* at 317 (“There is nothing indicating that after their separation her conduct had not been irreproachable.”).

<sup>107</sup> *Id.* at 318 (“We have reached the conclusion that there is no such preponderance of evidence in favor of the theory of plaintiff’s guilt, as authorized the Supreme Court to set aside the conclusions of the court below upon the ground that these findings were plainly and manifestly against the weight of the evidence.”).

<sup>108</sup> *De La Rama*, 201 U.S. at 318.

divorce fact-finding respectively, and it is therefore unsurprising that courts and commentators considering these cases find the jurisprudence confused.<sup>109</sup>

Confusion about the jurisprudence might be expected given the Court's posture in these cases affirming the existence of the exception but denying its applicability in the case before the Court.<sup>110</sup> However, the Court has not clarified matters very much even in cases in which the domestic relations exception provided the basis for denying federal jurisdiction.<sup>111</sup>

### C. Discussions of the Domestic Relations Exception in Cases in which Jurisdiction Is Declined

One of the seminal cases cited in *Ankenbrandt*<sup>112</sup> in which the Court held that a domestic relations matter could not be heard in federal court was *In re Burrus*.<sup>113</sup> Language from that case is cited in several of the Court's opinions,<sup>114</sup> and it might be hoped that consideration of that case would cast some light on the exception.

At issue in *Burrus* was a custody dispute between a child's father and grandfather.<sup>115</sup> The child's mother had contracted measles when the child, Evelyn, was only months old,<sup>116</sup> and the child had been placed with her grandparents.<sup>117</sup> She stayed with them for about eight years.<sup>118</sup> The father, who had moved to Ohio, subsequently remarried and wanted custody of his daughter.<sup>119</sup>

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<sup>109</sup>E.g., Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 671 (1995) (“[T]he 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.”); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1088 (1994) (“As the confused jurisprudence of the federal courts reflects, the division of authority between the state and federal courts over domestic relations law exists with little persuasive explanation for its origin and little challenge to its validity.”).

<sup>110</sup>Cf. Maryellen Murphy, *Domestic Relations Exception to Diversity Jurisdiction: Ankenbrandt v. Richards*, 28 NEW ENG. L. REV. 577, 593 (1993) (noting that in both *Simms* and *De La Rama*, “the Court reiterated the *Barber* dictum and, despite its apparent approval of the domestic relations exception, held that it had jurisdiction to review the decisions of the territorial courts.”).

<sup>111</sup>*Id.* at 596–97.

<sup>112</sup>*Ankenbrandt v. Richards*, 504 U.S. 689, 702 (1992) (citing *In re Burrus*, 136 U.S. 586 (1890)).

<sup>113</sup>*In re Burrus*, 136 U.S. 586 (1890).

<sup>114</sup>See *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930); *Ankenbrandt*, 504 U.S. at 692; *Elk Grove Unified School Dist. v. Newdow*, 542 U.S. 1, 12 (2004).

<sup>115</sup>*In re Burrus*, 136 U.S. at 594 (discussing “the right to the control and possession of this child, as it is contested by its father and its grandfather”).

<sup>116</sup>*Id.* at 587.

<sup>117</sup>*Id.* (“[W]hile his wife was lying sick of measles, from which she ultimately died, the child was taken, under the directions of a physician, to the residence of the grandfather, Thomas F. Burrus, and Catherine Burrus, his wife.”).

<sup>118</sup>See *id.* at 588.

<sup>119</sup>*Id.* at 587 (“Since that time, Miller [Evelyn’s father] has married again, and, having a house and home, and being well prepared to take care of his child, he has desired its care and custody, and

The Nebraska federal district court ordered the grandparents to return the child to her father,<sup>120</sup> which they did.<sup>121</sup> The father boarded a train to go back to Ohio with Evelyn, and the grandparents boarded the train as well.<sup>122</sup> When the train crossed the border into Iowa, the grandparents forcibly removed their granddaughter and took her back to Nebraska.<sup>123</sup> The grandfather was then held in contempt by the district court for disobeying the court order<sup>124</sup> and was committed to county jail for three months.<sup>125</sup>

When reviewing the various actions taken by the federal district court with an eye toward determining whether that court had jurisdiction in the first place to order the transfer of the child to her father,<sup>126</sup> the *Burrus* Court noted, “The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States.”<sup>127</sup> Yet, one might wonder why the lack of federal law regarding the custody of a child would defeat jurisdiction, given that the father was an Ohio domiciliary and the grandfather was a Nebraska domiciliary.<sup>128</sup> However, as the *Burrus* Court noted, diversity jurisdiction had been granted to the circuit courts, not the federal district courts.<sup>129</sup> Because there was no federal question jurisdiction and because the district court could not hear the case based on diversity jurisdiction, the federal

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made frequent demands of the said Thomas and Catherine Burrus that they deliver it up to him.”)

<sup>120</sup> *Id.* at 588 (“Afterwards, on the 25th day of June, 1889, Judge Dundy made an order that said Evelyn E. Miller, the child, was improperly detained and kept by Thomas Burrus and Catherine Burrus, and that she, the said Evelyn E. Miller, should be awarded to the care and custody of her father, Louis E. Miller.”).

<sup>121</sup> *In re Burrus*, 136 U.S. 586, 588 (1889) (“[S]aid Burrus and wife produce the child before the court within five days from the date of said order.”).

<sup>122</sup> *Id.* (“Miller having started from Omaha for his home in Ohio with the child, the petitioner Burrus and his wife got into the same train.”).

<sup>123</sup> *Id.* (“The result of these efforts was, that the father proceeded somewhat further into the state of Iowa, while the defendants, taking possession of the child with violence and against the will of the father, returned with it to the state of Nebraska.”).

<sup>124</sup> *Id.* at 589.

<sup>125</sup> *Id.* at 589 (“[F]or this contempt Burrus was committed to imprisonment for three months in a county jail.”).

<sup>126</sup> *See id.* at 609.

<sup>127</sup> *In re Burrus*, 136 U.S. at 593–94; *see also* Elk Grove Unified School Dist. v. Newdow, 542 U.S. at 12 (“One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed 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.”) (citing *In re Burrus*, 136 U.S. at 593–94).

<sup>128</sup> *In re Burrus*, 136 U.S. at 587.

<sup>129</sup> *See In re Burrus*, 136 U.S. at 596 (“[T]he District Courts of the United States have not jurisdiction by reason of the citizenship of the parties.”); *see also* Hess v. Hess, 950 F. Supp. 226, 229 n.2 (E.D. Tenn. 1996) (“As the opinion in *Ex parte Burrus* makes clear, federal district courts in that era did not have diversity jurisdiction. *See* 136 U.S. at 596.”); *Cherry v. Cherry*, 438 F.Supp. 88, 89 n.1 (D.C. Md. 1977) (“At that time only the federal circuit courts, not the district courts, had diversity jurisdiction. *See* 136 U.S. at 597.”); Sacks, *supra* note 13, at 1474 (“At that time, only federal circuit courts and not the district courts had diversity jurisdiction.”).

district court never had jurisdiction to order Evelyn's release in the first place.<sup>130</sup> Because that was so, the Court declared the order of imprisonment void as well.<sup>131</sup> But in this case, the suit was not dismissed because of a domestic relations exception as if the case could have been heard under diversity jurisdiction if only the subject matter had concerned something else. On the contrary, it was dismissed because no federal question was presented, and the federal district court did not have the power to hear cases by virtue of diversity jurisdiction.<sup>132</sup>

In *Ohio ex rel. Popovici v. Agler*,<sup>133</sup> the Supreme Court again invoked the domestic relations exception to explain why the federal court had no jurisdiction over a domestic relations matter. In *Popovici*, the wife of the Vice-Consul of Romania sued him for divorce.<sup>134</sup> As the Court noted, the U. S. Constitution specifies that "the "judicial Power shall extend ... to all Cases affecting Ambassadors, other public Ministers and Consuls" and that in "all Cases affecting Ambassadors, other public Ministers and Consuls ... the supreme Court shall have original jurisdiction."<sup>135</sup> Not only was there a constitutional basis for federal court jurisdiction, there was a federal statutory basis as well, which provided that the "jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States: ... Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls,"<sup>136</sup> and "Of all suits against consuls and vice consuls"; the Supreme Court by...being given 'exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics or domestic servants, as a court of law can have consistently with the law of nations.'<sup>137</sup>

The *Popovici* Court understood that the above constitutional and statutory language seemed "pretty sweeping,"<sup>138</sup> but then reasoned that "like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."<sup>139</sup> The Court cited to *Burrus* for the proposition that federal law

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<sup>130</sup> See *In re Burrus*, 136 U.S. at 597 ("[T]he whole proceeding before the district judge in the district court was *coram non jure* [literally "in presence of a person not a judge"; see Black's Law Dictionary 337 (6<sup>th</sup> ed.)] and void").

<sup>131</sup> *Id.* ("[I]mprisonment of Burrus for contempt of that order is equally void.")

<sup>132</sup> See *id.* at 597.

<sup>133</sup> *Popovici*, 280 U.S. 379, 383–84 (1930).

<sup>134</sup> See *id.* at 382.

<sup>135</sup> *Id.* (citing U.S. CONST. art. III, § 2).

<sup>136</sup> *Id.* at 382–83 (citing the Judicial Code (Act of March 3, 1911, c. 231) § 256 (28 USCA §371)).

<sup>137</sup> *Id.* at 383 (citing section 233 (28 USCA § 341)).

<sup>138</sup> *Id.*

<sup>139</sup> *Popovici*, 280 U.S. at 383.

does not govern domestic relations<sup>140</sup> and cited to *Barber, Simms* and *De La Rama* for the proposition that “the jurisdiction of the Courts of the United States over divorces and alimony always has been denied.”<sup>141</sup> The Court then construed the relevant constitutional and statutory language involving consuls as applying to “ordinary civil proceedings,”<sup>142</sup> not to domestic relations.<sup>143</sup>

The Court’s reasoning was unpersuasive. The Court admitted that “there may be objections of policy to one of our States intermeddling with the domestic relations of an official and subject of a foreign power”<sup>144</sup> but then reasoned that “if, as seems likely, the wife was an American citizen, probably she remained one notwithstanding her marriage.”<sup>145</sup> Yet, the point here was that both the Constitution and federal statute direct the federal courts to hear cases involving ambassadors because national interests might be at stake.<sup>146</sup> Further, the Court’s interpretation of the relevant case law was in error. Both *Simms* and *De La Rama* supported the conclusion that federal courts could hear domestic relations issues under these circumstances.<sup>147</sup> First, they involved permissible rather than impermissible assertions of jurisdiction by the federal courts in matters involving divorce and alimony.<sup>148</sup> Second, their emphasis was that jurisdiction was permissible if granted by statute, and both the statutes and constitutional provisions cited in *Popovici* expressly granted federal jurisdiction, at least in a case involving a foreign vice-consul.<sup>149</sup>

*Simms* and *De La Rama* were not dispositive with respect to which court should hear the *Popovici*’s dispute in that they involved territorial rather than state law, and there might have been other reasons that it would be desirable to have state rather than federal courts address the various issues raised in the divorce.<sup>150</sup> But to say that those cases did not require a

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 384.

<sup>143</sup> *See id.*

<sup>144</sup> *Id.*

<sup>145</sup> Ohio ex. rel. *Popovici v. Agler*, 280 U.S. 379, 384 (1930).

<sup>146</sup> See Bradford R. Clark, *Federal Common Law: A Structural Reinterpretation*, 144 U. PA. L. REV. 1245, 1288–89 (1996) (“Because the founders believed that failure to resolve such cases satisfactorily threatened the national peace and harmony, they regarded the availability of federal jurisdiction over such cases as essential.”).

<sup>147</sup> *Simms v. Simms*, 175 U.S. 162, 163 (1899); *De La Rama v. De La Rama*, 201 U.S. 303, 303 (1906).

<sup>148</sup> *Simms*, 175 U.S. at 166; *De La Rama*, 201 U.S. at 307

<sup>149</sup> *Popovici*, 280 U.S. at 380.

<sup>150</sup> Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL’Y 267, 312 (2009) (“The Supreme Court clearly believes that family litigation should remain the business of state courts. This is usually a sensible approach, which respects the state courts’ superior experience and expertise in these matters.”); see also *Rivers v. Hewitt*, No. 11-cv-00439-CMA-KMT, 2011 WL 1344231, \*2 (D. Colo. 2011) (“The Tenth Circuit also has explained the rationales for the rule:(1) the states have a strong interest in domestic relations matters and have



contrary holding is much different from saying that they supported or determined the outcome. *Popovici* did not clarify the doctrine but, instead, made the invocation of the exception seem even more unprincipled than might previously have been inferred.<sup>151</sup>

Regrettably, the Court's treatment of the exception in *Elk Grove Unified School District v. Newdow*<sup>152</sup> has engendered even more confusion. At issue was a suit by Michael Newdow, an atheist, whose daughter attended a school at which the Pledge of Allegiance was recited daily.<sup>153</sup> Newdow viewed the recitation as religious indoctrination because the Pledge contained the words "under God."<sup>154</sup>

Newdow's ex-spouse, Sandra Banning, had been granted exclusive legal custody of their daughter in the couple's divorce.<sup>155</sup> Banning argued that Newdow's suit was not in her daughter's interest, believing that "her daughter would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child as sharing her father's atheist views."<sup>156</sup> Banning opposed having her daughter as a party to the lawsuit.<sup>157</sup>

The *Newdow* Court noted that "[o]ne of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations."<sup>158</sup> Indeed, the Court pointed out, "So strong is our deference to state law in this area that we have recognized a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.'"<sup>159</sup> Here, the Court was not suggesting that the domestic relations exception controlled,<sup>160</sup> but merely that it was instructive to consider. After all, this case neither involved diversity jurisdiction nor even a request to issue a divorce, alimony, or

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developed an expertise in settling family disputes; (2) such disputes often require ongoing supervision, a task for which the federal courts are not suited; (3) federal adjudication of such disputes increases the chances of incompatible or duplicative federal and state court decrees; and (4) such cases serve no particular federal interest, while they crowd the federal court docket." (citing *Vaughan v. Smithson*, 883 F.2d 63, 65 (10th Cir. 1989)).

<sup>151</sup> See Cahn, *supra* note 113, at 1079 ("In yet another case showing the confused nature of the Domestic Relations Exception, the Supreme Court, per Justice Holmes in *Ohio ex rel. Popovici v. Agler*, refused to prevent the Ohio state courts from hearing a divorce suit filed against the Vice-Consul of Romania by his wife, an American citizen and an Ohio resident. To reach this decision, the Court papered over seemingly clear legislative and constitutional provisions to the contrary, further obscuring the source of the Exception.").

<sup>152</sup> *Elk Grove Unified Sch. Dist v. Newdow*, 542 U.S. 1 (2004).

<sup>153</sup> *See id.* at 5.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 9.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 9–10 ("Banning accordingly concluded, as her daughter's sole legal custodian, that it was not in the child's interest to be a party to Newdow's lawsuit.").

<sup>158</sup> *Newdow*, 542 U.S. at 12.

<sup>159</sup> *Id.* at 12–13 (citing *Ankenbrandt*, 504 U.S. at 703).

<sup>160</sup> The *Newdow* Court expressly declined to rest its holding on the domestic relations exception. *See id.* at 13 n.5.

child custody decree.<sup>161</sup>

The *Newdow* Court noted that the federal courts should sometimes decline to hear a case involving “elements of the domestic relationship... even when divorce, alimony, or child custody is not strictly at issue.”<sup>162</sup> For example if a “federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties,”<sup>163</sup> then abstention by the federal court might be appropriate.<sup>164</sup> Here, too, the Court’s point was accurate—there are cases in which abstention is appropriate.<sup>165</sup> Nonetheless, the Court’s comment is potentially misleading as it might be misinterpreted to suggest that the domestic relations exception is quite broad.<sup>166</sup>

The *Newdow* Court suggested that “it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts.”<sup>167</sup> Because *Newdow*’s standing in the case derived from his relationship with his daughter,<sup>168</sup> and because “the interests of this parent and this child are not parallel and, indeed, are potentially in conflict,”<sup>169</sup> the Court explained that:

[I]t is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff’s claimed standing.<sup>170</sup>

There were “hard questions” of family law at issue that were “sure to affect the outcome.”<sup>171</sup> The Court decided that the “prudent course [was] for the

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<sup>161</sup> See *id.* at 20–21 (Rehnquist, C.J., concurring) (“This case does not involve diversity jurisdiction, and respondent does not ask this Court to issue a divorce, alimony, or child custody decree.”).

<sup>162</sup> *Id.* at 13 (citing *Ankenbrandt*, 504 U.S. at 705).

<sup>163</sup> *Id.* (citing *Ankenbrandt*, 504 U.S. at 705–06 (quoting *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 814 (1976)).

<sup>164</sup> See Harbach, *supra* note 60, at 168–72 for a discussion of federal abstention in family matters.

<sup>165</sup> See, e.g., *Dixon v. Kuhn*, 257 F. App’x 553, 555–56 (3rd Cir. 2007) (upholding dismissal of action in federal court under *Younger* abstention doctrine.). The Third Circuit explained that such abstention was warranted when “(1) ongoing state proceedings that are judicial in nature; (2) the state proceedings implicate important state interests; and (3) the state proceedings provide an adequate opportunity to present federal claims.” See *id.* at 555 (citing *Anthony v. Council*, 316 F.3d 412, 418 (3<sup>rd</sup> Cir.2003)).

<sup>166</sup> See Lori A. Catalano, *Totalitarianism in Public Schools: Enforcing a Religious and Political Orthodoxy*, 34 CAP. U. L. REV. 601, 635 (2006) (“The majority in *Elk Grove* overextended this exception to include all cases involving ‘delicate issues of domestic relations.’”).

<sup>167</sup> *Newdow*, 542 U.S. at 13.

<sup>168</sup> See *id.* at 15.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 17.

<sup>171</sup> *Id.*

federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.”<sup>172</sup>

In his concurrence in the judgment, Chief Justice Rehnquist explained that the “domestic relations exception is ... a limiting construction of the statute defining federal diversity jurisdiction...which ‘divests the federal courts of power to issue divorce, alimony, and child custody decrees.’”<sup>173</sup> This meant that the domestic relations exception was not applicable, because the “case does not involve diversity jurisdiction, and respondent does not ask this Court to issue a divorce, alimony, or child custody decree.”<sup>174</sup> Thus, both the majority and the concurrence recognized that the domestic relations exception was not and should not be thought the basis for the decision, although *Newdow* is cited in the lower courts as support for the existence of the domestic relations exception to federal jurisdiction.<sup>175</sup>

The potential difficulty posed by associating *Newdow* with the exception is that courts might misunderstand what the exception is or how it works. For example, the court in *Chapman v. Barcus* cited *Newdow* for the proposition that the domestic relations exception permits a district court to “decline to exercise jurisdiction over cases which merely involve ‘elements of the domestic relationship.’”<sup>176</sup> This is quite unfortunate, because *Newdow* is being misunderstood as expanding an exception that the *Ankenbrandt* Court tried to make clear was quite narrow.<sup>177</sup>

A narrowly construed domestic relations exception establishes that as a general matter the federal courts should not address whether a divorce should be awarded, how much spousal support should be received, or who should receive custody. However, the federal courts can and should decide whether a state is using impermissible factors when addressing a domestic relations matter. Consider *Palmore v. Sidoti*, in which the Court reviewed a Florida custody decision modifying an award to the father from the

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<sup>172</sup> *Id.*

<sup>173</sup> *Newdow*, 542 U.S. at 20–21 (citing 28 U.S.C. § 1332 and *Ankenbrandt*, 504 U.S. at 703) (Rehnquist, C.J., concurring).

<sup>174</sup> *Id.* at 21 (Rehnquist, C.J. concurring).

<sup>175</sup> See, e.g., *Mayercheck v. Judges of the Pennsylvania Supreme Court*, No. 08-1112, 2009 WL 2524755, \*9 (W.D. Pa. 2009); *Hamilton v. Kentucky*, No. 08-326-KSF, 2009 WL 580217, \*5 (E.D. Ky. 2009); *Chapman v. Barcus*, No. 08-CV-0497-CVE-PJC, 2009 WL 57092, \*5 n.11 (N.D. Okla. 2009).

<sup>176</sup> *Chapman v. Barcus*, No. 08-CV-0497-CVE-PJC, 2009 WL 57092, \*5 n.11 (N.D. Okla. 2009) (citing *Elk Grove*, 542 U.S. at 13).

<sup>177</sup> *Marshall v. Marshall*, 547 U.S. 293, 299 (2006) (“In *Ankenbrandt v. Richards*, 504 U.S. 689 (1992), this Court reined in the ‘domestic relations exception.’”); Robert P. Dougherty III, *Marshall v. Marshall: Playmates, Prenupts, and the Probate Exception*, 61 ARK. L. REV. 329, 335 (2008) (“This recognition of the exception’s misuse led the *Ankenbrandt* Court to clarify the extent of the domestic-relations exception by stating that only ‘divorce, alimony, [and] child custody decree[s]’ remained outside of the jurisdictional bounds of the federal courts.”); Adler, *supra* note 35, at 238 (“*Ankenbrandt* affirms the existence of the domestic relations exception, but limits its application.”).

mother, who had cohabited with and then married an African-American man.<sup>178</sup> While admitting that the Court did not normally address such matters,<sup>179</sup> the Court nowhere suggested that it lacked jurisdiction to hear the case.<sup>180</sup> On the contrary, it addressed the merits of the case, reversing the decision because “racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”<sup>181</sup>

*Orr v. Orr*<sup>182</sup> involved a challenge to Alabama’s statutory scheme regarding spousal support.<sup>183</sup> William Orr had been ordered to pay Lillian Orr spousal support, and he argued that the Alabama spousal support statutes were “unconstitutional because they authorize courts to place an obligation of alimony upon husbands but never upon wives.”<sup>184</sup> As an initial matter, the *Orr* Court considered whether it had jurisdiction to hear the case, ultimately rejecting three possible bases upon which it might be thought that the Court should not issue an opinion.<sup>185</sup> In their dissents, Justice Powell argued that the Court should have abstained<sup>186</sup> and Justice Rehnquist claimed that William Orr did not have standing.<sup>187</sup> No justice on the Court argued that the domestic relations exception was applicable.

Some courts read the domestic relations exception as only applying to diversity jurisdiction.<sup>188</sup> Others read it more broadly to include federal

<sup>178</sup> *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984) (“In September 1981 the father sought custody of the child by filing a petition to modify the prior judgment because of changed conditions. The change was that the child’s mother was then cohabiting with a Negro, Clarence Palmore, Jr., whom she married two months later.”).

<sup>179</sup> *Id.* at 431 (“The judgment of a state court determining or reviewing a child custody decision is not ordinarily a likely candidate for review by this Court.”).

<sup>180</sup> *Cf. Adler, supra* note 35, at 239 (discussing “*Palmore v. Sidoti*, (in which the Supreme Court reversed a state court custody award because the non-custodial parent lost custody on the basis of her interracial remarriage)”).

<sup>181</sup> *Palmore*, 466 U.S. at 434. The Florida courts did not understand *Palmore* to require that the child be returned to her mother. *See Palmore v. Sidoti*, 472 So.2d 843, 846 (Fla. App. 1985) (“Also, contrary to the mother’s contention, we do not believe the Supreme Court’s opinion requires that custody be given to the mother. The Supreme Court’s decision was that the modification of custody could not be predicated upon the mother’s association with a black man. Its opinion did not direct a reinstatement of the original custody decree and the immediate return of the child.”).

<sup>182</sup> *Orr v. Orr*, 440 U.S. 268 (1979).

<sup>183</sup> *Id.* at 270 (“The question presented is the constitutionality of Alabama alimony statutes which provide that husbands, but not wives, may be required to pay alimony upon divorce.”).

<sup>184</sup> *Id.* at 271.

<sup>185</sup> *See id.* at 271–73. (The Court addressed whether Orr had standing, whether his challenge was timely, and whether he was bound in any event because the obligation was part of a stipulation made by the parties).

<sup>186</sup> *See id.* at 289 (Powell, J., dissenting) (“In these circumstances, I find the Court’s insistence upon reaching and deciding the merits quite irreconcilable with the long-established doctrine that we abstain from reaching a federal constitutional claim that is premised on unsettled questions of state law. . . .”).

<sup>187</sup> *See id.* at 299 (Rehnquist, J., dissenting) (discussing “appellant’s lack of standing”).

<sup>188</sup> *See Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 947 (9<sup>th</sup> Cir. 2008) (“Plaintiff argues that the domestic relations exception does not apply in this case, because subject matter jurisdiction exists under the federal question jurisdiction statute, § 1331, and the domestic

question jurisdiction.<sup>189</sup> Even under the latter reading, however, the precluded subject should be a particular award of custody or support rather than to the statutes underlying such awards.<sup>190</sup> That said, however, a federal court's holding that a particular statute violates constitutional guarantees would not entail that the court should decide who should be awarded custody in a particular case.<sup>191</sup> Thus, even if the domestic relations exception is read to preclude federal court jurisdiction even when a federal question is at issue, the content of the bar should be read narrowly—at most, the court should only be barred from addressing whether a divorce should be granted,<sup>192</sup> how much spousal support is appropriate,<sup>193</sup> or who should have custody.<sup>194</sup> A lack of familiarity or expertise with those questions would not similarly bar a federal court from addressing issues arising in a tort action<sup>195</sup> or whether a state's domestic relations law violated equal protection guarantees.<sup>196</sup>

### III. CONGRESS AND DOMESTIC RELATIONS

*Burrus* announced that there is no federal domestic relations law, and that decision has been cited with approval numerous times.<sup>197</sup> Further, the Supreme Court has repeatedly suggested that states rather than the federal government should regulate the family.<sup>198</sup> Yet, at the same time, Congress has passed numerous statutes affecting the family, and there is a developed jurisprudence specifying the conditions under which such legislation will be held unconstitutional under what might be termed a domestic relations

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relations exception applies only to the diversity jurisdiction statute, § 1332. We agree.”).

<sup>189</sup> *Norton v. McOsker*, 407 F.3d 501, 505 (1st Cir. 2005); *Danforth v. Celebrezze*, 76 F. App'x. 615, 616 (6th Cir. 2003).

<sup>190</sup> *See Johnson v. Rodrigues (Orozco)*, 226 F.3d 1103, 1108 (10th Cir. 2000) (“Plaintiff’s discrete general challenge to the validity of the Utah adoption laws must be considered, thus distinguishing this case from one challenging the merits of a particular state court ruling.”).

<sup>191</sup> *Id.* at 1113 (“If the Utah adoption law and its application here should be held invalid, of course the federal district court should not undertake the making of any custody or adoption ruling. Those matters instead would be within the jurisdiction and expertise of the Utah courts.”).

<sup>192</sup> *De la Rama v. De la Rama*, 201 U.S. 303 (1906).

<sup>193</sup> *Simms v. Simms*, 175 U.S. 162, 167–69 (1899).

<sup>194</sup> *Palmore v. Sidoti*, 466 U.S. 429, 430–31, 434 (1984).

<sup>195</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 703–04 (1992).

<sup>196</sup> *Palmore*, 466 U.S. at 429; *Orr v. Orr*, 440 U.S. 268 (1979).

<sup>197</sup> *In re Burrus*, 136 U.S. 586, 593–94 (1890); *see Elk Grove Unified School Dist. v. Newdow*, 542 U.S. at 12 (2004); *Boggs v. Boggs*, 520 U.S. 833, 848 (1997); *Ankenbrandt*, 504 U.S. at 703; *Rose v. Rose*, 481 U.S. 619, 625 (1987); *Ridgway v. Ridgway*, 454 U.S. 46, 72 n.2 (1981); *McCarty v. McCarty*, 453 U.S. 210, 220 (1981), *superseded by statute*, Former Spouses’ Protection Act, 10 U.S.C. § 1408 (2006), as recognized in *Mansell v. Mansell*, 490 U.S. 581 (1989); *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979); *Williams v. North Carolina*, 325 U.S. 226, 233 (1945); *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383 (1930); *Simms*, 175 U.S. at 167.

<sup>198</sup> *Burrus*, 136 U.S. at 593–94; *see Newdow*, 542 U.S. at 12; *Boggs*, 520 U.S. at 848; *Ankenbrandt*, 504 U.S. at 703; *Rose*, 481 U.S. at 625; *Ridgway*, 454 U.S. at 72 n.2; *McCarty*, 453 U.S. at 220; *Hisquierdo*, 439 U.S. at 581; *Williams*, 325 U.S. at 233; *Popovici*, 280 U.S. at 383; *Simms*, 175 U.S. at 167.

exception.<sup>199</sup> The applicable rule is relatively straightforward, although the Court has been inconsistent when applying it.

#### A. Federal Domestic Relations Law

Over one hundred years ago, the *Burrus* Court announced that the “whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the laws of the United States.”<sup>200</sup> That case has been cited with approval numerous times.<sup>201</sup> In *United States v. Lopez*, the Court struck down a federal law prohibiting guns in school zones,<sup>202</sup> reasoning that “under the Government’s ‘national productivity’ reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example.”<sup>203</sup> By the same token, the Court in *United States v. Morrison* struck down a provision of the Violence Against Women Act, because holding otherwise might open the door to congressional regulation of “family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and childrearing on the national economy is undoubtedly significant.”<sup>204</sup>

Yet, as various commentators have noted, there is extensive federal legislation affecting families.<sup>205</sup> At least one issue involves when such statutes will be found unconstitutional. While the Court implied in *Lopez* and *Morrison* that statutes attempting to regulate the family will simply be struck down as beyond Congress’s power, that does not represent the

<sup>199</sup> See Law, *supra* note 36, at 182–83 (discussing why the domestic relations exception should apply to both Congress and the federal courts).

<sup>200</sup> *Burrus*, 136 U.S. at 593–94; see *Newdow*, 542 U.S. at 12 (“One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. Long ago we observed 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.’”) (citing *Burrus*, 136 U.S. at 593–94).

<sup>201</sup> *Burrus*, 136 U.S. at 593–94; see *Newdow*, 542 U.S. at 12; *Boggs*, 520 U.S. at 848; *Ankenbrandt*, 504 U.S. at 703; *Rose*, 481 U.S. at 625; *Ridgway*, 454 U.S. at 72 n.2; *McCarty*, 453 U.S. at 220; *Hisquierdo*, 439 U.S. at 581; *Williams*, 325 U.S. at 233; *Popovici*, 280 U.S. at 383; *Simms*, 175 U.S. at 167.

<sup>202</sup> See *United States v. Lopez*, 514 U.S. 549, 551 (1995) (“In the Gun-Free School Zones Act of 1990, Congress made it a federal offense ‘for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone.’ 18 U.S.C. § 922(q)(1)(A) (1988 ed., Supp. V).”).

<sup>203</sup> *Id.* at 564.

<sup>204</sup> *United States v. Morrison*, 529 U.S. 598, 615–16 (2000).

<sup>205</sup> Estin, *supra* note 150, at 270 (“Congress has enacted an extensive legislative program in family law since 1974, based on its spending and commerce powers under Article I, its power under the Full Faith and Credit Clause in Article IV, and its enforcement power under Section 5 of the Fourteenth Amendment.”); Linda D. Elrod, *The Federalization of Family Law*, 36 HUM. RTS. 6, 6 (2009) (“A multitude of federal laws now regulate and impact families”); Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 653 (2001) (“federal statutory family policies are plentiful”).

prevailing jurisprudence for two distinct reasons. First, federal legislation affecting the family has been upheld even when passed pursuant to Congress's Commerce power. For example, various circuits have upheld the Child Support Recovery Act as a valid exercise of congressional power under the Commerce Clause.<sup>206</sup> Second, the Court has offered a general test for determining whether a federal statute affecting family law is constitutional, rejecting an all-or-nothing approach and instead examines the federal interests served by the legislation and the degree to which such interests would be undermined were the legislation not given effect.<sup>207</sup>

### *B. The Major Damage to Federal Interests Test*

Shortly after *Burrus* was decided, the Court had to resolve a conflict pitting state community property law against federal law in *McCune v. Essig*.<sup>208</sup> In this case, the Court seemed to adopt a categorical approach specifying which matters were left to the states to regulate and which matters were subject to federal regulation.<sup>209</sup>

*McCune v. Essig* involved competing title claims to a particular piece of property.<sup>210</sup> William and Sarah McCune had settled on certain property subject to the homestead laws.<sup>211</sup> If they lived on or cultivated the property for a certain period of time, they would become its owners.<sup>212</sup> In April of 1884, William filed a claim to the land as a homestead, but died intestate later that year, leaving his wife, Sarah, and daughter, Mary, his heirs.<sup>213</sup> Mother and daughter continued to reside on the land for the next five and a half years, whereupon Sarah McCune established that she had been in full compliance with the homestead laws.<sup>214</sup> In March of 1891, she was recognized as the legal owner of the land.<sup>215</sup> The next year, after marrying Daniel Donahue,<sup>216</sup> she sold the land to the Essigs.<sup>217</sup>

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<sup>206</sup> *United States v. King*, 276 F.3d 109, 113 (2d Cir. 2002) (“the CSRA is a permissible exercise of Congressional authority under the Commerce Clause”); *United States v. Faasse*, 265 F.3d 475, 479 (6<sup>th</sup> Cir. 2001) (“All ten of our sister circuits that have considered the constitutionality of the CSRA in Commerce Clause challenges after *United States v. Lopez*, 514 U.S. 549 (1995), have upheld the statute. We now join them in concluding that the CSRA is an appropriate exercise of Congress's power under the Commerce Clause.”).

<sup>207</sup> *McCune v. Essig*, 199 U.S. 382, 390 (1905).

<sup>208</sup> *Id.* at 388–90.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 386–87.

<sup>211</sup> *Id.* at 386.

<sup>212</sup> *See id.* at 388–89 (quoting the conditions specified in Ch.5, title 32, §2291 under which a patent to the property would be given to those living on or cultivating the land).

<sup>213</sup> *McCune*, 199 U.S. at 386–87.

<sup>214</sup> *Id.* at 387.

<sup>215</sup> *Id.* (“on the sixth of March, 1891, a patent was issued to her”).

<sup>216</sup> *Id.* (“In the year 1892 she, having become Mrs. Donahue”); *Id.* at 386 (Mary was the “stepdaughter of Daniel Donahue”).

<sup>217</sup> *Id.* at 387.

Mary McCune claimed that an interest in the property had passed to her pursuant to state law when her father had died and thus that Sarah did not have the power to sell Mary's interest in the property.<sup>218</sup> Mary sought both a partitioning of the property and payment for its use by the Essigs.<sup>219</sup> The Court explained that the interest that William McCune had in the property (which he could convey to his daughter) was established as a matter of federal law,<sup>220</sup> for it was only by virtue of federal law that the McCunes had acquired an interest in the property in the first place. However, federal law specified that William McCune would not have acquired an interest in the property until 1891 and thus had no interest to convey to his daughter; instead, the interest in the property accrued solely to the widow, Sarah McCune.<sup>221</sup> While there were some state cases that suggested that Mary had acquired a beneficial interest in the land,<sup>222</sup> the Court was "unable to accept them as controlling."<sup>223</sup>

Some commentators imply that the *McCune* Court suggested that state law was simply trumped by federal law.<sup>224</sup> However, a better reading is that the Court distinguished between those matters that were appropriately regulated by the state and those that were appropriately regulated by the federal government. Because the federal government owned the property at issue, federal law determined when and to whom the property had passed.<sup>225</sup> Once it had passed, state property law would govern.<sup>226</sup> The Court explained that the "law of the state is not competent to do this [i.e., give the daughter an interest in the land],"<sup>227</sup> because the state in effect was determining to whom the property had passed.<sup>228</sup> This means that *McCune*

<sup>218</sup> *Id.* at 387–88.

<sup>219</sup> *McCune v. Essig*, 199 U.S. 382, 386 (1905) ("Suit in equity to establish title in appellant to an undivided one half of northeast quarter of section 6, township 25 north, range 38 east, Washington meridian 2, and for accounting of rents and profits, and for partition between appellant and appellees.").

<sup>220</sup> *Id.* at 390 ("whenever the question is whether title to land which had been the property of the United States has passed, that question must be resolved by the laws of the United States").

<sup>221</sup> *See id.* at 388–89 (discussing the provisions of Chap. 5, title 32, § 2291 of the Revised Statutes)

<sup>222</sup> *See id.* at 390.

<sup>223</sup> *Id.*

<sup>224</sup> *See* Lynn D. Wardle, *Who Decides? The Federal Architecture of DOMA and Comparative Marriage Recognition*, 41 CAL. W. INT'L L.J. 143, 175 (2010) ("The Supreme Court rejected application of state law because '[t]he words of the [federal Homestead Act] statute are clear,' and even though contrary to state law, were controlling on the issue."); *see also* Joshua Baker & William C. Duncan, *As Goes DOMA ... Defending DOMA and the State Marriage Measures*, 24 REGENT U. L. REV. 1, 43–44 (2011–2012) ("the court concluded that '[t]he words of the {Federal Homestead Act} statute are clear'").

<sup>225</sup> *McCune*, 199 U.S. at 390 ("whenever the question is whether title to land which had been the property of the United States has passed, that question must be resolved by the laws of the United States").

<sup>226</sup> *Id.* ("whenever, according to those laws, the title shall have passed, then, like all other property in the state, it is subject to state legislation.")

<sup>227</sup> *Id.* at 389.

<sup>228</sup> *See id.* at 390 (suggesting that state law was attempting to "impos[e] a limitation upon the title



is not about which law trumps which but, instead, about which law governs the acquisition of an interest on the one hand and the transfer of an interest on the other.<sup>229</sup>

*McCune* involved the state of Washington's community property law,<sup>230</sup> many of the cases in the domestic relations exception jurisprudence involve actual or perceived conflicts between federal law and state community property law. Consider *Wissner v. Wissner*,<sup>231</sup> which involved a dispute over who should receive the proceeds of an insurance policy. Major Leonard Wissner, who died while serving his country,<sup>232</sup> had "named his mother principal and his father contingent beneficiary under his National Service Life Insurance policy,"<sup>233</sup> which presented the question of whether Wissner's widow was entitled to some of the proceeds.<sup>234</sup>

Wissner and his wife "were estranged at the time he entered the Army or shortly thereafter,"<sup>235</sup> although they never divorced.<sup>236</sup> At issue here was whether California community property law was preempted by the federal law that specified "with force and clarity" that "the proceeds belong to the named beneficiary and no other."<sup>237</sup>

Major Wissner's military pay, which was community property under California law,<sup>238</sup> was the source of the premiums for the insurance policy.<sup>239</sup> The California court ruled that the policy proceeds were community property<sup>240</sup> and thus that one half of the proceeds belonged to Wissner's widow.<sup>241</sup> The federal statute was held unconstitutional because it excluded Wissner's widow from receiving any proceeds and thus displaced the California community property scheme.<sup>242</sup>

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of the widow which section 2291 of the Revised Statutes does not impose.").

<sup>229</sup> *Id.* at 388–90.

<sup>230</sup> *See id.* at 387.

<sup>231</sup> *Wissner v. Wissner*, 338 U.S. 655, 658 (1950).

<sup>232</sup> *Id.* at 656–57 ("Major Leonard O. Wissner, ... died in India in 1945 in the service of the United States Army.").

<sup>233</sup> *Id.* at 657.

<sup>234</sup> *Id.* ("In 1947 the Major's widow brought action against the appellants in the Superior Court for Stanislaus County, State of California, alleging that under California community property law she was entitled to one-half the proceeds of the policy.").

<sup>235</sup> *Id.*

<sup>236</sup> *See id.* ("The decedent and his widow had been married in 1930, and until the date of Major Wissner's death had been legally domiciled there [in California] and subject to the state's community property laws.").

<sup>237</sup> *Wissner*, 338 U.S. at 658.

<sup>238</sup> *Id.* at 657.

<sup>239</sup> *Id.*

<sup>240</sup> *Id.* at 658.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 656 (explaining that the Court read "the opinion below as a decision that the federal statute was unconstitutional").

When addressing the constitutionality of the statute, the Court explained that “Congress in its desire to afford as much material protection as possible to its fighting force could wisely provide a plan of insurance coverage”<sup>243</sup> to enhance military morale.<sup>244</sup> The Court noted that the “National Service Life Insurance Act is the congressional mode of affording a uniform and comprehensive system of life insurance for members and veterans of the armed forces of the United States”<sup>245</sup> and was unwilling to recognize an exception that would undermine that uniform system.<sup>246</sup> Here, the Court did not adopt an approach suggesting that state and federal law governed non-overlapping spheres. On the contrary, the Court recognized that federal law and state community property law were in conflict and that the federal creation of “a uniform and comprehensive system”<sup>247</sup> would enhance something as important as “national defense,”<sup>248</sup> even if displacing state domestic relations law.

*De Sylva v. Ballentine* also involved a California law,<sup>249</sup> although the specific issue did not turn on a special feature of community property law. At issue, instead, was whether an illegitimate child, Stephen Ballentine, was entitled to share in the proceeds from copyrights that had been issued to his late father, George De Sylva.<sup>250</sup>

The *De Sylva* Court had two issues to decide: (1) whether the children of a deceased copyright holder were in the same class as the holder’s widow for purposes of benefiting from the copyright and (2) whether an illegitimate child would count as a child for purposes of determining who might benefit from copyright ownership.<sup>251</sup> *De Sylva*’s widow, Marie, argued that she and Ballentine were not in the same class of beneficiaries.<sup>252</sup> Once the relevant language was construed as placing them in the same class,<sup>253</sup> a separate issue was whether an illegitimate child should be treated as legitimate for purposes of the statute.<sup>254</sup>

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<sup>243</sup> *Wissner*, 338 U.S. at 660.

<sup>244</sup> *Id.* (“Possession of government insurance, payable to the relative of his choice, might well directly enhance the morale of the serviceman.”).

<sup>245</sup> *Id.* at 658.

<sup>246</sup> *Id.* at 660.

<sup>247</sup> *Id.* at 658.

<sup>248</sup> *Id.* at 661.

<sup>249</sup> As had been true in *Wissner*, *De Sylva* also involved California law. See *De Sylva v. Ballentine*, 351 U.S. 570, 573–75, 581 (1956).

<sup>250</sup> See *Ballentine v. De Sylva*, 226 F.2d 623, 624 (9<sup>th</sup> Cir. 1955) (“George G. DeSylva, who died July 11, 1950, was the author of numerous musical compositions which were copyrighted.”).

<sup>251</sup> See *De Sylva*, 351 U.S. at 572.

<sup>252</sup> *Id.* at 573 (“The widow ... interprets the clause as providing for the passing of the renewal rights, on the death of the author, first to the widow, and then only after her death to the ‘children’ of the author.”).

<sup>253</sup> See *id.* at 580 (“[W]e hold that, on the death of the author, the widow and children of the author succeed to the right of renewal as a class, and are each entitled to share in the renewal term of the copyright.”).

<sup>254</sup> *Id.* at 572.

One possible approach would have been to say that because this was a federal benefit at issue, the determination of whether “child” includes “illegitimate child” was itself a matter of federal, rather than state, law.<sup>255</sup> The *DeSylva* Court did not take that route, instead noting that “there is no federal law of domestic relations, which is primarily a matter of state concern.”<sup>256</sup> The Court then distinguished between the scope and the content of a right: “The scope of a federal right is, of course, a federal question, but that does not mean that its content is not to be determined by state, rather than federal law.”<sup>257</sup> Thus, whether a federal statute affording a right to a “child” of the deceased would include an illegitimate child was a matter of state law,<sup>258</sup> whereas the scope of the right, i.e., which benefits would accrue by virtue of having the right in question,<sup>259</sup> would be a matter of federal law.<sup>260</sup>

In *De Sylva*, federal law piggybacked on state law with respect to who counted as a child. Suppose, however, that there had been a conflict between state and federal law. As *Wissner* illustrates, a valid federal law will trump a state law where there is a conflict.<sup>261</sup> However, a separate issue involves the conditions under which a federal statute displacing state domestic relations law will be treated as valid.<sup>262</sup>

*Free v. Bland*<sup>263</sup> involved a conflict between federal law and the domestic relations law of Texas, another community property state.<sup>264</sup> At issue was the ownership of Treasury bonds that had been issued to Mr. and Mrs. Free. The relevant Treasury regulation specified that “when either co-owner dies, ‘the survivor will be recognized as the sole and absolute owner.’”<sup>265</sup> Mrs. Ida Free died and Mr. J.W. Free as the survivor claimed exclusive ownership of the bonds. However, James Bland, Mrs. Free’s son from a previous marriage, claimed an interest in the bonds “as the principal

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<sup>255</sup> *Id.* at 583 (Douglas, J. concurring) (“The meaning of the word ‘children’ as used in § 24 of the Copyright Act is a federal question.”).

<sup>256</sup> *Id.* at 580.

<sup>257</sup> *De Sylva*, 351 U.S. at 580.

<sup>258</sup> See *id.* at 581–82; *Cf.* *Astrue v. Capato ex rel. B.N.C.* 132 S.Ct. 2021, 2030 (U.S. 2012) (“Reference to state law to determine an applicant’s status as a ‘child’ is anything but anomalous.”).

<sup>259</sup> See *De Sylva*, 351 U.S. at 582 (noting that although the illegitimate child qualified as a child for purposes of determining whether that individual had any rights at all, “there remains the question of what are the respective rights of the widow and child in the copyright renewals, once it is accepted that they both succeed to the renewals as members of the same class”).

<sup>260</sup> *De Sylva*, 351 U.S. at 580.

<sup>261</sup> See *supra* notes 211–27 and accompanying text; see also *Free v. Bland*, 369 U.S. 663, 666 (1962) (“when there is a conflict ... [between a state law and] a valid federal law, ... the Framers of our Constitution provided that the federal law must prevail”).

<sup>262</sup> *De Sylva*, 351 U.S. at 582.

<sup>263</sup> *Free*, 369 U.S. at 663.

<sup>264</sup> *Id.* at 664 (“Mr. and Mrs. Free were domiciled in Texas. That State follows the community property system.”).

<sup>265</sup> *Id.* at 664–65 (citing 31 CFR § 315.61).

beneficiary under his mother's will."<sup>266</sup> Under Texas community property law, "each spouse own[ed] an undivided one-half interest in the community property."<sup>267</sup>

The Treasury had adopted these regulations "to establish the right of survivorship regardless of local state law."<sup>268</sup> The Court reasoned that the "success of the management of the national debt depends to a significant measure upon the success of the sales of the savings bonds"<sup>269</sup> and that the "survivorship provision [was] a convenient method of avoiding complicated probate proceedings."<sup>270</sup> Here, to determine the validity of the federal displacement of state law, the Court considered the importance of the federal interest at issue (management of the national debt) rather than the importance of the state interest, explaining that the "relative importance to the State of its own law is not material when there is a conflict with a valid federal law."<sup>271</sup>

One of the reasons that the Court upheld the application of the federal provision was that there was no reason to believe that federal law was being used to perpetrate a fraud;<sup>272</sup> if the husband had predeceased the wife, then she would have been entitled to the bonds. If, instead, the federal provision had somehow been used to effectuate a fraud, federal law could not be used as a shield to preclude a remedy.<sup>273</sup> The Court discussed this fraud exception in *Yiatchos v. Yiatchos*.<sup>274</sup>

*Yiatchos* involved the purchase of U. S. Savings Bonds with community property funds.<sup>275</sup> The bonds were made payable upon the death of the purchaser to the purchaser's brother,<sup>276</sup> and the Court explained that the brother was "entitled to the bonds unless his deceased brother [had] committed fraud or breach of trust tantamount to fraud."<sup>277</sup> Whether Angel Yiatchos had in fact committed fraud depended at least in part on whether Pearle Yiatchos, his widow, had agreed to Angel's making

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<sup>266</sup> *Id.* at 665.

<sup>267</sup> *Id.* at 664.

<sup>268</sup> *Id.* at 667-68.

<sup>269</sup> *Free*, 369 U.S. at 669.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.* at 666.

<sup>272</sup> *Id.* at 670-71 ("The regulations are not intended to be a shield for fraud and relief would be available in a case where the circumstances manifest fraud or a breach of trust tantamount thereto on the part of a husband while acting in his capacity as manager of the general community property.")

<sup>273</sup> *See Yiatchos v. Yiatchos*, 376 U.S. 306, 307 (1964) ("[T]he federal law [is] not to be used as a shield for fraud or to prevent relief 'where the circumstances manifest fraud or a breach of trust tantamount thereto on the part of a husband while acting in his capacity as manager of the general community property.'").

<sup>274</sup> *Yiatchos*, 376 U.S. at 307.

<sup>275</sup> *Id.* at 307-08 ("Petitioner is the brother of Angel Yiatchos who died in 1958 and who in 1950-1951 purchased with community funds belonging to himself and his wife United States Savings Bonds in the face amount of \$15,075.")

<sup>276</sup> *See id.* at 308.

<sup>277</sup> *Id.* at 309.

the bonds payable to his brother<sup>278</sup> and, if not, whether allowing “all of the bonds to pass to the designated beneficiary would effect an involuntary and impermissible conversion of the widow’s assets.”<sup>279</sup> The Court therefore remanded the case for further proceedings.<sup>280</sup>

In *Yiatchos*, the Court discussed the importance of maintaining the savings bond system—the “success of the management of the national debt ... depend[s] upon the successful sale of the savings bonds.”<sup>281</sup> The federal regulations themselves did not permit fraud,<sup>282</sup> so there was no clear opportunity to discuss the conditions under which a federal law might be held unconstitutional because it displaced state law. That opportunity was presented in *United States v. Yazell*.<sup>283</sup>

The *Yazell* Court did two things: it announced the standard for determining whether a federal law displacing state domestic relations law offends constitutional guarantees, and it held that federal law did not trump the state law at issue.<sup>284</sup> The Court explained:

Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements. They should be overridden by the federal courts only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied.<sup>285</sup>

At issue in *Yazell* was a Texas coverture law, since repealed,<sup>286</sup> that precluded a married woman from binding her separate property absent a court decree permitting her to do so.<sup>287</sup> Delbert and Ethel Mae Yazell had received a loan from the Small Business Administration (SBA) after their

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<sup>278</sup> *Id.* at 310 (“If she gave such consent, or if she ratified the purchase and registration of the bonds, the conduct of the husband was not, for federal purposes, fraud or breach of trust sufficient to avoid the command of the regulations, and petitioner would be entitled to all of the bonds.”).

<sup>279</sup> *Id.* at 311.

<sup>280</sup> See *Yiatchos*, 376 U.S. at 313.

<sup>281</sup> *Id.* at 307 (citing *Free*, 369 U.S. at 669).

<sup>282</sup> *Id.* at 309 (“Under the federal regulations petitioner is entitled to the bonds unless his deceased brother committed fraud or breach of trust tantamount to fraud.”).

<sup>283</sup> See *United States v. Yazell*, 382 U.S. 341 (1966).

<sup>284</sup> See *id.*

<sup>285</sup> *Id.* at 352.

<sup>286</sup> See *id.* at 351.

<sup>287</sup> *Id.* at 343 (“At the time the loan was made, Texas law provided that a married woman could not bind her separate property unless she had first obtained a court decree removing her disability to contract.”).

business had been destroyed in a flood,<sup>288</sup> although Ethel Mae had never received court authorization to use her separate property as collateral.<sup>289</sup> The Court noted that the SBA loan “was negotiated with specific reference to Texas law,”<sup>290</sup> and stated that “the SBA was aware and is chargeable with knowledge that the contract would be subject to the Texas law of coverture.”<sup>291</sup> If indeed all of the parties were operating under the assumption that the Texas coverture law would still be operating to protect Mrs. Yazell’s separate property,<sup>292</sup> then the federal government was now “seeking the unconscionable advantage of recourse to assets for which it did not bargain.”<sup>293</sup>

The Court explained that the federal laws that permissibly “supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation.”<sup>294</sup> The Court applied the standard discussed in *Yazell* in *Hisquierdo v. Hisquierdo*.<sup>295</sup>

At issue in *Hisquierdo* was whether a divorcee was entitled to a share of her husband’s retirement benefits under the Railroad Retirement Act as required by California law.<sup>296</sup> The *Hisquierdo* Court quoted *Burrus* for the proposition that the “whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States,”<sup>297</sup> explaining both that conflicts between state and federal law are rare and that preemption will not be presumed absent express statement by Congress to that effect.<sup>298</sup> A difference in word choice in state versus federal statutes will not be enough to establish that a conflict exists and that a choice between them must be made.<sup>299</sup> However, where there is a conflict and the Court must decide whether state law is preempted by federal law, the applicable test is from *Yazell*: “State family

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<sup>288</sup> *Id.* at 344 (“A disastrous flood occurred in Lampasas on May 12, 1957. The stock of Yazell’s Little Ages was ruined. Its fixtures were seriously damaged.”).

<sup>289</sup> *See Yazell*, 382 U.S. at 343.

<sup>290</sup> *Id.* at 346.

<sup>291</sup> *Id.*

<sup>292</sup> *Id.* (“[B]oth the SBA and the Yazells entered into the contract without any thought that the defense of coverture would be unavailable to Mrs. Yazell with respect to her separate property as provided by Texas law”).

<sup>293</sup> *Id.*

<sup>294</sup> *Id.* at 354.

<sup>295</sup> *See Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

<sup>296</sup> *Id.* at 573 (“Petitioner Jess H. Hisquierdo in 1975 sued to dissolve his marriage with respondent Angela Hisquierdo. The Supreme Court of California, in applying the State’s community property rules, awarded respondent an interest in petitioner’s expectation of ultimately receiving benefits under the Railroad Retirement Act of 1974, 88 Stat. 1305, 45 U.S.C. § 231 *et seq.*”).

<sup>297</sup> *Id.* at 581 (quoting *Burrus*, 136 U.S. at 593–94).

<sup>298</sup> *Id.* (“On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has ‘positively required by direct enactment’ that state law be pre-empted.”)(citing *Wetmore v. Markoe*, 196 U.S. 68, 77 (1904)).

<sup>299</sup> *Id.* (“A mere conflict in words is not sufficient.”).

and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.”<sup>300</sup> The Court explained how it would go about determining in a particular case whether state law had been preempted: “The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.”<sup>301</sup>

Congress had not only specified that the benefits would be disbursed “to each eligible ‘individual’”<sup>302</sup> but had also discussed the conditions under which a spouse would be entitled to receive the benefits. “[T]he spouse qualifies for an individual benefit if the spouse lives with the employee, and receives regular contributions from the employee for support, or is entitled to support from the employee pursuant to a court order.”<sup>303</sup> However, lest one think that Congress intended that the ex-spouse also receive payments so long as decreed within the divorce judgment, Congress specifically provided that the “benefits terminate, however, when the spouse and the employee are absolutely divorced.”<sup>304</sup> Thus, the question before the Court was not whether Congress intended to displace state law but whether the federal interests justified the displacement.

The Court discussed the congressional intention to prevent “the vagaries of state law from disrupting the national scheme, and guarantees a national uniformity that enhances the effectiveness of congressional policy.”<sup>305</sup> Congress had numerous objectives. It wanted to induce individuals to retire and “fixed an amount thought appropriate to support an employee’s old age and to encourage the employee to retire.”<sup>306</sup> Were that amount reduced, e.g., because some of it would be diverted to an ex-spouse, individuals might be tempted to delay retirement.<sup>307</sup> Furthermore, an already divorced individual would have an additional incentive to work longer, because benefits earned post-divorce would not have to be split with the ex-spouse.<sup>308</sup>

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<sup>300</sup> *Id.* (citing *Yazell*, 382 U.S. at 352); *See also* *Rose v. Rose*, 481 U.S. 619, 625 (1987) (articulating the same standard and citing *Hisquierdo*, 439 U.S. at 581).

<sup>301</sup> *Hisquierdo*, 439 U.S. at 583.

<sup>302</sup> *Id.* at 574 (citing 45 U.S.C. § 231a).

<sup>303</sup> *Id.* at 575 (citing 45 U.S.C. § 231a(c)(3)(i)).

<sup>304</sup> *Id.* (citing 45 U.S.C. § 231d(c)(3)).

<sup>305</sup> *Id.* at 584.

<sup>306</sup> *Id.* at 585.

<sup>307</sup> *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 585 (1979) (“Any automatic diminution of that amount frustrates the congressional objective. By reducing benefits received, it discourages the divorced employee from retiring.”).

<sup>308</sup> *Id.* (“[I]t provides the employee with an incentive to keep working, because the former spouse has no community property claim to salary earned after the marital community is dissolved.”).

A different possibility would be to award the pre-determined amount to the retiring worker and, in addition, pay out the share to which the divorced spouse would be entitled.<sup>309</sup> However, such a plan had its own pitfalls, given “the perilous financial state of the Railroad Retirement Account, and the need to devote funds to other purposes.”<sup>310</sup>

Congress had carefully considered “how these finite funds are to be allocated”<sup>311</sup> and had achieved a “delicate” balance.<sup>312</sup> Permitting California law to require that the benefits be distributed differently would throw off that balance. By “revers[ing] the flow of incentives Congress originally intended,”<sup>313</sup> state law would “cause[] the kind of injury to federal interests that the Supremacy Clause forbids.”<sup>314</sup>

The Court used similar reasoning to reach a similar result in *McCarty v. McCarty*,<sup>315</sup> where the Court addressed “whether, upon the dissolution of a marriage, federal law precludes a state court from dividing military nondisability retired pay pursuant to state community property laws.”<sup>316</sup> This pension system was designed to provide an incentive for individuals to retire.<sup>317</sup> Numerous benefits would thereby accrue: it would not only “provide for retired officers,” but in addition it would “ensure a ‘young and vigorous’ military force.”<sup>318</sup> Additionally, it would “create an orderly pattern of promotion” and, finally, it would “serve as a recruiting and re-enlistment inducement.”<sup>319</sup>

The Court viewed the statutory language as “straightforward,”<sup>320</sup> and construed the retirement pay as a “personal entitlement,”<sup>321</sup> which should “actually reach the beneficiary.”<sup>322</sup> The Court concluded that “the application of community property principles to military retired pay threatens grave harm to ‘clear and substantial’ federal interests,”<sup>323</sup> citing *inter alia* the “potential for disruption of military personnel

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<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Hisquierdo*, 439 U.S. at 585.

<sup>314</sup> *Id.* at 590.

<sup>315</sup> *McCarty v. McCarty*, 453 U.S. 210 (1981) (superseded by statute); *See Mansell v. Mansell* 490 U.S. 581, 584–85 (1989) (“In direct response to *McCarty*, Congress enacted the Former Spouses’ Protection Act, which authorizes state courts to treat ‘disposable retired or retainer pay’ as community property. 10 U.S.C. § 1408(c) (1).”).

<sup>316</sup> *McCarty*, 453 U.S. at 211.

<sup>317</sup> *Id.* at 212–13 (“The impetus for this legislation was the need to encourage or force the retirement of officers who were not fit for wartime duty.”).

<sup>318</sup> *Id.* at 213.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.* at 223.

<sup>321</sup> *Id.* at 227.

<sup>322</sup> *McCarty*, 453 U.S. at 228 (citing *Hisquierdo*, 439 U.S. at 584).

<sup>323</sup> *Id.* at 232 (citing *Yazell*, 382 U.S. at 352).



management.”<sup>324</sup>

*Ridgway v. Ridgway*<sup>325</sup> also involved the military. This time the proceeds from a life insurance policy were at issue, with the widow pitted against the deceased’s children from a previous marriage. As part of a divorce judgment, Sergeant Richard Ridgway had been ordered “to keep in force the life insurance policies on his life now outstanding for the benefit of the parties’ three children.”<sup>326</sup> However, within four months of the divorce, Ridgway remarried and changed the terms of the policy, making his second wife the beneficiary.<sup>327</sup>

The *Ridgway* Court noted “the limited application of federal law in the field of domestic relations generally,”<sup>328</sup> and reiterated that “[s]tate family and family-property law must do ‘major damage’ to ‘clear and substantial’ federal interests before the Supremacy Clause will demand that state law be overridden.”<sup>329</sup> However, the Court reasoned that this case was “controlled by *Wissner*.”<sup>330</sup> Here, too, Congress had “spoken with force and clarity in directing that the proceeds belong to the named beneficiary and no other.”<sup>331</sup> While the Court recognized that “unpalatable case suggests certain ‘equities’ in favor of the respondent minor children and their mother,”<sup>332</sup> the Court concluded that the judgment about how best to weigh the conflicting interests in this kind of case was Congress’ to make.<sup>333</sup> Where state law “with a valid federal law, . . . the Framers of our Constitution provided that the federal law must prevail.”<sup>334</sup>

*Boggs v. Boggs*<sup>335</sup> similarly pitted a surviving widow against children from a previous marriage. At issue was whether the Employee Retirement Income Security Act (ERISA) preempted a state law that permitted the spouse of an employee to bequeath to her children an interest in “undistributed pension plan benefits.”<sup>336</sup> The Court noted “the pervasive significance of pension plans in the national economy, the congressional mandate for their uniform and comprehensive regulation, and the fundamental importance of community property law in defining the marital partnership in a number of States.”<sup>337</sup> A further consideration was that

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<sup>324</sup> *Id.* at 234.

<sup>325</sup> *Ridgway v. Ridgway*, 454 U.S. 46, 46–50 (1981).

<sup>326</sup> *Id.* at 48.

<sup>327</sup> *See id.* at 48–49.

<sup>328</sup> *Id.* at 54 (citing *McCarty*, 453 U.S. at 220; *Hisquierdo*, 439 U.S. at 581; *Burrus*, 136 U.S. at 593–94).

<sup>329</sup> *Id.* (citing *Hisquierdo*, 439 U.S. at 581).

<sup>330</sup> *Id.* at 55.

<sup>331</sup> *Ridgway*, 454 U.S. at 56.

<sup>332</sup> *Id.* at 62.

<sup>333</sup> *See id.* at 63.

<sup>334</sup> *Id.* at 54–55 (quoting *Free*, 369 U.S. at 666).

<sup>335</sup> *Boggs v. Boggs*, 520 U.S. 833 (1997).

<sup>336</sup> *Id.* at 837.

<sup>337</sup> *Id.* at 836.

“ERISA is an intricate, comprehensive statute,”<sup>338</sup> which includes an “express pre-emption clause states that the Act ‘shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.’”<sup>339</sup> Through ERISA, Congress had expressed special “solicitude for the economic security of surviving spouses [that] would be undermined by allowing a predeceasing spouse’s heirs and legatees to have a community property interest in the survivor’s annuity.”<sup>340</sup>

Permitting state law to trump federal law in this case would cause the kind of damage that Congress was seeking to avoid, since the “principal object of the statute is to protect plan participants and beneficiaries.”<sup>341</sup> ERISA conferred “beneficiary status on a nonparticipant spouse or dependent in only narrow circumstances delineated by its provisions,”<sup>342</sup> for example, through its provisions on the use of a Qualified Domestic Relations Orders (QDRO).<sup>343</sup> The Court explained that the QDRO provisions “give enhanced protection to the spouse and dependent children in the event of divorce or separation, and in the event of death the surviving spouse.”<sup>344</sup> However, unless one qualifies under these provisions,<sup>345</sup> “ERISA does not confer beneficiary status on nonparticipants by reason of their marital or dependent status.”<sup>346</sup>

After careful deliberation and balancing, Congress chose to protect certain family interests and no others. “Congress chose to protect the community property interests of separated and divorced spouses and their children, a traditional subject of domestic relations law, but not to accommodate testamentary transfers of pension plan benefits.”<sup>347</sup> The *Boggs* Court did not recognize a new area of federal domestic relations law, reaffirming that as “a general matter, [t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States,”<sup>348</sup> and admitting that “domestic relations law is primarily an area of state concern.”<sup>349</sup> Nonetheless, the Court reasoned that “it would be inimical to

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<sup>338</sup> *Id.* at 841.

<sup>339</sup> *Id.* (quoting 29 U.S.C. § 1144(a)).

<sup>340</sup> *Id.* at 843.

<sup>341</sup> *Boggs*, 520 U.S. at 845 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)).

<sup>342</sup> *Id.* at 846.

<sup>343</sup> *See id.* at 846–47. Such an order “is a type of domestic relations order that creates or recognizes an alternate payee’s right to, or assigns to an alternate payee the right to, a portion of the benefits payable with respect to a participant under a plan.” *See id.* at 846 (citing 29 U.S.C. § 1056(d)(3)(B)(i)).

<sup>344</sup> *Id.* at 847.

<sup>345</sup> *Id.* at 839 (noting that the QDRO “requirements were not met by the 1980 judgment of possession.”).

<sup>346</sup> *Id.* at 847.

<sup>347</sup> *Boggs*, 520 U.S. at 848.

<sup>348</sup> *Id.* at 848 (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)).

<sup>349</sup> *Id.* at 850.

ERISA's purposes to permit testamentary recipients to acquire a competing interest in undistributed pension benefits, which are intended to provide a stream of income to participants and their beneficiaries.”<sup>350</sup> The Court cited past law, noting that “[c]ommunity property laws have, in the past, been pre-empted in order to ensure the implementation of a federal statutory scheme”<sup>351</sup> and explaining that there would be a variety of negative consequences if state law were not preempted.<sup>352</sup>

The Court also found preemption in another ERISA case in *Egelhoff v. Egelhoff ex rel. Breiner*.<sup>353</sup> At issue was whether the ex-spouse of the deceased was entitled to the proceeds under the insurance policy and the pension plan.<sup>354</sup> The applicable Washington statute provided that “the designation of a spouse as the beneficiary of a nonprobate asset is revoked automatically upon divorce,”<sup>355</sup> and the deceased’s children from a previous marriage had sued to recover the proceeds from the life insurance policy.<sup>356</sup> The *Egelhoff* Court recognized that there is “a presumption against pre-emption in areas of traditional state regulation such as family law.”<sup>357</sup> However, the Court worried that deferring to state law would result in interference with “nationally uniform plan administration.”<sup>358</sup> Plan administrators would then not be able to “make payments simply by identifying the beneficiary specified by the plan documents.”<sup>359</sup> Instead, they would have to “familiarize themselves with state statutes so that they can determine whether the named beneficiary's status has been ‘revoked’ by operation of law.”<sup>360</sup> Further, making matters more complicated, the burden would be “exacerbated by the choice-of-law problems that may confront an administrator when the employer is located in one State, the plan participant lives in another, and the participant's former spouse lives in a third.”<sup>361</sup> While admitting that “all state laws create some potential for a lack of uniformity,”<sup>362</sup> the Court reasoned that “differing state regulations affecting an ERISA plan’s ‘system for processing claims and paying benefits’ impose ‘precisely the burden that ERISA pre-emption was intended to avoid.’”<sup>363</sup>

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<sup>350</sup> *Id.* at 852 (citing *Guidry v. Sheet Metal Workers Nat. Pension Fund*, 493 U.S. 365, 376 (1990)).

<sup>351</sup> *Id.* at 852–53 (citing *Wissner*, *Hisquierdo*, and *McCarty*, among others).

<sup>352</sup> *See id.* at 853.

<sup>353</sup> *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001).

<sup>354</sup> *See id.* at 144.

<sup>355</sup> *Id.* at 143.

<sup>356</sup> *See id.* at 144.

<sup>357</sup> *Id.* at 151 (citing *Hisquierdo*, 439 U.S. at 581).

<sup>358</sup> *Id.* at 148.

<sup>359</sup> *Egelhoff*, 532 U.S. at 148.

<sup>360</sup> *Id.* at 148–49.

<sup>361</sup> *Id.* at 149.

<sup>362</sup> *Id.* at 150.

<sup>363</sup> *Id.* (citing *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 10 (1987)).

The Court's jurisprudence in this area is straightforward in some respects. The relevant standard is clear—"State family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden."<sup>364</sup> The cases in which the Court has found that the federal interest was both sufficiently important and would be damaged to the required extent have involved uniform and comprehensive systems, the operation of which would be much more difficult were state law allowed to trump the plan's general provisions.<sup>365</sup> In these cases, the Court often noted that Congress had engaged in careful balancing of a number of competing interests.<sup>366</sup>

It is incorrect to believe that the Court always interprets federal law to supplant state family law in this line of cases.<sup>367</sup> In *Rose v. Rose*,<sup>368</sup> the Court explained that "Congress would surely have been more explicit had it intended the Administrator's apportionment power to displace a state court's power to enforce an order of child support."<sup>369</sup> In any event, the Court rejected that "the state court's award of child support from appellant's disability benefits does 'major damage' to any 'clear and substantial' federal interest created by this statute."<sup>370</sup>

Congress is permitted to displace state domestic relations law when important national interests might otherwise be at risk, e.g., national defense or the management of the national debt and when the uniformity of a comprehensive system is important to maintain. The cases heard by the Court have not involved the paradigmatic examples reserved for the states under the domestic relations exception—divorce, spousal support, or child custody—although Congress has passed legislation establishing which state has jurisdiction to modify existing support or custody orders.<sup>371</sup> Congress has passed legislation which defines marriages for federal purposes,<sup>372</sup> although that legislation seems unlikely to pass muster under a variety of tests including the major damage to substantial federal interests

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<sup>364</sup> *Hisquierdo*, 439 U.S. 572, 581 (1979) (citing *Yazell*, 382 U.S. at 352. See also *Rose v. Rose*, 481 U.S. 619, 625 (1987) (articulating the same standard and citing *Hisquierdo*, 439 U.S. at 581).

<sup>365</sup> See *Egelhoff*, 532 U.S. at 148–49 (discussing ways in which deferring to state law would make the federal program more difficult to administer).

<sup>366</sup> See *Boggs v. Boggs*, 520 U.S. 833, 848 (1997) (noting Congress's attempt to balance competing factors).

<sup>367</sup> Cf. Andrew Koppelman, *Dumb and DOMA: Why the Defense Of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1, 4 n.25 (1997) ([T]he 'major damage' prong has been toothless; it has not even had much influence on the interpretation of any federal statute.").

<sup>368</sup> *Rose*, 481 U.S. 619 (1987).

<sup>369</sup> *Id.* at 628.

<sup>370</sup> *Id.* (citing *Hisquierdo*, 439 U.S. at 581).

<sup>371</sup> See, e.g., Full Faith and Credit for Child Support Orders Act, 28 U.S.C. §1738B; Parental Kidnapping Prevention Act, 28 U.S.C. §1738A.

<sup>372</sup> See Defense of Marriage Act, 1 U.S.C. §7.

test.<sup>373</sup>

The major damage to substantial federal interests test is only triggered when federal law *displaces* state law and is not triggered when Congress through its spending power<sup>374</sup> induces a state to modify its own law.<sup>375</sup> Where a State changes its own laws to receive federal monies,<sup>376</sup> the requisite conflict between federal and state law is not present. That is not to say that Congress has unlimited power under the Spending Clause,<sup>377</sup> but merely that the major damage to clear and substantial federal interests test is not triggered in such a case.

#### IV. CONCLUSION

Federal intervention in state domestic relations law is limited in two different ways. First, federal courts do not have diversity jurisdiction and may not have federal question jurisdiction to hear domestic relations matters if divorce, spousal support, or child custody are at issue. However, this does not bar the federal courts from hearing any cases touching on domestic relations, especially if, for example, the state is deciding custody or support issues on an impermissible basis. The domestic relations exception to federal court jurisdiction, whether construed solely as barring diversity jurisdiction or as barring jurisdiction even when federal questions are implicated, should be construed narrowly as only applying to a decision about whether a divorce should be granted or whether or how much spousal or child support should be ordered. If indeed a federal court is going to decline jurisdiction over other matters, that decision should be based on the abstention doctrine or some other justification rather than the domestic relations exception.<sup>378</sup>

Second, federal law will not be permitted to displace state domestic relations law unless there would otherwise be major damage to important federal interests, for example, military defense or management of the national debt. Comprehensive programs requiring uniformity are the kinds of federal programs that might meet the relevant standard. However, this sort of family law exception operates rather differently than the domestic

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<sup>373</sup> See Mark Strasser, *DOMA's Bankruptcy*, 79 TENN. L. REV. 1, 17–18 (2011).

<sup>374</sup> See Resnik, *supra* note 189, at 645 (noting that Congress sometimes engages in “federal family lawmaking” via the Spending Clause.).

<sup>375</sup> See Scott Dodson, *Vectoral Federalism*, 20 GA. ST. U. L. REV. 393, 422 (2003) (noting that “Spending Clause legislation can also be used to purchase regulatory power over the states.”).

<sup>376</sup> See Maureen Callahan VanderMay, *The Constitutional Implications of the Federalization of Child Support Law*, 35 WILLIAMETTE L. REV. 783, 787 (1999) (discussing “Congress’s conditioning of federal grants of funds to the states on state compliance with stated federal requirements.”).

<sup>377</sup> See *South Dakota v. Dole*, 483 U.S. 203, 207–08 (1987) (describing the restrictions on Congress’s spending power).

<sup>378</sup> See Harbach, *supra* note 60, at 168–72, for a discussion of the abstention doctrine in family matters,

relations exception. The range of issues that might trigger the relevant test is somewhat broader—here, the test is triggered whenever federal law displaces state domestic relations law. However, merely because the test is triggered does not mean that the federal law will be held unconstitutional—as long as the displacement prevents important federal interests from being significantly damaged, the federal statute will be upheld. Further, this test will not even be triggered in those cases in which there is no conflict between state and federal law because the states have been induced to modify their own laws as a price of participating in federal programs.<sup>379</sup>

Courts and commentators disagree about whether there should be a domestic relations exception and, if so, whether it should be construed as a narrow exception to diversity jurisdiction. That there is this disagreement is unsurprising, given that the case law both supports and undermines the exception at almost every turn. The same observation might be made about the Court's analysis of the conditions under which Congress can displace state domestic relations law. The Court frequently discusses the importance of reserving family law for the states but rarely strikes down federal legislation doing just that, rigorous standard for upholding such laws notwithstanding. Regrettably, those examining the case law discussing the conditions under which federal intervention in state domestic relations law is permitted will find the jurisprudence in disarray. The Court announces standards but then applies them in ways that provide little useful guidance.

At its earliest opportunity, the Court should articulate and apply a consistent approach with respect to the conditions under which federal intervention in family matters is permissible. Until the Court refrains from sending mixed signals, lower courts will continue to be confused about which cases can be heard and the conditions under which Congress can displace federal law. The Nation's families deserve better and more consistent treatment, and the Court must clarify this area of law rather than send mixed messages at almost every opportunity.

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<sup>379</sup> Cf. Susan J. Becker, *Second-Parent Adoption by Same-Sex Couples in Ohio: Unsettled and Unsettling Law*, 48 CLEV. ST. L. REV. 101–02 (2000) (“The federal government has enacted laws providing financial incentives to states that streamline their adoption procedures and place these children in permanent homes.”).