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Comment

Maryellen Murphy [a1]

DOMESTIC RELATIONS EXCEPTION TO DIVERSITY JURISDICTION: ANKENBRANDT v. RICHARDS

I. INTRODUCTION

For more than a century, federal courthouse doors have been closed to family disputes. The so-called domestic relations exception [1] is a limitation on federal court diversity jurisdiction [2]. It mandates that federal courts dismiss a domestic relations case, even if it satisfies all of the diversity statute requirements. [3]

The exception is founded neither in the wording of the Constitution [4] nor in the specific statutory language conferring diversity jurisdiction on the federal courts. [5] Rather, it is a judicially-created doctrine applied by the federal courts, for over a century, to exclude a myriad of cases from the court's jurisdiction. [6]

***578** The United States Supreme Court first articulated the domestic relations exception in 1859, in dicta, stating: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony." [7] In a subsequent case, the Court further disclaimed federal jurisdiction over "the whole subject of husband and wife, parent and child." [8] As a result, federal courts have continued to avoid cases requiring an inquiry into a marital or parent-child relationship. [9]

Until recently, the nature and scope of the exception remained unclear.[10] The 1992 decision of the United States Supreme Court in *Ankenbrandt v. Richards*[11] is significant because a six-justice majority not only reaffirmed the existence of the domestic relations exception but also, for the first time, defined its scope and, more sigificantly, set forth a basis for the exception.[12] The case is especially notable for its unsupportable reasoning in construing a federal statute.[13] Although there may exist sound policy reasons to justify the Court's decision,[14] three justices offered persuasive alternative reasoning which could have decided the case without resorting to a distortion of important principles of statutory construction.[15] The *Ankenbrandt* decision also raises an important issue concerning the authority of federal courts to create ***579** expansive exceptions to the statutory jurisdiction that Congress has conferred.[16]

This Comment focuses on the reasoning of the majority in holding that a domestic relations exception to federal diversity jurisdiction exists as a matter of statutory construction.[17] Part II describes the *Ankenbrandt* case which raised the question of the existence of a domestic relations exception to the United States Supreme Court.[18] Part III examines the majority opinion relating to the validity and scope of the exception,[19] and then discusses the concurring yet disapproving opinions by Justice Blackmun[20] and Justice Stevens,[21] with whom Justice Thomas joined. Part IV analyzes the majority opinion's rationale for holding that the domestic relations exception exists as a matter of statutory construction and considers opposing arguments.[22] Part V then concludes that the *Ankenbrandt* case could have been narrowly decided,[23] but instead, the Supreme Court went to extreme lengths in finding that the basis for the exception rests upon a historical construction of the diversity statute.[24] The door is now open for Congress to either accept this questionable judicial construction of the diversity statute or, perhaps, to create by statute a special basis for federal jurisdiction in domestic relations disputes.

II. ANKENBRANDT V. RICHARDS

A. *Facts*

Petitioner Carol Ankenbrandt brought this tort action on behalf of her two minor daughters, against her former husband, Jon Richards, and his female companion, Debra Kesler.[25] Ankenbrandt sought to recover monetary damages for the alleged

sexual and physical abuse of the children committed by Richards and Kesler.[26] Petitioner Ankenbrandt was a Missouri citizen; respondents Richards and Kessler were citizens of Louisiana.[27] Ankenbrandt brought this suit in the United States District Court for the Eastern District of Louisiana, alleging federal jurisdiction based on the diversity of citizenship provision of ***580** 28 U.S.C. § 1332.[28] Ankenbrandt represented[29] that prior to the filing of this federal court action, a Louisiana juvenile court had already entered a judgment under that State's child protection laws, permanently terminating all of Richards' parental rights.[30] Ankenbrandt further claimed that the decision was never appealed, and was final.[31]

The plaintiffs argued that, since Richards had lost his parental rights, he was no more than a defendant in a tort action, separate and distinct from any domestic dispute.[32] The defendants argued that the allegations of abuse were an integral part of the ongoing domestic jurisdiction of the state court, and hence, the federal action should be dismissed for lack of jurisdiction under the domestic relations exception.[33]

B. *Procedural History*

Upon the motion of the defendants, the district court dismissed the suit.[34] The court concluded that this case fell within the domestic relations exception to federal court jurisdiction and the federal abstention principles announced in *Younger v. Harris.*[35] The Fifth Circuit Court of Appeals affirmed the judgment in an unpublished opinion.[36] Following that decision, Ankenbrandt petitioned for certiorari to the Supreme Court of the United States.[37]

The United States Supreme Court granted certiorari[38] to resolve the following questions: (1) Is there a domestic relations exception to federal jurisdiction? (2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages? (3) Did ***581** the District Court in this case err in abstaining from exercising jurisdiction under the doctrine of *Younger v. Harris?*[39]

The United States Supreme Court held that there is a domestic relations exception but that it only divests federal courts of the power to issue divorce, alimony, and child custody decrees.[40] Accordingly, the Court concluded that "[t]he exception ha[d] no place in a suit such as this one".[41] The Court further found that the Court

of Appeals had erred by affirming the District Court's rulings to decline jurisdiction based on the domestic relations exception and to abstain under the doctrine of *Younger*. [42] As a result, the decision of the Court of Appeals was reversed and the case remanded for further proceedings. [43]

III. THE MAJORITY OPINION

A. *Validity of the Exception*

Justice White, writing for the majority, [44] began the decision in *Ankenbrandt* by noting that the domestic relations exception had been invoked repeatedly by the lower federal courts. [45] The Court also noted that there had been a general divergence in the Courts of Appeals in applying the exception to diversity-based tort suits brought in federal courts. [46] The *Ankenbrandt* Court determined that the origin of the domestic relations exception was rooted in an 1859 declaration in *Barber v. Barber* [47] that the federal courts have no jurisdiction over original ***582** proceedings involving divorce or alimony. [48]

Although the dissent in *Barber* claimed that the English Chancery Courts, and thus the federal courts, lacked jurisdiction over the case at bar, [49] the *Barber* majority did not provide a clear rationale for its broad disclaimer of jurisdiction over domestic matters. [50] Acknowledging the absence of any subsequent explanations in the past 133 years for the basis of such a limitation, the *Ankenbrandt* Court stated: "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." [51]

First, the Court looked to the language of the Constitution [52] and found that it does not contain any limitations on "subjects of a domestic ***583** relations nature." [53] Then, after reviewing *Barber* and subsequent decisions, the Court concluded that "the exception is not grounded in the Constitution." [54] Furthermore, because the *Barber* Court did not purport to justify the domestic relations exception on constitutional grounds, the Court believed that it was "logical to presume that the [[[*Barber*] Court based its statement limiting such power on narrower statutory . . . grounds." [55]

This determination, the Court asserted, was supported by subsequent decisions such as *De La Rama v. De La Rama.*[56] The *De La Rama* court referred to the "long established rule" that federal courts have no jurisdiction over divorce and alimony, as having been based on the assumption that the requirements of diverse citizenship and amount in controversy cannot be met in domestic controversies.[57] As a result, the *Ankenbrandt* Court reasoned that "*De La Rama's* articulation of the 'rule' in terms of the statutory requirements for diversity jurisdiction further supports the view that the exception is not grounded in the Constitution."[58] In addition, because "the Court has heard appeals from territorial courts involving divorce,[59] . . . this Court implicitly has made clear its understanding that the source of the constraint on jurisdiction from *Barber* was *not* Article III; otherwise the Court itself would have lacked jurisdiction over appeals from these legislative courts."[60] Hence, the Court concluded that *Barber's* disclaimer of jurisdiction over the subject of divorce was not based on the Constitution.[61]

Next, the Supreme Court pointed out that even though the Constitution "does not mandate the exclusion of domestic relations cases from federal-court jurisdiction . . . [this] does not mean that such courts ***584** necessarily must retain and exercise jurisdiction over such cases."[62] The Court emphasized that their judicial power is entirely dependent upon the action of Congress[63] and to this end, began an analysis of the relevant jurisdictional statutes created by Congress which granted the courts' power to hear controversies between citizens of different states.[64]

The original diversity statute granted jurisdiction over "all suits of a civil nature at common law or in equity."[65] The Court noted that this phrase was the primary element in determining the boundaries of diversity jurisdiction[66] until 1948 when Congress changed the statutory language to "all civil actions".[67] After examining the *Barber* dissent,[68] ***585** and noting the absence of any rebuttal by the *Barber* majority, the *Ankenbrandt* Court inferred that the jurisdictional limitation set out in *Barber* was based on the premise that because the English courts of common law lacked authority to issue divorce and alimony decrees, so too did the federal courts.[69] In other words, a suit seeking such relief did not fall within the statutory language "all suits of a civil nature at common law or in equity."[70]

However, the Court did not feel compelled to follow this historical justification over which there has been much debate. [71] Instead, the *Ankenbrandt* Court declared that it was:

> content to rest [its] conclusion that a domestic relations exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948, when the statute limited jurisdiction to "suits of a civil nature at common law or in equity." [72]

As additional support for its conclusion that there exists a domestic relations exception, the Court referred to the principle of stare decisis. [73]

Then, presuming that, in 1948, Congress was aware of the "nearly century-long interpretation of the prior statutes" construing the diversity statute to contain a domestic relations exception, and "absent any indication that Congress intended to alter this exception," the ***586** *Ankenbrandt* Court simply surmised "that Congress 'adopted that interpretation' when it reenacted the diversity statute." [74]

B. *The Scope of the Exception*

Having concluded that the domestic relations exception exists, as demonstrated by: (1) the inclusion of the defining phrase "all suits of a civil nature at common law or in equity" in the pre-1948 versions of the diversity statute; [75] (2) by Barber's implicit interpretation of that phrase to exclude divorce and alimony actions; [76] (3) by Congress' silent acceptance of this construction; [77] as well as, (4) considerations of stare decisis, [78] the Supreme Court set out to define the scope of the exception.

Once again, the Supreme Court looked to the decision in *Barber* and noted that many of the lower courts, in applying the exception, had gone "well beyond the circumscribed situations posed by *Barber* and its progeny." [79] The *Barber* Court articulated the scope of the exception to encompass a narrow range of domestic relations issues. [80] Accordingly, the *Ankenbrandt* Court determined that the exclusion announced in *Barber* covered only the issuance of divorce and alimony decrees. [81]

However, the Court noted, the exclusion was subsequently expanded in *In re Burrus,* [82] to include child custody decrees. [83] The key statement ***587** made by the *Burrus* Court was 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." [84] Despite the fact that *Burrus* did not involve diversity jurisdiction, [85] as *Barber* did, the *Ankenbrandt* Court stressed that the statement had nonetheless "been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction." [86]

Claiming that this interpretation was consistent with *Barber's* ruling excluding jurisdiction over suits for divorce and alimony decrees, the *Ankenbrandt* Court concluded that: "the domestic relations exception, as articulated by this Court since *Barber,* divests the federal courts of the power to issue divorce, alimony, and child custody decrees." [87] The Court reasoned that "[g]iven the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders." [88]

C. *Policy Considerations*

The Court offered further support for its conclusion with "sound policy considerations". [89] The first was that of judicial economy; the Court explained that "state 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." [90]

***588** The second policy reason given by the *Ankenbrandt* Court was that of judicial expertise. The court asserted that "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." [91]

The Court then reiterated its holding that the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree. [92] Accordingly, since *Ankenbrandt* in no way sought such a decree,

the Court found that the Court of Appeals had erred by affirming the District Court's invocation of this exception. [93]

D. *Abstention as an Alternative*

Next, the Court addressed the use of abstention, [94] by the Court of Appeals and the District Court, as an alternative ground for dismissing the case. [95] Stating that "[a]bstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise ***589** the jurisdiction given them"', [96] the Court concluded that "[a] bsent any *pending* proceeding in state tribunals, . . . application by the lower courts of *Younger* abstention was clearly erroneous." [97]

The Court did suggest however, that the *Burford* abstention principles [98] might be relevant in certain cases involving "elements of the domestic relationship, even when the parties do not seek divorce, alimony, or child custody." [99] This would apply, "when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar."' [100] Nonetheless, the *Ankenbrandt* Court concluded that this did not apply to the case at bar because state law had already determined the status of the parties and that, in any event, the parties' status had "no bearing on the underlying torts alleged." [101]

As a result, the decision of the Court of Appeals was reversed [102] and the lawsuit was held to be appropriate for the exercise of diversity jurisdiction, given the existence of diverse citizenship between the plaintiff and defendants, and the pleading of the relevant amount in controversy. [103]

E. *Concurring Opinion by Justice Blackmun*

Justice Blackmun wrote a separate opinion concurring in the judgment that the Federal District Court in Louisiana did have jurisdiction over this tort action. [104] He also agreed that federal courts normally should not issue divorce, alimony, or child custody decrees. [105] Nevertheless, Justice Blackmun took strong exception to the Court's statutory construction and its interpretation of congressional intent. He asserted that:

> The Court is correct that abstention 'rarely should be invoked.' But rarer still -- and by far the greater affront to Congress -- should be the

> occasions when this Court invents statutory exceptions that are simply not there. It is one thing for this Court to defer to more than a century ***590** of practice unquestioned by Congress. It is quite another to defer on a pretext that Congress legislated what in fact it never did. [106]

Instead, Justice Blackmun suggested that "continued discretionary abstention rather than mandatory limits on federal jurisdiction" [107] provides a more principled basis for the Court's refusal to issue divorce, alimony, or child custody decrees. [108]

F. *Justice Stevens' Concurring Opinion, Joined by Justice Thomas*

Justice Stevens announced that *Ankenbrandt* "should be an exceedingly easy case." [109] In his view, the case presented a simple diversity suit in tort, and as such, did not come within whatever domestic relations exception may or may not exist. [110] Accordingly, Justices Stevens and Thomas would have left consideration of the domestic relations exception for another day. [111]

IV. ANALYSIS

This case presented a simple tort action between parties that were, at one time, members of the same family. [112] All the requirements of federal court subject matter jurisdiction, pursuant to the diversity statute, were met. [113] In addition, resolution of Ankenbrandt's claim did not require adjudication of her marital or custody status, child support, or alimony. Accordingly, a unanimous Court [114] agreed that the Federal District Court had proper jurisdiction over Ankenbrandt's tort claim. [115]

The first question to be asked then is, if all nine justices agreed that petitioner Ankenbrandt had properly invoked the federal court's jurisdiction to hear her tort claim, why did the Court go much further than it had to and feel "compelled to explain" [116] the basis for the domestic relations limitation on federal court jurisdiction? Secondly, why did the Court go to great lengths to base the limitation on statutory construction, [117] thereby disclaiming jurisdiction altogether over domestic relations cases? What, if any, historical support exists for this statutory

construction rationale? Thirdly, would the application of ***591** modern doctrines of federal abstention, as suggested by Justice Blackmun, [118] have been a better path to follow by allowing federal courts the discretion to refuse to excercise jurisdiction over domestic relations cases? It was these questions which caused a rift in the *Ankenbrandt* Court.

A. *Dicta or Needed Direction? Why The Court Felt "Compelled to Explain"*

Of the three separate opinions written in *Ankenbrandt,* arguably, only Justice Stevens' was correct. The case presented a simple diversity tort, and as such, did not fall within any domestic relations exception that might or might not exist. [119]

One possible reason why the Court diverged from its historical practice of deciding cases on their narrowest possible grounds was that lower federal courts had been applying the domestic relations exception inconsistently. [120] Also, many lower federal courts were questioning the very existence and nature of a domestic relations exception, [121] and many commentators were calling for its abolition. [122] This lack of consistency among the courts faced with the difficult task of deciding whether a case falls within the judicially-created domestic relations exception is mainly due to the murky origins of the exception. [123]

The United States Supreme Court has never set forth, in an unequivocal direct holding, the basis for the exception. [124] The absence of any previous clear jurisdictional explanation enabled the Court in *Ankenbrandt* to follow a traditional pattern of narrowly construing federal jurisdiction. [125] By holding that the exception is based on century-old ***592** statutory construction of the diversity statute [126] and Congress' centurylong silent acceptance of this construction, [127] the Court has taken domestic relations cases involving divorce, alimony, and child custody decrees completely out of its jurisdiction. [128] The Court's rationale, however, is flawed for two reasons.

First, it is far from clear that *Barber* and its progeny were relying on statutory grounds as a basis for the exception. [129] Second, as a result of this uncertainty, the Court errs in imputing a congressional intent based upon this premise. [130] As stated by Justice Blackmun, "[t]he Court today has a difficult enough time arriving at this unlikely interpretation of the *Barber* decision. I cannot imagine that Congress ever assembled this construction on its own." [131]

Traditional doctrines of statutory construction hold that the imputation of Congressional intent should be based on a clear coherent doctrine. [132] The primary flaw with the Court's rationale is that "no coherent 'jurisdictional' explanation for this [exception] emerges" from *Barber* and its progeny, and "it is unreasonable to presume that Congress divined and accepted one from these cases." [133]

B. *Murky Origins of the Statutory Construction Rationale*

The main argument against the Court's statutory construction rationale can be found in Justice Blackmun's concurring opinion. [134] Justice Blackmun insisted that the Court's interpretation of *Barber,* the original source of the domestic relations exception, was seriously flawed because *Barber* itself "did not express any intent to construe the diversity statute." [135] In fact, as the majority opinion pointed out, "*Barber* 'cited no authority and did not discuss the foundation for its announcement' disclaiming jurisdiction over divorce and alimony matters." [136] The majority could only "infer" that the *Barber* Court based its disclaimer on a "common law or equity" limitation of the diversity statute. [137] In so doing, the *Ankenbrandt* majority incorrectly reasoned that Congress must have been aware of, and accepted, this century-long disclaimer as an ***593** interpretation of the diversity statute when, in 1948, the language was changed to "all civil actions". [138] This reasoning, however, can hardly be said to constitute evidence of Congressional approval, especially if Congress was never even aware that the *Barber* Court was relying on the diversity statute as the basis for declining jurisdiction. [139]

Indeed, the *Barber* Court, as evidenced by the dissenting opinion, was in disagreement as to the nature of the exception. [140] It would be just as logical to "presume" [141] that Congress accepted a nonstatutory basis for the *Barber* Court's disclaimer over domestic relations cases in the years prior to 1948. [142] Consequently, the *Ankenbrandt* Court should not have presumed Congressional acceptance of a statutory construction which cannot clearly be found in *Barber.*

C. *Vague Historical Underpinnings*

Justice Blackmun points to three subsequent Supreme Court cases which, he claims, "seriously undermine any inference that *Barber's* recognition of a domestic relations 'exception' traces to a 'common law or equity' limitation of the diversity statute." [143] The first two cases, where the Supreme Court initially applied its half-century old *Barber* dictum, involved divorce cases on appeal from territorial

courts. *Simms v. Simms* [144] was an appeal from a divorce order, with an award of alimony, by the territorial Supreme Court of Arizona. *De La Rama v. De La Rama* [145] involved an appeal from a decision of the Supreme Court of the Phillipines reversing a lower court decree granting the wife a divorce, division of property, and allowance for support. In both cases, 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. [146] As Justice Blackmun pointed out, in neither case was the "common law or equity" limitation ***594** relied on as a bar to jurisdiction. [147] Rather, *Simms* and *De La Rama,* in upholding jurisdiction over these domestic relations cases, "distinguished *Barber* on grounds that it involved domestic relations matters in the States rather than in the territories." [148] The fact that the Supreme Court may review the decisions of territorial courts in divorce cases suggests only that such cases are not excluded from federal court jurisdiction by the Constitution. [149] It does not indicate to Congress that the Court's longstanding practice for disclaiming jurisdiction was based on an interpretation of the diversity statute. [150]

The third decision which Justice Blackmun claimed undermines the Court's interpretation of *Barber* was *Ohio ex rel. Popovici v. Agler.* [151] In *Popovici,* a vice-consul of a foreign country, who was stationed and residing in Ohio, was sued by his wife for a divorce and alimony in an Ohio state court. [152] The vice-consul asserted that the state court lacked jurisdiction because "federal statutes granted *exclusive* jurisdiction to the federal courts of 'all suits and proceedings against . . . consuls or vice consuls.'" [153] The Supreme Court rejected the vice-consul's claim and found that "the jurisdictional statutes 'do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce.'" [154] Instead, as Justice Blackmun pointed out, the *Popovici* Court traced this lack of federal jurisdiction to the Constitution itself and not to the diversity statute. [155]

Because of the inconsistencies in these leading Supreme Court opinions disclaiming jurisdiction over domestic relations cases prior to 1948, Justice Blackmun believes, and understandably so, that the *Ankenbrandt* Court was not justified in claiming that Congress accepted the limitation in *Barber* as a construction of the diversity statute. [156] ***595** The fact that Congress, in 1948, did not mention domestic relations cases in the new diversity statute more likely indicates that Congress "had no idea . . . that the diversity statute contained an exception for domestic relations

matters" [157] rather than indicating that Congress adopted, what the majority refers to as, the prior "well-known construction" [158] of the diversity statute. As a result, "the Court is without a requisite foundation for ratifying what Congress intended" in 1948 when it reenacted the diversity statute. [159]

Moreover, the *Ankenbrandt* Court's reasoning is based on the inherently speculative assumption that congressional inaction indicates specific congressional intent. [160] The Court has previously described the weight to be given congressional silence as follows:

> 'It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines. It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law. . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases.' [161]

Although Congress is presumed to be aware of judicial interpretation of a statute and to adopt that interpretation upon reenactment, [162] legislative inaction is a weak indicator of congressional intent unless there is clear proof that Congress considered the particular interpretation. [163] In fact, the *Ankenbrandt* Court noted that there was no "indication that Congress" even considered the matter. [164]

Although the Court's rationale is somewhat flawed, as Justice Blackmun indicated, [165] there does exist some historical underpinning for the majority's view. In *Simms v. Simms,* [166] the United States Supreme Court denied jurisdiction to review a divorce granted by a territorial court because the case did not meet the amount in controversy requirement, [167] but upheld the jurisdiction of the Supreme Court to ***596** review alimony awards of territorial courts that met the requirement. [168] In *De La Rama v. De La Rama,* [169] the Court went a little further than *Simms* and upheld the jurisdiction of the Supreme Court to review territorial court decisions regarding both the granting of a divorce and the award of alimony. [170] In both cases, the Court characterized the exception as evolving, not from any historical restriction on the federal courts, as purported by the *Barber* dissent, [171] but rather from the potential difficulties faced by divorce and alimony

litigants in satisfying either the diversity requirement or the amount in controversy requirement. [172]

Because the *Simms* and *De La Rama* Courts did, in fact, make some mention of the statutory prerequisites of diversity jurisdiction, [173] the *Ankenbrandt* Court is not entirely without a historical foundation for its holding that the domestic relations exception exists as a matter of statutory construction of the diversity statute. Nevertheless, neither of these cases sets forth a *clear* coherent jurisdictional basis for the exception from which Congress can be said to have accepted and understood in the years prior to 1948. Furthermore, the *Ankenbrandt* ***597** majority admitted that, in the years since *Barber,* "the Court has dealt only occasionally with the domestic relations limitation on federal-court jurisdiction, and it has *never addressed the basis for such a limitation.*" [174]

The absence of a clear, coherent foundation for the exception is further demonstrated by the various ways in which lower federal courts have explained and applied the exception. Some courts have characterized the domestic relations exception as a question of power, [175] while other federal courts have claimed that the exception is a discretionary surrender of jurisdiction in favor of state courts. [176] As a result, it is difficult to fathom that in 1948 Congress "understood" the basis of the exception to lie in the diversity statute, and "accepted" that rationale, when federal courts since then have not consistently reached that conclusion. [177]

Furthermore, notwithstanding the accuracy or inaccuracy of the *Ankenbrandt* Court's interpretation of *Barber,* Justice Blackmun pointed out that the Court's "extention of any domestic relations 'exception' to the diversity statute for child custody matters is not warranted by any known principles of statutory construction." [178] In fact, the Court in *Burrus,* [179] upon which the *Ankenbrandt* majority relied, [180] specifically reserved judgment on the appropriateness of federal jurisdiction in domestic relations cases where jurisdiction was based on diverse citizenship. [181] In addition, the often quoted statement in *Burrus,* [182] which many lower federal courts have relied on as authority for the ***598** existence of a domestic relations exception in child custody matters, [183] clearly referred only to the substantive law to be applied in such cases and not to federal court jurisdiction. [184]

Thus, despite lower federal court reliance on the *Burrus* Court statement when disclaiming jurisdiction over child custody matters, the *Ankenbrandt* Court is

without any support for presuming Congress to be aware of, and having accepted, judicial interpretation of the diversity statute if that statute was not even at issue in *Burrus.* [185] The Court's view that this was only a "technical[ity]" [186] was not lost on Justice Blackmun who stated: "I find it germaine, because, to the best of my knowledge, a court is not at liberty to craft exceptions to statutes that are not at issue in a case." [187]

Given the weaknesses of the majority's rationale, it is likely that the Court adopted it only because alternatives rationales were less satisfying. One alternative rationale for the exception, offered by Justice Blackmun [188] and other commentators, [189] was the doctrine of abstention. The *Ankenbrandt* majority, however, rejected relying on abstention principles as a basis for the domestic relations exception. [190]

D. *Why The Abstention Doctrine Was Rejected*

Justice Blackmun suggested that the common concern reflected in these earlier cases disclaiming jurisdiction over domestic relations matters was "in modern terms, abstentional--and not jurisdictional--in nature." [191] That is, that the basic premise underlying these cases was based more on a recognition that the states had "virtually exclusive primacy at that time . . . in the regulation of domestic relations" than on any historical jurisdictional limitation of the English courts. [192] This premise, he claimed, can be found in *Simms* and *De La Rama* because the Court "justified its exercise of jurisdiction over actions for divorce and alimony . . . by reference to the absence of any interest of States in appeals from courts in territories controlled by the National Government." [193] ***599** But, Justice Blackmun pointed out, "whether the interest of States remains a sufficient justification today for abstention is uncertain in view of the expansion in recent years of federal law in the domestic relations area." [194]

The majority opinion in *Ankenbrandt* recognized that it was possible for the *Burford*-type abstention [195] to be proper in certain domestic relations cases [196] but criticized Justice Blackmun's suggestion that the earlier cases could be reinterpreted to support a special abstention doctrine. [197] Justice Blackmun's primary point, however, was that *whatever* the past basis for the exception is, modern principles of abstention offer a "more principled basis" for *continuing* to recognize the exception rather than the Court "invent[ing] statutory exceptions that are simply not there." [198] Notably, many commentators have also suggested the use of

abstention principles as a better basis for federal courts to avoid certain domestic relations cases. [199]

The primary argument against the use of abstention principles as a basis for declining jurisdiction over domestic relations cases is that it is a discretionary doctrine. It is this discretionary feature which most likely prompted the Court to refrain from relying on abstention principles and to go to such great lengths in interpreting the pre-1948 cases, which disclaimed jurisdiction over domestic relations matters, as being based on judicial interpretation of the diversity statute.

There is nothing in the federal diversity statute which allows federal courts to have any measure of discretion in allowing diverse citizens meeting the amount in controversy requirement to have access to the ***600** federal forum. [200] If federal jurisdiction exists, a litigant has an absolute right to be heard in the federal forum. [201] The doctrine of abstention contradicts this notion of an absolute right to a federal forum. Consequently, by claiming an absolute lack of power to hear divorce, alimony, or child custody cases, the Court has effectively narrowed their jurisdictional power and avoided the possible numerous litigations associated with discretionary-type doctrines. At the same time, the Court has given clear notice to Congress that the diversity statute contains a domestic relations exception. It is now up to Congress to either accept this questionable judicial construction of the diversity statute, or, perhaps, to create by statute a special basis for federal jurisdiction in domestic relations disputes.

V. CONCLUSION

The United States Supreme Court rooted its decision in *Ankenbrandt* on a judicial construction of the federal diversity statute. This rationale, however, cannot be supported by any established principles of statutory construction. The Court's holding, that there exists a domestic relations exception as a matter of statutory construction, was not based on the "plain language" of the statute principle; [202] or on stare decisis; [203] or even on legislative history. [204] Instead, the *Ankenbrandt* Court relied on legislative silence; a principle which the Court has long since held to be meaningless. [205]

The Supreme Court could have decided *Ankenbrandt* very narrowly, or could even have relied upon abstention principles. Yet, neither of these choices would have accomplished the Court's obvious goal--to settle a murky area of the law.

Neither a narrow disposition of the case, nor abstention, would have established the "exception" clearly and make way for even-handed rulings in the domestic relations area. The Court's policy goals are laudable, but they were reached at the expense of distorting important principles of statutory construction.

***601** In the words of Justice Stevens, "[a]n easy case is especially likely to make bad law when it is unnecessarily transformed into a hard case." [206] Moreover, "when the Court goes beyond what is necessary to decide the case before it, it only encourages the perception that it is pursuing its own notions of social policy, rather than adhering to its judicial role." [207] Any alterations in the jurisdiction of federal courts must be made by Congress and not by a result-oriented judiciary.

Footnotes

a1 This article is dedicated to my daughter, Dawna, and to my parents, for their endless love and support.

1 *See generally,* 13B CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3609, *Judicially Created Limitations on Diversity Jurisdiction-Domestic Relations Cases* (1984).

2 Diversity jurisdiction refers to the federal court power to hear controversies between citizens of different states. 28 U.S.C. § 1332 (1991).

3 *Id.* The diversity statute provides in pertinent part that: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and cost, and is between--citizens of different States . . . . "

4 Congress enacted the diversity statute pursuant to Article III of the Constitution, which provides in part: "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . . The judicial Power shall extend . . . to Controversies . . . between Citizens of different States . . . . " U.S. CONST. art. III, §§ 1,2.

5 28 U.S.C. § 1332 (1991); *see also supra* note 3.

6 *See, e.g.,* Ingram v. Hayes, 866 F.2d 368 (11th Cir. 1988) (tort action for intentional infliction of emotional distress); Sutter v. Pitts, 639 F.2d 842 (1st Cir 1981) (suit to redress frustration of civil rights due to disobedience of visitation and custody orders); Jagiella v. Jagiella, 647 F.2d 561 (5th Cir. 1981) (counter-claim alleging alienation of child's affection and infliction of mental anguish); Buechold v. Ortiz, 401 F.2d 371 (9th Cir. 1968) (suit to establish paternity and child support); Hernstadt v. Hernstadt, 373 F.2d 316 (2d Cir. 1967) (suit to establish custody and visitation rights); Albanese v. Richter, 161 F.2d 688 (3d Cir. 1947) (suit by illegitimate child against putative father to invalidate fraudulently obtained agreement), *cert. denied,* 332 U.S. 782 (1947); Carqueville v. Woodruff, 153 F.2d 1011 (6th Cir. 1946) (habeus corpus proceedings for child custody); Williamson v. Williamson, 306 F. Supp. 516 (W.D. Okla. 1969) (suit for division of marital assets); *In re* Freiberg, 262 F. Supp. 482 (E.D. La. 1967) (adoption proceedings); Bercovitch v. Tanburn, 103 F. Supp. 62 (S.D.N.Y. 1952) (suit to recover money for necessaries supplied to wife); Linscott v. Linscott, 98 F. Supp. 802 (S.D. Iowa 1951) (action to have property settlement declared void on grounds of fraud and duress); Garberson v. Garberson, 82 F. Supp. 706 (N.D. Iowa 1949) (suit for maintenance). *See generally,* WRIGHT, *supra* note 1.

7 Barber v. Barber, 62 U.S. (21 How.) 582, 584 (1859). For a discussion of *Barber,* see *infra* notes 47-50 and accompanying text.

8 *In re* Burrus, 136 U.S. 586, 593-94 (1890). For a discussion of *Burrus,* see *infra* notes 82-85 and accompanying text.

9 *Jagiella,* 647 F.2d at 561. "The general inquiry is whether hearing the claim will necessitate the court's involvement in domestic issues. i.e., whether it will require inquiry into the marital or parent-child relationship." *Id.* at 565.

10 *See, e.g.,* Lloyd v. Loeffler, 694 F.2d 489 (7th Cir. 1982). "The boundaries of the exception are uncertain." *Id.* at 492; Allen v. Allen, 518 F.Supp. 1234 (E.D.Pa 1981). "The critical question, of course, is what a domestic relations case is . . . . [There is] a large 'gray area' for future caselaw [sic] development." *Id.* at 1236; Solomon v. Solomon, 516 F.2d 1018 (3d Cir. 1975) (Gibbons, J., dissenting). "[T]here is no well-established domestic relations exception . . . . Rather, there is a collection of misstatements of ancient holdings and ill-considered dicta." *Id.* at 1030.

11 112 S. Ct. 2206 (1992).

12 *Id.* at 2209-15.

13 *See infra* notes 134-39, 202-205 and accompanying text.

14 *See infra* notes 89-91 and accompanying text.

15 *See infra* notes 104-11 and accompanying text.

16 *See infra* note 63 and accompanying text.

17 *See infra* notes 44-88 and accompanying text.

18 *See supra* notes 11-16, *infra* notes 25-43 and accompanying text.

19 *See infra* notes 44-103 and accompanying text.

20 *See infra* notes 104-08 and accompanying text.

21 *See infra* notes 109-11 and accompanying text.

22 *See infra* notes 112-201 and accompanying text.

23 *See infra* notes 109-11 and accompanying text.

24 *See infra* notes 87-88 and accompanying text.

25 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2208-09 (1992).

26 *Id.* at 2208.

27 *Id.*

28 *Id; see supra* note 3.

29 Petition for Writ of Certiorari at 1, Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) (No. 91-367).

30 Neither the District Court, nor the Court of Appeals, nor the Supreme Court found it necessary to pass on the accuracy of this representation. *Ankenbrandt,* 112 S. Ct. at 2209, n. 1.

31 Petition for Writ of Certiorari at 1, *Ankenbrandt* (No. 91-367). Richards claimed that, on the advice of counsel, he did not defend himself against the allegations of abuse in the divorce and juvenile proceedings, or appeal the termination of his parental rights, because he was told that to do so would have prejudiced his defense

against then-pending criminal charges. Opposition Brief to Writ of Certiorari at 5, *Ankenbrandt* (No. 91-367). Apparently, the criminal charges were later dropped. *Id.*

32 Petition for Writ of Certiorari at A3-4, *Ankenbrandt* (No. 91-367).

33 Opposition Brief to Writ of Certiorari at 12-19, *Ankenbrandt* (No. 91-367).

34 *Ankenbrandt,* 112 S. Ct. at 2209.

35 *Ankenbrandt,* 112 S. Ct. at 2209 (citing Younger v. Harris, 401 U.S. 37 (1971)). The district court also relied upon *In re* Burrus, 136 U.S. 586 (1890) in reaching this conclusion; *see infra* notes 82-85 and accompanying text (discussing *Burrus); see also infra* note 94 (discussing the Younger abstention doctrine).

36 *Ankenbrant,* 112 S. Ct. at 2209.

37 *Id.* at 2206.

38 112 S. Ct. 855 (U.S. Jan. 10, 1992) (No. 91-367).

39 *Id.*

40 *Ankenbrandt,* 112 S. Ct. at 2215.

41 *Id.* at 2216.

42 *Id.; see infra* note 94 (discussing doctrine of abstention).

43 *Ankenbrandt,* 112 S. Ct. at 2216-17.

44 Justice White was joined by Rehnquist, C.J., and O'Connor, Scalia, Kennedy, and Souter, JJ.. Blackmun, J., filed an opinion concurring in the judgment. Stevens, J., filed an opinion concurring in the judgment, in which Thomas, J., joined.

45 *Id.* at 2209 n.2.

46 *Id.*

47 62 U.S. (21 How.) 582 (1859). In *Barber,* a wife brought suit in federal district court pursuant to diversity jurisdiction, against her former husband to enforce a New York state court divorce decree awarding her alimony. *Id.* at 583-84. The former husband had moved to Wisconsin and refused to make the alimony payments. The Wisconsin Federal District Court accepted jurisdiction, over the protests of the defendant, and gave judgment for the divorced wife. On appeal, the United States Supreme Court held that the Wisconsin District Court had jurisdiction to enforce the decree. *Id.* While allowing the enforcement of an existing decree, the *Barber* Court pointed out that this was not a suit asking to determine alimony anew, rather it was only asking the court to prevent the already-entered decree from being defeated by fraud. *Id.* at 584. The seminal language followed: "We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce." *Id.*

48 *Ankenbrandt,* 112 S. Ct. at 2209.

49 *Barber,* 62 U.S. (21 How.) at 592. Three members of the *Barber* court dissented, offering the only rationale for the majority's broad disclaimer. The dissent stated that because the English Chancery did not have jurisdiction over divorce and alimony, and because federal courts historically derived their equity jurisdiction from the English Chancery, Congress did not intend to confer jurisdiction over these subjects under the Judiciary Act of 1789. *Id.* at 605.

The Judiciary Act of 1789 provided that diversity jurisdiction required a "suit of a civil nature at common law or in equity." Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. This grant of equity jurisdiction had been interpreted to include only that jurisdiction held by the English Chancery Courts at the time the United States became a

nation. *See generally* WRIGHT ET AL., *supra* note 1. At that time it was believed that since domestic relations cases had historically been the exclusive province of the ecclesiastical courts in England rather than the Chancery, they did not meet the statutory description. *Id.* This jurisdictional preclusion, in turn, purportedly bound the common law and equity courts of the United States, whose jurisdiction evolved from the Chancery. *Id.*
However, there has been widespread criticism of this historical explanation and it is no longer viewed as a justification for the exception. *See* Lloyd v. Loeffler, 694 F.2d 489, 491-92 (7th Cir. 1982) (noting the "unconvincing" nature of the historical account, and the "dubious . . . historical pedigree"); *see also* Spindel v. Spindel, 283 F. Supp. 797, 806-09 (E.D.N.Y. 1968) and cases cited therein effectively refuting this historical justification.

50 *Ankenbrandt,* 112 S. Ct. at 2210.

51 *Id.*

52 U.S. CONST. art. III, § 2 provides:
The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;-- to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;-- between Citizens of the same State claiming Land under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

53 *Ankenbrandt,* 112 S. Ct. at 2211.

54 *Id.*

55 *Id.*

56 201 U.S. 303 (1906). *De La Rama* involved an appeal from a divorce suit brought in a Court of First Instance in the Phillipines. *Id.* at 304. The Supreme Court stated once again that the United States courts have no jurisdiction over divorce and alimony. *Id.* at 307. However, the Court upheld its appellate jurisdiction over appeals from the Phillipine territorial courts concerning domestic controversies. *Id.* at 308. The *De La Rama* Court suggested that the role of the federal legislature, and presumably the federal courts as well, in the territories, is analogous to that of the state government, and not of the federal government. Thus, the *De La Rama* Court reasoned, the considerations in *Barber* which distinguished between state and federal interest in domestic matters, do not apply in territorial cases. *Id.*

57 *Ankenbrandt,* 112 S. Ct. at 2211.

58 *Id.*

59 *See, e.g., De La Rama,* 201 U.S. 303 (1906). For a discussion of *De la Rama,* see *supra* note 56-58 and *infra* notes 145-48 and 169-72 and accompanying text.

60 *Ankenbrandt,* 112 S. Ct. at 2211.

61 *Id.*

62 *Id.* at 2212. The Court used other Constitutional provisions to buttress its position:
Article I, Sec. 8, cl. 9, for example, authorizes Congress '[t]o constitute Tribunals inferior to the supreme Court' and Article III, Sec. 1, states that '[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.'
Id. In addition, "[t]he Court's cases state the rule that 'if inferior federal courts were created, [Congress was not] required to invest them with all the jurisdiction it was authorized to bestow under Art. III.'" *Id.* (citation omitted).

63 *Ankenbrandt,* 112 S. Ct. at 2212. The Court explained that:

this position has held constant since at least 1845, when the Court stated that 'the judicial power of the United States . . . is (except in enumerated instances, applicable exclusively to this court) dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress, who possess the sole power of creating the tribunals (inferior to the Supreme Court) . . . and of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good.'
Id. (citations omitted).

64 *Id.*

65 *Id.* The First Judiciary Act, Act of Sept. 24, 1789, § 11, 1 Stat. 78, provided that:
the circuit courts shall have original cognizance concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, . . . [and] the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

66 *Ankenbrandt,* 112 S. Ct. at 2212.

67 *Id.* (citing the 1948 Judicial Code and Judiciary Act, 62 Stat. 930, codified at 28 U.S.C. § 1332).

68 *Id.* Justice Daniel, dissenting in *Barber,* stated:
'[T]he origin and the extent of [the federal courts'] jurisdiction must be sought in the laws of the United States, and in the settled principles by which those laws have bound them, [and that] as the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States *in chancery* is equally excluded.'
Id. (quoting *Barber,* 62 U.S. (21 How.) at 605 (Daniel, J., dissenting)).

69 *Id.* at 2212-13. *See supra* note 49.

70 *Id.* at 2212.

71 *See supra* note 49. *See also* Sharon E. Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective,* 60 NOTRE DAME L. REV. 1, 15 (1984); Rebecca E. Swenson, Note, *Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction,* DUKE L.J. 1095, 1098-99 (1983); Anthony B. Ullman, Comment, *The Domestic Relations Exception to Diversity Jurisdiction,* 83 COLUM. L. REV. 1824, 1835 (1983).

72 *Ankenbrandt,* 112 S. Ct. at 2213.

73 *Id.* Stare decisis is a judicial doctrine which means to adhere to precedent and not disturb settled points. BLACK'S LAW DICTIONARY 1406 (6th ed. 1990). It is "a rule by which common law courts 'are slow to interfere with principles announced in the former decisions and often uphold them even though they would decide otherwise were the question a new one.'" BARRON'S LAW DICTIONARY, 461 (2d ed. 1984). The "[d]octrine is one of policy grounded on theory that security and certainty require that accepted and established legal principle, under which rights may accrue, be recognized and followed . . . . " BLACK'S LAW DICTIONARY, 1406 (6th ed. 1990).

74 *Ankenbrandt,* 112 S. Ct. at 2213.

75 *See supra* notes 65-67 and accompanying text.

76 *See supra* notes 68-70 and accompanying text.

77 *See supra* note 72 and accompanying text.

78 *See supra* note 73 and accompanying text.

79 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2214 (1992). *See, e.g.,* cases cited in *supra* note 6.

80 *Ankenbrandt,* 112 S. Ct. at 2214. The *Barber* Court maintained that:

> 'It is, that when 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, that courts of equity will interfere to prevent the decree from being defeated by fraud. The interference, however, is limited to cases in which alimony has been decreed; then only to the extent of what is due, and always to cases in which no appeal is pending from the decree for the divorce or for alimony.'

Id. (quoting *Barber,* 62 U.S. (21 How.) 582, 591 (1859)).

81 *Id.* The Court noted that there was no dissent in *Barber* to the conclusion that federal courts lacked jurisdiction to issue divorce and alimony decrees. *Id.*

82 136 U.S. 586 (1890).

83 *Id.* at 594. *Burrus* involved a dispute between a father and a grandfather over the custody of a child. The Supreme Court entertained a writ of habeas corpus brought by the grandfather who had been imprisoned for disobeying a child custody order. The custody order had been issued by a federal district court in a habeas corpus proceeding, granting custody of the child to the father. The grandfather argued that he had been improperly imprisoned because the federal court did not have jurisdiction to hear the original habeas corpus proceeding. *Id.* at 589. The Supreme Court agreed and issued the writ. *Id.* at 597. The *Burrus* Court ruled that the right of the father and grandfather to custody of the child did not depend upon any law or treaty of the United States or its Constitution, as "[the] whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *Id.* at 593-94.

84 *Ankenbrandt,* 112 S. Ct. at 2214 (quoting *Burrus,* 136 U.S. at 593-94).

85 In fact, the *Burrus* Court reserved the question of whether there was federal diversity jurisdiction over the adjudication of custody rights:

> But whether the diverse citizenship of parties contesting this right to the custody of the child, could, in the courts of the United States, give jurisdiction to those courts to determine that question, has never been decided by this court that we are aware of. Nor is it necessary to decide it in this case . . . .

Burrus, 136 U.S. at 596.

86 *Ankenbrandt,* 112 S. Ct. at 2214. *See, e.g.,* Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982); Solomon v. Solomon, 516 F.2d 1018, 1025 (3d Cir. 1975); Hernstadt v. Hernstadt, 373 F.2d 316, 317 (2d Cir. 1967). *See generally* WRIGHT., *supra* note 1, at 477-79 nn.28-32.

87 *Ankenbrandt,* 112 S. Ct. at 2215.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.*

92 *Id.*

93 *Id.*

94 In addition to the domestic relations exception, some federal courts invoke abstention doctrines to decline jurisdiction over these types of cases. The doctrine of abstention permits a federal court, in the exercise of its discretion, to relinquish jurisdiction where necessary to avoid needless conflict with the administration by a state

of its own affairs. BLACK'S LAW DICTIONARY 9 (5th ed. 1979); *see e.g.,* Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir. 1972).

Under the domestic relations exception, once a case is characterized as a domestic relations case, jurisdiction does not exist. Conversely, abstention doctrines are characterized as only a postponement of proper jurisdiction. *See generally,* 1A J. MOORE, MOORE'S FEDERAL PRACTICE § 0.203 (3d ed. 1985).

The United States Supreme Court has sanctioned abstention in three instances. First, the Supreme Court has abstained when a state court decision might eliminate the need to decide a federal question. Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). Second, the Court has sanctioned abstention when the area of activity at issue is intimately regulated by a state. Burford v. Sun Oil Co., 319 U.S. 315 (1943). Third, the Court has abstained if a state criminal proceeding was pending. Younger v. Harris, 401 U.S. 37 (1971). The Court has also extended *Younger* abstention to certain civil contexts as well. *See, e.g.,* Pennzoil Co. v. Texaco Inc., 481 U.S. 1 (1987) (extended to pending state appeal proceedings); Ohio Civil Rights Comm'n v. Dayton Christian Schools, Inc., 477 U.S. 619 (1986) (extended to pending state administrative proceedings); Middlesex County Ethics Comm. v. Garden State Bar Assn., 457 U.S. 423 (1982) (extended to pending state disciplinary proceeding).

For a further discussion on the application of the abstention doctrines to the domestic relations exception to federal court diversity jurisdiction, see Barbara A. Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction,* 35 HASTINGS L.J. 571 (1984); Swenson, *supra* note 71, at 1095.

95 *Ankenbrandt,* 112 S. Ct. at 2215.

96 *Id.*

97 *Id.* at 2216.

98 Burford v. Sun Oil Co., 319 U.S. 315. For an explanation of the *Burford*-type abstention principle, see *supra* note 94.

99 *Ankenbrandt,* 112 S. Ct. at 2216.

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

101 *Id.*

102 *Id.* at 2216-17.

103 *Id.* at 2216.

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

105 *Id.* (Blackmun, J., concurring).

106 *Id.* at 2221. (Blackmun, J., concurring).

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

108 *Id.* (Blackmun, J., concurring).

109 *Id.* at 2222. (Stevens, J., concurring).

110 *Id.* (Stevens, J., concurring).

111 *Id.* (Stevens, J., concurring).

112 *Id.* at 2208.

113 *Id.* at 2216.

114 *Id.* at 2208.

115 *Id.* at 2216.

116 *Id.* at 2210.

117 *Id.* at 2212-13.

118 *Id.* at 2221 (Blackmun, J., concurring). *See supra* notes 92-96.

119 *Id.* at 2222 (Stevens, J., concurring).

120 *See* Pet. for Writ of Cert. at 3, Ankenbrandt v. Richards, No.91-3037 (5th Cir. May 31, 1991) (No. 91-367).

121 *See supra* note 10.

122 *See, e.g.,* Linda A. Ouellette, Note, *The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation,* 24 B.C. L. REV. 661, 663 (1983) "[B]ecause the exception is based on a notion no longer reflecting the reality of federal law regarding the family, it ought to be abolished"; Mark S. Poker, Comment, *A Proposal For The Abolition Of The Domestic Relations Exception,* 71 MARQ. L. REV. 141, 165 (1987) "[C]oncerns of fairness and uniformity must override any practical reasons for continued adherence to the exception"; Barbara F. Wand, *A Call For The Repudiation Of The Domestic Relations Exception To Federal Jurisdiction,* 30 VILL. L. REV. 307, 401 (1985) "[G]iven the changing nature of domestic relations law . . . judicial repudiation of the exception, rather than any makeshift revision, is the appropriate course of action."

123 *Ankenbrandt,* 112 S. Ct. at 2210.

124 *Id.*

125 1 JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 0.60 at 623 (2d ed. 1985) "[G]enerally it is proper to resolve any ambiguity or uncertainty by construing the statute against federal jurisdiction."

126 *Ankenbrandt,* 112 S. Ct. at 2213; *see supra* notes 65-72 and accompanying text.

127 *Ankenbrandt,* 112 S. Ct. at 2213.

128 *Id.* at 2215.

129 *Id.* at 2218 (Blackmun, J., concurring).

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

131 *Id.* at 2218 (Blackmun, J., concurring).

132 *See infra* notes 160-64 and accompanying text.

133 *Ankenbrandt,* 112 S. Ct. at 2220 (Blackmun, J., concurring).

134 *Id.* at 2217-22 (Blackmun, J., concurring); *see supra* notes 104-108 and accompanying text.

135 *Id.* at 2218 (Blackmun, J., concurring).

136 *Id.* (Blackmun, J., concurring) (quoting from the majority opinion, at 2210).

137 *Id.* at 2213.

138 *Id.*

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

140 *Id.* at 2212-13.

141 *Id.* at 2213.

142 A possible nonstatutory basis for the federal court's disclaimer over domestic relations cases could have been the notion of federalism. That is, a recognition by the federal government that they should keep their hands off what is primarily a state's affair. This is similar to the modern-day doctrine of abstention exercised by the federal courts to avoid possible conflict with the administration by a state of its own affairs; *see supra* note 94 and *infra* notes 191-94 and accompanying text.

143 *Id.* at 2218 (Blackmun, J., concurring).

144 175 U.S. 162 (1899); *see also infra* notes 166-72 and accompanying text (discussing *Simms*).

145 201 U.S. 303 (1906); *see also supra* notes 56-59 and *infra* notes 169-72 and accompanying text (discussing *De La Rama*).

146 *Ankenbrandt,* 112 S. Ct. at 2218-19 (Blackmun, J., concurring).

147 *Id.* (Blackmun, J., concurring).

148 *Id.* (Blackmun, J., concurring).

149 *Id.* at 2219 n.6 (Blackmun, J., concurring). This supports Justice Blackmun's position that federalism and modern-day abstention principles were the more likely basis for denying jurisdiction; *see also infra* notes 191-94 and accompanying text.

150 *Ankenbrandt,* 112 S. Ct. at 2219 (Blackmun, J., concurring).

151 280 U.S. 379 (1930).

152 *Ankenbrandt,* 112 S. Ct. at 2219 (Blackmun, J., concurring).

153 *Id.* (Blackmun, J., concurring) (quoting *Popovici,* 280 U.S. at 383). Note, however, that the diversity statute was not at issue in *Popovici.*

154 *Id.* (Blackmun, J., concurring) (quoting *Popovici,* 280 U.S. at 383).

155 *Id.* (Blackmun, J., concurring). The *Popovici* Court stated:
"'If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes.'" *Id.* (Blackmun, J., concurring) (quoting *Popovici,* 280 U.S. at 383-84).

156 *Ankenbrandt,* 112 S. Ct. at 2219 (Blackmun, J., concurring).

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

158 *Id.* at 2213.

159 *Id.* at 2219-20 (Blackmun, J., concurring).

160 *Id.* at 2217 n.1 (Blackmun, J., concurring).

161 Girouard v. United States, 328 U.S. 61, 69-70 (1946) (quoting Helueric v. Hallock, 309 U.S. 106, 119 (1940)).

162 *See, e.g.,* Lorillard v. Pons, 434 U.S. 575, 580-81 (1978).

163 *See generally* 2 B. SUTHERLAND STAT. CONST. § 49.10 (5th ed. 1992); *see also supra* 161 and *infra* note 205 and accompanying text.

164 *Ankenbrandt,* 112 S. Ct. at 2213.

165 *Id.* at 2217-22 (Blackmun, J., concurring).

166 175 U.S. 162 (1899); *see also supra* notes 144-48 and accompanying text (discussing *Simms*).

167 *Id.* at 168-69.

168 *Id.* The Court's referral to the amount in controversy requirement suggests that the Court was relying on the diversity statute as a basis for denying review of the divorce decree.

169 201 U.S. 303 (1906); *see also supra* notes 56-59, 145-48 and accompanying text (discussing *De La Rama*).

170 *Id.* at 307.

171 *See supra* note 68 and accompanying text.

172 In *Simms,* the Court held that the domestic relations exception had "no application to the jurisdiction of the courts of a Territory, or to the appellate jurisdiction of this court over those courts." *Simms,* 175 U.S. at 167-68. After reviewing the relevant statutes, the Court concluded that "the original jurisdiction of suits for divorce is vested in the district courts of the Territory" and that the Supreme Court had appellate jurisdiction over the orders of the district court. *Id.* at 168. The Court went on to hold that it had no jurisdiction to review the divorce decree because it involved "a matter the value of which could not be estimated in money." *Id.* at 168-69. It is important to note, however, that although the *Simms* Court cited *Barber,* the Court did not rest its holding on the domestic relations exception.
In *De La Rama,* the Court characterized the domestic relations exception as a "long established rule," but offered reasons different from those advanced by the *Barber* dissent:
[T]he courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value.
De La Rama, 201 U.S. at 307.

173 *See supra* note 172 and accompanying text.

174 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2210 (1992) (emphasis added).

175 *See, e.g.,* Williamson v. Williamson, 306 F. Supp. 516, 518 (W.D. Okla. 1969) ("Subject matter jurisdiction . . . is wholly lacking in a federal court in spite of the fact that" the jurisdictional requirements of 28 U.S.C. § 1332 have been satisfied); *see also* Solomon v. Solomon, 516 F.2d 1018, 1024 (3d Cir. 1975) ("Federal courts do not have jurisdiction in domestic relations suits").

176 *See, e.g.,* Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir. 1981) ("federal courts traditionally have refrained from exercising jurisdiction over cases which in essence are domestic relations disputes"); *see also* Crouch v. Crouch, 566 F.2d 486, 487-88 (5th Cir. 1978) (applicability of domestic relations exception is determined in light of policy considerations); Kilduff v. Kilduff, 473 F. Supp. 873 (S.D.N.Y. 1979) (federal court may decline jurisdiction even in tort action if tortious conduct arose from marital relationship).

177 *See supra* notes 175-76 and accompanying text.

178 *Ankenbrandt,* 112 S. Ct. at 2220 (Blackmun, J., concurring); *see infra* notes 202-05 and accompanying text.

179 *In re* Burrus, 136 U.S. 586 (1890).

180 *Ankenbrandt,* 112 S. Ct. at 2214.

181 *Burrus,* 136 U.S. at 596-97. *See supra* note 85.

182 The often quoted statement made by the *Burrus* Court was 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." *Burrus,* 136 U.S. at 593-94. *See supra* notes 82-84 and accompanying text.

183 *See supra* note 86.

184 The Supreme Court has made clear that the federal courts, in diversity cases, are required to apply state substantive law in adjudicating those disputes. *See* Erie R. Co. v. Tompkins, 304 U.S. 64 (1938).

185 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2220 (1992) (Blackmun, J., concurring).

186 *Id.* at 2214 (Blackmun, J., concurring).

187 *Id.* at 2220 (Blackmun, J., concurring).

188 *Id.* (Blackmun, J., concurring).

189 *See infra* note 199 and accompanying text.

190 *Ankenbrandt,* 112 S. Ct. at 2216; *see supra* notes 94-97 and accompanying text.

191 *Ankenbrandt,* 112 S. Ct. at 2220 (Blackmun, J., concurring); *see supra* note 94 and accompanying text.

192 *Id.* (Blackmun, J., concurring).

193 *Id.* (Blackmun, J., concurring).

194 *Id.* at 2221 (Blackmun, J., concurring). *See, e.g.,* Victims of Child Abuse Act of 1990, 42 U.S.C. § 13001 *et seq.;* Family Violence Prevention and Services Act, 42 U.S.C. § 10401 *et seq.;* Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A; Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. § 620-628, 670-679a; Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 42 U.S.C. § 5111 *et seq.;* Child Abuse Prevention and Treatment Act, 42 U.S.C. § 1501 *et seq.;* Uniform Child Custody Jurisdiction Act § 1-28, 9 U.L.A. 116 (1979).

195 *See supra* notes 94-100 and accompanying text.

196 *Ankenbrandt,* 112 S. Ct. at 2216. The Court stated that "[s]uch might well be the case 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." *Id.*

197 *Id.* at 2216 n.8.

198 *Id.* at 2221 (Blackmun, J., concurring).

199 *See, e.g.,* Barbara A. Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction,* 35 HASTINGS L.J. 571, 575 (1984) ("[T]he various abstention doctrines provide a principled basis for dismissing certain kinds of domestic relations claims"); *see Swenson, supra* note 71, at 1096 ("[T]he standards employed in the abstention doctrines should also be applied to domestic relations actions").

200 *See supra* note 3.

201 *See, e.g.,* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

202 *See, e.g.,* Caminetti v. United States, 242 U.S. 470, 485 (1917); *see generally* 2A SUTHERLAND STAT. CONST. § 46.01 (5th ed. 1992).

203 *See, e.g.,* Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989). Although the majority mentioned stare decisis briefly, *supra* note 73, it did not ultimately rely on the principle to reach its decision.

204 *See, e.g.,* United Steelworkers of Am. v. Weber, 443 U.S. 193, 201 (1979); *see generally* 2A Sutherland Stat. Const. § 48.01 (5th ed. 1992).

205 *See, e.g.,* Boys Mkt. Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235, 241-42 (1970); *see also infra* notes 160-64 and accompanying text.

206 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2222 n. * (1992) (Stevens, J., concurring).

207 United States v. Leon, 468 U.S. 897 (1984) (Stevens, J., dissenting).

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