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FAMILY LAW, FEDERALISM, AND THE FEDERAL COURTS [d]

INTRODUCTION

Whether family law belongs in the federal courts under diversity jurisdiction is somewhat contested within federal court jurisprudence. Although neither the Constitution nor the federal diversity statute explicitly prevents federal courts from considering family law issues, there has developed both a legislative and judge-made Domestic Relations Exception, precluding federal courts from hearing divorce, alimony, and child custody cases. [1] While federal courts increasingly oppose the expansion, or even the existence, of diversity jurisdiction, [2] the reluctance to consider all family law cases is firmly rooted in federal court tradition and jurisprudence.

This Article argues that a doublestranded federalism explains the unwillingness to decide family law cases: Family law is a traditional area of state regulation, and it should be kept separate from the national business of the federal courts. Under the first strand, respect for the constitutionally-established separate spheres of federal and state court expertise appears to require that federal courts refuse to hear family law diversity cases. According to this Federalist theory, [3] federal courts should exercise only ***1074** limited jurisdiction, deferring to the strong (and equal) state courts, which traditionally have controlled and developed expertise in family law. This conventional reading of the story, however, does not explain why the Supreme Court has, at times, actually decided some family law cases that have arisen in lower federal courts under diversity jurisdiction, and it is inconsistent with the Court's frequent decisions considering state family law issues pursuant to federal question jurisdiction. [4] Nor does this reading have any particularly strong basis in the

development of federal court diversity jurisdiction. Instead, the second federalism strand, that family law is somehow out of place in the federal courts, provides a supplemental explanation.[5] This second strand is based on an examination of the roles of women and families in federal court jurisprudence.[6]

The Supreme Court's 1992 decision in *Ankenbrandt v. Richards*[7] demonstrates the continuing vitality of the Domestic Relations Exception in the federal courts. In *Ankenbrandt,* the Court clarified the sources and scope of ***1075** the Exception, deciding that although the actual tort suit at issue could proceed, the diversity statute and congressional concurrence with past Court interpretations of the statute precluded federal courts from hearing other types of family law cases. The decision is flawed historically and reflects the longstanding hostility of federal courts to serious consideration of many family law issues.

While the Constitution, the diversity statute, and Court precedent do not provide a completely satisfactory basis for the Domestic Relations Exception, the federal courts have treated domestic relations cases differently than virtually any other type of diversity case, persistently refusing to exercise diversity jurisdiction over family law cases. The federal courts, however, do not refuse all diversity cases that could be deemed domestic relations cases. When such cases involve other areas of the law, such as tort or contract, the cases will proceed.[8] Various rationales explain why federal courts might decline jurisdiction, including tradition, competence (in the sense of both statutory authority and expertise), and a hierarchy of priorities that does not include family law cases. While some of these reasons may support refusal to exercise jurisdiction- for example, state courts arguably do have more proficiency in these cases than do federal courts-they do not provide a principled basis for treating different types of family law cases differently, or for treating family law cases differently from other types of diversity cases.

Given the lack of a persuasive rationale for excepting some types of family law cases, and in light of the need for diversity jurisdiction to help litigants overcome local bias,[9] federal courts should consider exercising jurisdiction over these cases in the same manner as they do over other diversity cases. While the actual number of cases in federal court might not dramatically increase-since true diversity and the requisite amount in controversy may infrequently co-exist[10]-the rhetorical significance of such a change would support the changing status of family law in our society and would recognize that in an increasingly mobile culture, families are a national issue. My argument here is not about federalizing family law; it is instead concerned with discrimination against the family. Indeed, what is at

issue is not necessarily any benefits that would accrue to individual domestic relations litigants from presenting their cases in federal courts, because ***1076** there actually may be relatively few. [11] Instead, the underlying issues concern the historical discrimination by federal courts against domestic relations cases, and even more broadly, the nature of the family in contemporary culture.

Part I of this Article gives a doctrinal history of the Domestic Relations Exception, canvassing the confusing jurisprudence of the federal courts before examining the recent *Ankenbrandt* decision. Part II examines the differing rationales that have been provided for the Exception and argues that none provide a satisfactory basis. Part III explores differing notions of federalism, arguing that an explanation based on the federal structure of our government is, at best, incomplete. Instead, by looking at the roles of women and families in the federal courts, this section concludes that a second federalism strand, one based on bias against both women and families, more fully explains the existence of the Domestic Relations Exception. Part IV discusses the changing nature and status of family law, changes that increasingly challenge this continued discrimination. Part V explores possible justifications for and objections to hearing domestic relations cases under diversity jurisdiction, and Part VI suggests these cases appropriately can appear in federal courts.

I. THE DEVELOPMENT OF THE DOMESTIC RELATIONS EXCEPTION

The interrelated themes of federalism and a private sphere for family law appear, either explicitly or implicitly, in the Court's Domestic Relations Exception cases. Even before the Court's 1992 decision in *Ankenbrandt,* federal court jurisprudence on the origins and scope of the Exception was muddled. The courts, however, have generally traced the actual Domestic Relations Exception in federal court jurisprudence to *Barber v. Barber,* [12] an 1859 case that actually reached the merits of a family law dispute.

A. History of Family Law Decisions

Although earlier Supreme Court cases frequently mentioned the power of states over domestic relations law in dicta, [13] *Barber* was the first case in which the Supreme Court squarely addressed family law. In that case, Huldah Barber (through her next friend) asked a federal court to enforce a maintenance decree granted to her by a state court as part of a separation action against her husband. The Supreme Court recognized not only that Mrs. Barber could establish a separate

domicile from that of her husband, but also that she could enforce the alimony decree pursuant to ***1077** the diversity jurisdiction of federal courts. [14]

Notwithstanding its decision that this case could proceed, however, the Court took the opportunity, at the beginning of the third paragraph of the opinion, to announce: "Our first remark is-and we wish it to be remembered-that this is not a suit asking the court for the allowance of alimony .... We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony." [15] The Court failed to provide any further justification for this statement.

The three dissenters in *Barber,* Chief Justice Taney and Justices Daniel and Campbell, asserted Mrs. Barber could not establish a domicile separate from that of her husband. [16] Turning to the authority of the federal courts over domestic relations, the dissent argued that the government should not enter "the chambers and nurseries of private families," [17] and posited a source for the Domestic Relations Exception which would itself delineate the Exception's scope. The jurisdiction of United States courts in chancery, they claimed, was subject to the same limits placed on the English courts of chancery. [18] Only the ecclesiastical courts, not the chancery courts, had jurisdiction over divorce and alimony in England. [19] Since federal courts were equivalent to chancery courts, they could not assume the jurisdiction of English ecclesiastical courts, even though no American ecclesiastical courts existed. [20] While state courts had taken over some of the ecclesiastical courts' jurisdiction, their assumption of jurisdiction was not binding on the federal courts, which were subject only to laws of the United States. [21] Consequently, the federal courts had no jurisdiction to hear Mrs. Barber's claim. [22]

In its historical context, the dissent reflects the states' rights philosophy of the Chief Justice. [23] In his most infamous case on the Court, *Dred Scott,* decided two years before *Barber,* Taney preserved state control over what he deemed to be "property." [24] One basis for his holding, as in the *Barber* ***1078** dissent, concerned diversity of citizenship; because blacks could not be citizens of the United States, he held, they could not invoke diversity jurisdiction. [25] To protect the Southern states and their white citizens, he denied blacks the right to bring suit in federal court. [26] Somewhat analagously, Taney sought in *Barber* to preserve state control over the family and to protect another form of "property." In this case he argued

that women could not bring suit in federal court because they could not establish a domicile separate from that of their husbands. [27]

Over the next 130 years, the Court handed down several additional, and somewhat inconsistent, decisions concerning the Domestic Relations Exception. In cases arising under federal statutes or the Constitution, as well as in cases considering the jurisdiction of territorial courts (rather than in diversity jurisdiction cases), the Court repeatedly made pronouncements about the competence of federal courts to handle domestic relations cases. [28]

For example, in *In re Burrus,* [29] a federal district court had issued a writ of habeas corpus requiring a grandfather to turn over custody of his grandchild to her father. When the grandfather was imprisoned for disobeying the writ, he challenged the jurisdiction to issue the writ against him. The Supreme Court held that the habeas statute was available if someone were held in custody in violation of a federal or international law, but that it was unavailable for purposes of a child custody proceeding between a father and a grandfather. [30] The Court reasoned that " t he whole subject of the domestic relations of husband and wife, parent and ***1079** child, belongs to the laws of the States and not to the laws of the United States." [31] The Court cited no authority for this proposition. Although the Court decided the case on federal question grounds, leaving open the issue of whether the federal courts would have had jurisdiction pursuant to the diversity statute in effect at that time (which, at any rate, vested such jurisdiction in the circuit courts, rather than in the district courts), courts over the past century have repeatedly construed *Burrus* to preclude diversity jurisdiction in domestic relations cases, [32] an interpretation subsequently ratified in *Ankenbrandt.*

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. [33] To reach this decision, the Court papered over seemingly clear legislative and constitutional provisions to the contrary, further obscuring the source of the Exception. First, the Court held that the statute providing for *exclusive* federal jurisdiction over ambassadors did not include divorce actions. [34] The Court then shrugged off the explicit constitutional language in Article III concerning federal jurisdiction over suits against ambassadors. [35] In its brief opinion, the Court noted that the Constitution had to be understood in light of

the "tacit assumptions upon which it is reasonable to suppose that the language was used"; when the Constitution was adopted, the "common understanding" was that domestic relations belonged to the states, not the federal government. [36] Even though this was a federal question case, the Court relied on diversity jurisdiction cases, including *Barber,* to find that a state ***1080** court could appropriately hear a divorce case against an ambassador. [37]

Historically, the Court's statements concerning the source and scope of the Domestic Relations Exception have provided little guidance for the lower federal courts. While most lower federal courts either found that the diversity statute presented a bar or used abstention to refrain from hearing family law cases, [38] other courts based the Exception on the Constitution. [39] With the source of the Exception not clearly identified, and indeed, changing over time, the lower courts had only vague pronouncements of the Court from which to discern the Exception's scope. Some courts excepted child support, child custody, and divorce cases; [40] others accepted jurisdiction. [41]

***1081** *B. Grounding the Exception - Ankenbrandt*

In *Ankenbrandt,* the Supreme Court finally attempted-explicitly-to clarify the sources and scope of the Domestic Relations Exception. Carol Ankenbrandt, a Missouri citizen, brought a tort suit in federal court against Jon A. Richards, a Louisiana citizen, who was her former husband and the father of her two daughters, L.R. and S.R. [42] In the month before the federal action was initiated, a Louisiana court had terminated Mr. Richards' parental rights. [43] The subsequent tort suit sought monetary damages for the defendant's physical and sexual abuse of L.R. and S.R. After both the federal district court and Fifth Circuit dismissed the suit, holding that they had no jurisdiction over a case presenting domestic relations issues, [44] the Supreme Court accepted certiorari on the existence of and limitations to a Domestic Relations Exception to federal court jurisdiction. All nine Justices agreed that this particular suit could go forward because it did not involve traditional domestic relations laws of divorce, alimony, or child custody. They disagreed, however, about the existence, sources, and continuing viability of a Domestic Relations Exception.

Justice White's majority opinion, joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Souter, concluded that the Constitution itself did not prevent federal courts from hearing domestic relations cases. [45] Nonetheless,

Justice White found a limitation on the jurisdiction of "inferior courts" under the congressional statute defining diversity jurisdiction. To do so, he first reexamined *Barber*. Although he recognized that the *Barber* majority had not discussed the diversity statute in effect at that time, which limited jurisdiction to "all suits of a civil nature at common law or in equity," [46] the *Barber* dissenters had "implicitly" referred to the statute when they opined that the federal courts were limited in jurisdiction to suits that could be brought in English chancery ***1082** courts. [47] Because the majority had not disagreed with this implicit reference, "it may be inferred fairly that the jurisdictional limitation recognized by the Court rested on this statutory basis and that the disagreement between the Court and the dissenters thus centered only on the extent of the limitation." [48]

The *Ankenbrandt* Court itself took no position as to whether this interpretation of English chancery court jurisdiction or of the diversity statute was accurate. Instead, the Court held that because of stare decisis and Congress's alleged concurrence in this interpretation, the restriction existed. [49] The Court reasoned that Congress accepted the existence of the Domestic Relations Exception when it amended the diversity statute in 1948 and failed to change the statute's longstanding construction. [50]

With respect to the scope of the Exception, the Court stated that it does not encompass all domestic relations cases; only those involving divorce, alimony, and child custody are included. [51] While the *Barber* dictum referred only to divorce and alimony, the Court used somewhat convoluted reasoning to arrive at the limitation on child custody in the diversity statute, finding a source for the child custody limitation in the 1890 habeas corpus case, *In re Burrus*. [52] Although the Court recognized that *Burrus* concerned the habeas corpus statute, and not the diversity statute, "its statement that 'the whole subject of 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,' ... has been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction." [53]

According to the Court, policy considerations, including judicial economy and expertise, further supported its conclusion about the Domestic Relations Exception. The Court suggested that state courts have close ***1083** connections to local agencies which resolve conflicts resulting from domestic relations decrees. [54] Because the state courts are accustomed to handling these cases, the cases should stay there.

Although the remaining Justices concurred that the case could go forward, they disagreed with the majority's treatment of the Domestic Relations Exception. Justices Stevens and Thomas explained that because all of the Justices agreed that the case could proceed, there was no need to allocute the Exception. [55] In a separate opinion concurring in the judgment, Justice Blackmun asserted that the diversity statute contained no limitation on jurisdiction over domestic relations cases. [56] Instead, he argued, federal courts could abstain if they chose to do so. [57] Even then, he questioned whether the traditional deference to states' interests in regulating domestic relations law was a sufficient basis for federal court abstention, especially in light of the increasing Congressional regulation of family law. [58]

On one hand, the Court's opinion clearly resolves the status of family law in federal court. It squarely addresses what the Domestic Relations Exception *is.* First, *Ankenbrandt* establishes a limited Domestic Relations Exception for divorce, alimony, and child custody, but allows other cases involving family members, such as tort suits or enforcement of alimony decrees, to proceed. Since many of the cases excepted might not reach the monetary threshold for diversity jurisdiction, this is not a severe restriction. By clarifying a confusing area of federal jurisdiction, the Court delineates which family law cases can be heard by federal courts.

Second, the decision grounds the Exception in the competency of lower federal courts pursuant to the diversity statute, rather than in the jurisdiction conferred by the Constitution. Thus, the Supreme Court has jurisdiction over domestic relations cases. For the lower federal courts, the Constitution does not inherently bar their hearing family law cases; [59] it is the diversity statute that provides the limitation on the courts' jurisdiction. Consequently, *Ankenbrandt* does not preclude Congress from enacting legislation to change the parameters of the Exception to allow federal courts to hear these cases. [60]

Notwithstanding the positive aspects of the ruling, the opinion is problematic on several different levels. First, as in *Barber,* everything in the opinion concerning the Domestic Relations Exception is dicta. Although, at the Court's request, the parties briefed the scope of the Exception, this issue was not otherwise before the Court. As demonstrated by the differing ***1084** opinions of the Justices, the Court needed only to determine whether the Exception encompassed Ms. Ankenbrandt's tort claim. Beyond this determination, a decision on the scope of the Exception was not necessary to the Court's resolution of the case.

Second, as in most cases, the *Ankenbrandt* dicta still leaves open many issues. Some of the potentially confusing areas relate to abstention when domestic relations appear in the federal courts: [61] While the Supreme Court rejected the lower courts' use of *Younger* abstention-which applies when federal courts seek to interfere with pending state criminal prosecutions-it left open the appropriate use of other forms of abstention. [62]

Other, more fundamental issues concerning federal court jurisdiction remain unresolved, promising many future disagreements among the federal courts. The Court concluded merely "that the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree." [63] To what extent must a case implicate these matters to require application of the Exception? [64] Should courts adhere to the literal language of *Ankenbrandt,* or should they construe the excepted categories more broadly? [65] Child support, for instance, is not enumerated in the Court's list. Arguably, however, child support is comparable to alimony because it is a form of ongoing wealth transfer after divorce. It also is closely related to child custody determinations because most state statutes require the noncustodial parent to pay. [66] On the other ***1085** hand, since child support is becoming increasingly subject to Congressional legislation, it may more appropriately be considered in the federal courts. [67] Despite the Court's attempts to clarify the Domestic Relations Exception, *Ankenbrandt* still leaves many issues muddled. [68]

Third, the Court used questionable reasoning when interpreting the precedents on the Domestic Relations Exception. [69] Given that neither the majority nor the dissent in *Barber* mentioned the diversity statute, and that the opinion allowed an action to enforce an alimony award to proceed, *Barber* is scarcely a definitive statement on the scope of the Domestic Relations Exception. Moreover, *Barber* gave no explicit basis for its conclusion that the federal courts had no jurisdiction over alimony or divorce. Nonetheless, the *Ankenbrandt* opinion finds it "logical" to assume that the *Barber* majority based its decision on the diversity statute, not the Constitution. [70] *Ankenbrandt* then grounds its interpretation of the diversity statute on an "implicit" reference to the statute by the *Barber* dissent and a failure by the *Barber* majority to disagree with this reference. [71] This "explicit" non-reference is a fragile precedential foundation for the *Ankenbrandt* opinion.

Drawing the child custody exception from *Burrus* is a similarly dubious enterprise. *Burrus* simply was not a diversity case; it originated in a district court, which did not

have jurisdiction over diversity cases at the time the case arose. *Burrus* was, rather, a habeas corpus case, deciding merely that the federal habeas statute did not include child custody matters between family members because of the inability to place a pecuniary value on the custody dispute. Indeed, the Court explicitly reserved the issue of whether ***1086** custody cases were included under diversity jurisdiction. [72] The *Ankenbrandt* opinion did recognize that *Burrus "technically* did not involve a construction of the diversity statute, as we understand *Barber* to have done," [73] but it proceeded to derive the child custody prong of the Domestic Relations Exception from the case. The nature of the federal statute under which the *Burrus* petitioner brought suit in federal court is more than a "technical" matter however, for whether a case is initiated under federal question or diversity jurisdiction has important substantive consequences today. [74]

Fourth, beyond its questionable interpretation of *Burrus,* the Court refused to re-examine the legal history upon which this and other domestic relations precedents rest. [75] Instead, the Court ascribed an intent to Congress-that it did not mean to overrule the Court's alleged precedents on the Domestic Relations Exception, and, indeed, adopted the Court's interpretation-that may not be warranted. The Court's explanation for Congressional concurrence rests on two assumptions: that Congress interpreted the Court's precedents in the same manner as did the Court, and that legislative inaction is equivalent to ratification. As Justice Blackmun noted, it was hard enough for the *Ankenbrandt* majority to arrive at its tortured interpretation of the earlier Domestic Relations decisions; to suppose that Congress was aware of that interpretation ascribes a clairvoyance for which Congress is not noted. [76] Then, to suppose that Congress did not intend to overrule this tortured interpretation of Court cases is highly speculative, given that legislative inaction does not necessarily indicate approval and that the Court itself inconsistently interprets Congressional inaction. [77] This sleight of hand may serve to elide responsibility, or abdicate ***1087** power, because it appears to cede to Congress the power to interpret and ratify the Court's earlier decisions, even when those decisions are unclear. Regardless of whether the earlier decisions were wrong, the Court need not address them because Congress, rightly or wrongly, has endorsed them.

Finally, as an empathetic matter, the Court barely mentioned the intrafamily relationship giving rise to the case. [78] There was little reference to the underlying tortious conduct of the father upon his daughters. The Court did allow the suit to go forward, but only because it looked like other cases that belonged in federal

court.[79] In reasoning by analogy alone, the Court ignored the significant and disruptive issues of child sexual abuse, perhaps reflecting a discomfort with these concerns.

As a result of *Ankenbrandt,* federal courts cannot exercise jurisdiction in core domestic relations cases, although they may do so when they need not decide traditional family law issues. Because diversity simply does not exist in many family law cases, the actual restriction on the federal courts is comparatively limited. Moreover, because the Exception is located in the diversity statute, not the Constitution, Congress can modify or entirely eliminate the restriction. Nonetheless, the Court's rhetoric is far-reaching, implying there is little tolerance for intimate family law details in the federal courts pursuant to diversity jurisdiction.

II. TRADITIONAL RATIONALES FOR THE DOMESTIC RELATIONS EXCEPTION

Diversity jurisdiction of the federal courts is based in Article III of the Constitution.[80] The Judiciary Act of 1789 vested jurisdiction over "suits of ***1088** a civil nature at common law or in equity" between citizens of different states in the circuit courts.[81] That language remained unchanged until 1948, when it became "all civil actions."[82] Although the diversity statute itself has never explicitly excluded any area of law, courts have implied various exceptions, such as family law and probate.[83] Whether these are constitutional, statutory, or discretionary has not always been explicit. While the Domestic Relations Exception has at times been justified by all three, in *Ankenbrandt* the Court based it, somewhat precariously, on the diversity statute.[84]

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. For example, in his influential 1891 treatise on family law, Joel Prentice Bishop stated, with no footnotes or other interpretory material, that "[t]he national power does not extend to the domestic affairs of the States ... within State Lines, it cannot control either marriages or divorces."[85] As this bare assertion indicates, by the end of the nineteenth century, this division of authority had approached the status of a truism.

Courts and commentators typically base the so-called Domestic Relations Exception on one or more of the following rationales: [86] The Exception is necessary to preserve to the states their traditional functions and to ***1089** protect federalism because power over domestic relations is not explicitly allocated to the federal government; federal court jurisdiction is limited to that of the English chancery courts and does not include cases heard by the ecclesiastical courts; [87] states have developed substantial expertise in the family law area, as well as special structures, such as family law courts and social service agencies; [88] and issues of marital status are outside the competence of federal courts. [89]

These explanations, however, are incomplete and instead reflect judicial searches for a credible rationale that is in accord with contemporary jurisprudence. [90] The latter three rationales-chancery court jurisdiction, state court expertise, and federal court incompetence-rest on premises that are, at best, questionable. At the core, each of these rationales merely restates the first and can be explained as yet another expression of federalism.

A. The Jurisdiction of Ecclesiastical and Chancery Courts

The argument that the jurisdiction of the federal courts is limited to that of the English chancery courts is one typically invoked to explain why federal courts should not hear domestic relations cases. According to this argument, domestic relations cases must lie outside the jurisdiction of the United States federal courts because these cases historically were subject to the jurisdiction of the ecclesiastical courts rather than the common-law courts.

The underlying assumption-that ecclesiastical courts had exclusive jurisdiction over divorce-is somewhat doubtful. [91] The jurisdiction of the English ecclesiastical courts was one of privilege, not of right, with the common-law courts defining its boundaries. [92] Nor was the jurisdiction conferred exclusive. Ecclesiastical courts were empowered to grant only divorce from bed and board, not absolute divorces, which were the province ***1090** of the secular state. [93] After litigants obtained partial divorces from ecclesiastical courts, Parliament enacted bills of absolute divorce. [94] In at least a few cases, the chancery courts themselves had granted divorces prior to 1787. [95] In many of the American colonies, which had only one adjudicative system, courts of general jurisdiction issued divorce decrees, as did colonial governors. [96] Given the indeterminacy over whether the ecclesiastical

courts had exclusive jurisdiction and the historical jurisdiction of colonial courts, seeking to elide jurisdiction by drawing on the history of English chancery courts is, at best, a questionable enterprise.

More fundamentally, when the argument is viewed in context, it provides no explanation at all. The relationship between church and state in the early United States differed not only from that in England, but also, from the distinct relationship existing today.[97] As there are no ecclesiastical courts in the United States, either at the state or federal level, some other judicial entity must exercise the authority that the ecclesiastical courts formerly exercised. The argument that federal courts are unable to assume the supposed jurisdiction of the ecclesiastical courts leaves these issues to state courts merely by default. The asserted explanation provides no rationale for allocating family law cases exclusively to one judicial system over another. Indeed, in other contexts, the Supreme Court has refused to defer to the historical distinctions between British ecclesiastical and secular courts to limit federal court jurisdiction.[98]

*1091 *B. State Court Expertise*

The federal courts have also explained that they should defer to state courts not only because states have themselves built up expertise in the family law area, but also because they have established social service agencies to support their work. In *Ankenbrandt,* the Court added support to this argument, noting that state courts often need to retain continuing jurisdiction over domestic relations cases.[99] There are two responses to this assertion: First, this state court competence may not always exist; and second, even if it does exist, it should not preclude federal courts from hearing these cases or imply that federal courts are incapable of doing so.

First, the underlying premise about the history and competency of state courts is questionable. The first family law courts did not develop until the early twentieth century.[100] Today, most state court systems have family and juvenile courts,[101] which hear only cases concerning divorce, custody, support, and property distribution, or abuse and neglect. Consequently, state courts have developed specialized methods for handling domestic relations cases, including family court-related social services agencies. Yet complete, unquestioned deferral to the expertise of these courts may not always be warranted. The exact nature of their expertise has been questioned, and state family law courts have been criticized for their failure to develop sufficient mechanisms to handle family law cases. Not only do many judges dislike serving on the family courts, but also, judges

in many state domestic relations courts rotate through a family calendar, remaining for only one year before moving on to a criminal calendar.[102] Even within the family calendar, there will be cases ranging from adoption to domestic violence to equitable distribution at divorce.[103]

The social service agencies that administer disputes under domestic relations decrees also have been criticized. As the number of families going through the legal process has increased, social workers have become involved in an attempt to make the process less adversarial so that family ***1092** ties can continue. Counselors and therapists, who worked in roles supportive of the adjudicative function, have become more central to the family dissolution process.[104] In some states, mediation by a social service professional is required as part of a custody proceeding.[105] While these developments are well-intended, they may further disempower women,[106] require a continuing relationship between parents when such a relationship is inappropriate,[107] and enmesh the parties in an ongoing connection to the legal process. The utility of social service agencies affiliated with family courts is itself controversial because of their biases.[108]

Second, even if state courts are "better" or more competent at handling domestic relations cases in some areas, federal courts need not decline jurisdiction. In diversity cases, federal courts must often decide questions of state law, notwithstanding specialized state court procedures. Presumably, federal courts can do the same in family law cases.[109] Alternatively, they can simply refer parties to state social service agencies for resolution of appropriate issues, work with these agencies themselves, or both.[110] A tradition of state courts handling domestic relations cases does not necessitate respect for the status quo and ratification of this division of authority when federal courts would otherwise have jurisdiction.

Without an analysis of the benefits actually provided, blind deference to state courts and related social service agencies is questionable.[111] The mere assertion of state court expertise serves as yet another cover for referring domestic relations cases out of federal courts.

C. Status Issues

Yet another explanation provided for the Domestic Relations Exception is that issues involving marital status lie outside of the competence of ***1093** the federal courts, even though issues involving marital property may lie within

this competence. Almost forty years ago, in their influential article on diversity jurisdiction limitations, Allan Vestal and David Foster argued that federal courts should not exercise jurisdiction over a determination of the parties' marital status, but could and should exercise jurisdiction over property rights. [112] According to this argument, courts should not make any determinations with respect to the validity of a marriage or the granting of a divorce decree. [113] Indeed, federal courts repeatedly have explained that they will not decide cases involving a determination of the relationship between husband and wife, or between parents and children. [114] Only if the cases can be brought outside of the marital relationship will these federal courts consider them.

The application of this approach, however, has led to inconsistent results. [115] Moreover, the distinction between property and status is conceptually difficult to maintain. Courts have identified many cases as involving interdependent issues of both property and status; [116] property and status are integrally tied together, and status is often a form of property. [117] Although Vestal and Foster attempt to distinguish the two, and assert, for example, that courts should not "refuse d to exercise jurisdiction simply because of the relationship of the individuals involved," they nonetheless acknowledge that the law concerning the status of the individuals may be ***1094** relevant to a determination of their property rights. [118]

Even if there were a viable distinction between property and status, the ability to distinguish between them does not justify excepting issues of status in domestic relations law from the federal system. The distinction attempts merely (and inadequately) to clarify the application of the traditional rule, prescribing when the federal courts can hear domestic relations cases. The complex distinction between status issues and other legal matters is thus meaningless, leaving marital status issues to the state courts without providing justification for doing so.

D. Alternative Rationales

The traditional explanations for the Domestic Relations Exception have shifted over time. While, when viewed critically, these explanations have little force, the existence of the Exception today may stem from the politics of the diversity grant. Federal court judges are reluctant to decide many other types of diversity cases, and the continued existence of diversity jurisdiction is under attack. [119] The question thus may be why any diversity jurisdiction still exists, rather than why family law issues are excepted. The Domestic Relations Exception may continue to exist

simply because of opposition to expanding the diversity grant, with the federal courts reluctant to acknowledge this rationale.

Reluctance to expand the diversity grant does not, of course, adequately explain the historical discrimination against family law cases. More importantly, it fails to explain why today some family law cases, but not others, are heard under such jurisdiction. I thus turn to examine other possible bases for the Exception, bases that suggest an underlying continuity in federal court jurisprudence.

III. FEDERALISM AND FEMINISM

As the somewhat pretextual nature of these shifting excuses suggests, federalism concerns-in the form of the appropriate division between state and federal sovereignty- are at the base of the federal courts failure to exercise jurisdiction over domestic relations cases. [120] The federalism explanation, in turn, may rest on either or both of two possible bases: First, a concern with constitutional federalism, drawing on an enumerated powers rationale; and second, an attitude that dismisses the comparative importance ***1095** of family law, both in the sense that it is more appropriate for states to control family law and also that family law, perceived as a traditionally feminine domain, does not merit federal judicial resources.

A. Enumerated Powers - Federalism

The simplest explanation for assigning domestic relations to the states rests on the federalist structure of the United States government. [121] Article I, Section 8 of the Constitution enumerates various powers to be exercised by Congress, thereby appearing to limit both state and federal sovereignty. [122] Further reinforcement for the limited nature of federal government power appears to be based in the Tenth Amendment, which proclaims: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [123] While the limitations imposed by the Tenth Amendment per se are confused, the Amendment does provide a constitutional basis for federalism. [124] Under the federalist scheme, certain areas of the law are appropriate for state authority, others only for federal.

In identifying which particular powers are reserved to the states, the Court has vascillated between two tests, sometimes identifying these powers ***1096** as those constituting a "traditional governmental function" or of a local character, [125] and

sometimes applying a more flexible approach based on the political process. [126] Most recently, *Garcia v. San Antonio Metropolitan Transit Authority* [127] and *New York v. United States* [128] repeated the pattern of fluctuation between the different tests. In *Garcia,* the Court articulated a flexible test based on the political process and few substantive rights for the states, [129] while in *New York* the Court emphasized the Constitutional framework and limitations on the federal government's power. [130]

It remains unclear, however, what limits, if any, the Constitution places on the power of the judiciary to consider cases traditionally dealt with by state law. Most of the cases considering the allocation of powers pursuant to the Tenth Amendment have concerned congressional legislation enacted under the Commerce Clause or Congress's Spending Power, and the most recent cases have concerned regulation of states, rather than of individuals. In addition, while Article I sets out the enumerated powers of Congress, Article III sets out the constitutional limitations on the federal judiciary. Although *Erie Railroad Co. v. Tompkins* imposes additional limitations on the power of federal courts to make federal common law, [131] neither *Erie* nor Article III enunciate a doctrine of federalism that limits federal courts from considering matters, such as domestic relations, traditionally left to the state courts. Rather, federal court reluctance to hear these cases appears to ***1097** explain judicial deference toward domestic relations. [132]

B. (Un)Importance of Family Law - Feminism

Federalism may explicitly operate to protect federal courts from certain types of family law cases, as the Court's opinion in *Lehman v. Lycoming County* reflects. [133] In that case, Marjorie Lehman brought suit in federal court pursuant to the habeas corpus statute, seeking to recover custody of her three children whom the state had placed in foster care. [134] The Court, focusing on federalism, rejected Ms. Lehman's attempt to use the federal habeas statute. In doing so, however, the Court noted that the issues in a child custody case were different from those in other habeas cases. Because of the "profound" nature of the habeas statute, the Court explained, it should be used only in cases in which "the federal interest in individual liberty is so strong that it outweighs federalism" concerns, [135] not in the comparatively trivial cases in which a parent seeks access to her children.

The invocation of federalism appears to be an instrumental method for shielding the Court from hearing these cases. The decision to use federalism doctrine to avoid

hearing certain issues is inevitably and necessarily interrelated with an evaluation of the merits of those issues.[136] Family law has a comparatively low status in the hierarchy of cases, in both federal and state courts, and domestic relations cases are perceived as involving "burdensome, fact-bound and often protracted ... disputes."[137] Domestic relations cases require confronting the emotional and dependent side of family life-the messy realities of divorce, children, and child abuse. It is not that the Court does not deal with the messy realities of other kinds of cases, but that the other cases simply do not present the same types of ***1098** intimate intrafamily issues for review.[138]

The federal dumping of family law cases into state courts is comparable to what Judith Resnik has examined in a different context and termed "housekeeping": Article III judges send to Article I judges many of those cases involving "dependency," in which individual claimants are dependent either on the state to prevent them from being in more desperate straits, or on the legal system for "assistance, interpretation, and patience."[139] While these decisionmaking functions are necessary, federal judges attempt to subordinate them to what they see as more important legal tasks. Professor Resnik underscores the simultaneous valuation and devaluation of such cases in the courts, and its parallels to women's status in the nineteenth century, in which (white, middle class) women were placed on a pedestal, but confined to that pedestal.[140] Similarly, the Court recognizes the importance of domestic relations, but relegates it to a different set of courts, those of the state.[141] This is based in part on bias against women, as well as on conventional concepts of the family.

1. Gender Bias

By asking what Katharine Bartlett calls "the woman question," we can at least partially explain the relative absence of family law within the federal courts. By examining "how the law fails to take into account the experiences and values that seem more typical of women than of men .... [T]he woman question helps to demonstrate how social structures embody norms that implicitly render women different ...."[142] Indeed, as Judith Resnik has suggested, the Court's association of domestic relations with women, and the assumption that women are not "relevant" in the federal courts, partially explain the Court's relegation of family law to the states.[143] Given the traditional association of women with the family and with emotional, intuitive feelings, families are not welcome in the federal court, lest the

courts be required to decide women's concerns, especially when they would ***1099** prefer to decide other kinds of cases. [144]

The Ninth Circuit Gender Bias Task Force has documented the impact of gender in the federal courts, [145] and Professor Resnik has discussed the courts' initial reluctance to undertake the study of gender bias within the federal judicial system. [146] The critique, in which women are signified as family members and are therefore not important enough for the federal courts, is powerful. The early opposition to the federal Violence Against Women Act by the Judicial Conference of the United States [147] shows how wary federal courts are of women. Nonetheless, gender bias alone does not fully explain federal court treatment of family law; the actual situation of women and families in the federal courts is more complex. At least in certain roles, women do appear in federal court cases. In her survey of women in the federal courts, Professor Susan Gluck Mezey lists a series of areas in which women have successfully litigated their rights, including the equal employment and education areas. [148] The ACLU Women's Rights Project has litigated many cases promoting women's rights, developing a significant jurisprudence on gender discrimination. [149] Even the abortion rights decisions that appear to curtail women's autonomy include some strong feminist language recognizing the rights of at least some women. [150] Women outside of the family-in situations that do not ***1100** involve marriage, divorce, child custody, and support-do appear in federal court cases. When women seek to act autonomously, as individuals, without respect to their family roles, or outside of dependency relationships, the Court is not necessarily inhospitable to their claims. [151]

The Court has developed two different approaches to women: In the private sphere of the family, the Court does not examine women's traditional role, while in the public sphere of the workplace, women can successfully challenge the status quo. [152] Suggesting that federal courts are hostile to family law solely because of gender bias, however, reveals the underlying problems with an analysis that joins women and the family. [153] While women are more likely to be litigants in family law cases, and thus more likely to be seeking a court's aid, the entire family is excluded. In addition, although women are typically viewed as wives and mothers, they do perform other roles; focusing on their representation as family members ***1101** obscures both these other responsibilities as well as women's appearances in the federal courts. As this analysis suggests, a more precise explanation of the federal courts' approach towards families should focus on what happens to families, as well as to women, in the federal courts. [154]

2. Separate Spheres

By using a lens that focuses on family law issues, it appears that the Court will consider some types of family law cases, but not others. When a domestic relations case looks like another case over which federal courts typically exercise diversity jurisdiction, such as a tort or contract case, and does not involve a determination of the ongoing nature of family relationships, then the Court will proceed. However, in an alimony case, for instance, the Court must undertake a more fact-based and wide-ranging examination of the nature of the relationship, looking at factors such as the contribution of each party to the marriage. When a domestic relations case requires an examination of the interdependencies within the family, or of ongoing family relationships, the Court relegates the case to the state courts.

By confining these types of family law issues to a separate judicial system, the Court echoes the outmoded dichotomy between a public sphere (the marketplace, the federal courts) and a private sphere (the family, the state courts). While the "separate spheres" ideology was explicit in the late nineteenth century, [155] it is now an implicit underlying theme that permeates the Court's family law decisions. There are two aspects to the Court's public/private dichotomy in family law: one between the states, which provide public regulation, and the family, which, notwithstanding public ***1102** regulation, still belongs to the private sphere; and a second between the federal and state courts. The federal courts generally respect state interests and regulation concerning dependent intrafamily relationships, but they do not defer to state law when an examination of such relationships is not central.

a. Significant Family Law Cases: Protecting a Just Family in a Private Sphere

Despite the respect owed to state family law, the Court has not hesitated to intervene between the state and the family when constitutional rights are at stake. Indeed, the Court has constitutionalized some family law issues, setting the outer boundary on state regulation. [156] While there is today no doubt that constitutional liberties trump state family law, [157] many of the Court's decisions striking down state statutes that regulate the family do not even articulate the importance of deferring to state law over parental rights, much less balance the rights of parents and the state. [158] Instead, the Court articulates the critical nature of family rights.

In *Zablocki v. Redhail,* for instance, the Court reviewed the constitutionality of a state statute regulating the right to marry.[159] Striking down the statute, rather than deferring to the state's judgment, the Court noted that the right to marry was fundamental, just like other decisions concerning family relationships.[160] Accordingly, the state needed to articulate a "sufficiently important" interest, which it had failed to do.[161] In *Wisconsin v.* ***1103** *Yoder,* the Court explained that "this case involves the fundamental interest of parents, as contrasted with that of the State, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children."[162] And, in *Stanley v. Illinois,* the Court noted it had "frequently emphasized the importance of the family," and catalogued various interests, including the right to conceive and raise children as well as the "integrity of the family unit."[163]

The anomaly presented by these decisions can be explained by a resort to the traditional conception of the family itself.[164] In effect, the Court accepts the existence of a just family in a private sphere.[165] In cases arising under federal question jurisdiction, the Court generally seeks either to protect the "privacy" of an intact family, or to impose an explicit form of discipline on broken families.[166] The Court wants to enforce a traditional ***1104** family structure by supporting either the parents or the state, whichever is capable of the more authoritarian structure.[167] "When the Supreme Court extends protection to the family unit, therefore, it is not merely carving out a separate sphere devoid of substantive content ... it is designing specific values and institutional structures that serve specific political ends."[168]

By enforcing the public/private distinction between the state and the family, the Court undermines the second aspect of the dichotomy, that between the federal and state courts. The Court's efforts to protect traditional families illustrate that family law is no longer reserved solely to the states. Just as a "private sphere" is permeable, so too is the boundary between federal and state law on the family when sufficiently weighty interests are at stake.[169] As discussed below, however, the Court will only go ***1105** so far.

b. Insignificant Family Law Cases

While many of the Court's most famous constitutional law decisions on privacy and autonomy begin with declarations of the significance of family rights, its use of such language is limited. Even in cases presenting a constitutional challenge, when the Court upholds the state statute, it frequently refers to the traditional function of the state in regulating the family. In *Sosna v. Iowa,* for example, the Court considered a constitutional challenge to Iowa's requirement of residency as a condition for marriage. [170] Upholding the statute, the Court explained that it was part of "Iowa's comprehensive statutory regulation of domestic relations, an area that has long been regarded as a virtually exclusive province of the States." [171]

The rhetoric confining family law to the states is reminiscent of earlier language that confined women to the private sphere. [172] Although the Court no longer mentions the public/private distinction, it explicitly relegates the interdependency issues of family law to the separate spheres of the states and their courts. State courts are, of course, part of the public sphere. Nonetheless, in the world of federal and state courts, state courts are ranked second; in the dichotomy male/female, public/private, white/black, one/other, state courts can be seen as the other. [173]

Perhaps most importantly, deciding these cases would require breaching the private sphere of family relations. [174] Thus, in the child custody area, despite federal legislation which arguably creates federal question (or possibly diversity) jurisdiction, the Court has failed to find such ***1106** jurisdiction. [175] As the early opposition to the Violence Against Women Act revealed, the federal judiciary has remained averse to important domestic relations issues.

i. The Parental Kidnapping Prevention Act

In an effort to prevent forum shopping and to ensure uniform state jurisdiction in child custody cases, Congress enacted the Parental Kidnapping Prevention Act (PKPA) in 1980, setting out jurisdictional parameters for state courts in these cases. [176] The statute provides standards for determining when a second state should enforce, without modifying, child custody awards entered by another state, so long as the first state has made a determination in accordance with the PKPA. Although some disagreement existed over the availability of a federal forum and congressional intent was unclear, [177] two federal circuit courts held the statute created a private cause of action in federal court. [178] Nonetheless, in the two PKPA cases that have reached the Supreme Court - *California v. Superior Court of*

California in 1987 [179] and *Thompson v. Thompson* in 1988 [180] -the Court definitively excluded federal courts from the domestic relations area.

In both cases, Louisiana and California courts had issued conflicting decrees relating to child custody, with each decree favoring the parent who resided in that state. In *California,* the Court considered whether California must comply with a Louisiana extradition warrant against a father who had taken his children from Louisiana to California pursuant to his California custody decree. Focusing on federal Extradition Act issues presented by the case, the Court virtually ignored the PKPA issues and held that the warrant must be respected. The dissenting opinion, however, found the PKPA important to its conclusions about the Extradition Act. In the dissent, Justices Stevens and Brennan argued that the father had not been substantially charged with a crime under the Extradition Act because under ***1107** the PKPA, he had acted consistently with federal law. [181] The dissenters believed that, in enacting the PKPA, Congress intended to discourage contested interstate child custody proceedings; because Congress had enacted federal legislation, there was no need to respect state law by enforcing the warrant. [182]

In *Thompson,* the Court was asked to decide whether federal courts could resolve which of two conflicting state court custody decrees had been issued in compliance with the PKPA. Using congressional intent as the "focal point" of the inquiry, the Court unanimously held there was no federal cause of action pursuant to the PKPA, which would have enabled federal courts to decide between the conflicting state court decrees. [183] Briefly referring to federalism issues, the Court explained that " i nstructing the federal courts to play Solomon where two state courts have issued conflicting custody orders would entangle them in traditional state-law questions that they have little expertise to resolve." [184] The Court was absolutely certain, arguably beyond what the legislative record supported, that this was "a cost" that Congress did not intend when it enacted the PKPA. [185]

***1108** In both *California* and *Thompson,* the Court construed a federal statute so that federal courts would not have to handle any of the underlying child custody issues. In *California,* the Court found the PKPA irrelevant; in *Thompson,* the Court found that the PKPA did not authorize federal courts to resolve conflicting state court custody decrees. In both cases, the Court believed that Congress had not intended federal courts to exercise jurisdiction, and that state courts provided the appropriate forum for resolving the custody issues. As a result, the Court refused to intervene in family law disputes involving conflicting state court decrees. As with diversity jurisdiction, the Court foreclosed federal jurisdiction over domestic

relations issues. Even though the PKPA might have justified at least some form of federal judicial involvement in child custody, the Court consigned those issues to the states. The Court did not explicitly admit that it chose not to decide custody cases. Rather, it used the rhetoric of family law not belonging in the federal courts and its interpretation of congressional intent to avoid deciding these cases. [186]

ii. The Violence Against Women Act and Federal Judges' Opposition to Expanding Domestic Relations Jurisdiction

After four years of consideration, Congress finally enacted a Violence Against Women Act (VAWA) in 1994. [187] Under the VAWA, domestic ***1109** violence could become a significant presence in federal court. On the criminal side, federal prosecutors can bring domestic violence criminal actions, such as violations of civil protection orders, into the federal courts. On the civil side, victims of gender-based violence can bring civil rights cases in the federal courts.

The legislation demonstrates a strong federal response to domestic violence. As in the child custody area, however, federal court judges initially opposed such an expansive federal role. While judges supported certain provisions of the VAWA, they spoke out against VAWA provisions that would substantially increase federal court involvement. They based their opposition on what they saw as the federalization of domestic violence, on fears of overcrowding the federal courts, [188] and on a concern that the federal courts not usurp state domestic relations law. [189]

It appears the new private cause of action itself will not dramatically increase the federal court dockets. [190] The federal judiciary apparently ***1110** feared that in ongoing state domestic relations cases, one party would file (or would threaten to file) a civil rights suit in federal court and seek to consolidate the two proceedings in the federal arena. This might, theoretically, have forced the federal courts to decide the underlying domestic relations issues as they considered the federal question issues. [191]

Despite these concerns, the traditional aversion to family law appears to more completely explain the federal judiciary's reaction to the VAWA. The notion that the federal courts should not overload their schedules with domestic relations cases [192] implies that these cases are not as important as others which should, more appropriately, fill up the federal court dockets. Federal court judges are more willing, pursuant to diversity jurisdiction, to consider complex commercial

litigation cases that do not require them to peer behind the curtain of familial privacy. The concern is not with overcrowding the courts, but with the types of cases that the courts might be forced to hear.

Moreover, the theoretical possibility that litigants would join a state court domestic relations proceeding with the federal proceeding is not likely under the legislation as written. The VAWA does not change existing federal jurisdictional standards relating to family law cases.[193] As the Senate Report acerbically noted, "That married claimants could, in theory, sue under this law, does not convert it into a divorce law. Married claimants can now sue, in theory, under any f ederal law, but no one claims that the ***1111** possibility of such a suit transforms all f ederal laws into a 'divorce' law."[194] The difference between these other laws and the VAWA is, of course, the underlying subject matter of the lawsuit, which concerns intrafamily violence. Finally, even if the legislation did authorize federal courts to hear domestic relations cases, federal courts could continue to invoke the doctrines of abstention, under which they could decline to exercise jurisdiction when there is an ongoing state proceeding.[195]

No matter how courts have chosen to justify the Domestic Relations Exception to diversity jurisdiction, federalism concerns apparently are at the base. Nonetheless, the federal structure of our government does not clearly assign domestic relations cases to state courts. Thus, a second federalism strand-one based on federal judicial reluctance to hear the interdependency issues of family law-provides a more complete explanation. The dichotomy between the federal and state courts, however, is becoming increasingly tenuous. As discussed below, both the nature and status of family law have changed and continue to do so at an increasingly rapid pace.

IV. CHANGES TOWARDS FAMILY LAW

Historically, family law has been devalued, both in theory and in practice. Although most people's contact with the judicial system today occurs because of family law issues,[196] the status of domestic relations in American law has not reflected its importance to society. Typically, family law practitioners have been less respected than attorneys who handle cases with corporate clients, matters involving the transfer of large amounts of money,[197] or cases that do not involve "intimate" matters.[198]

This historical lack of respect must be placed in context, as the nature of family law has changed dramatically over the past 200 years. [199] Even prior to the availability of no-fault divorce-although certainly accelerated by it-increasing numbers of families had to use the judicial system for disputes relating to divorce, custody, support, and property distribution. The hodge-podge of federal regulation-tax laws, bankruptcy laws, etc.-shows not just the national nature of family law, but also its increasing ***1112** complexity. While family law may have been perceived as relatively unimportant within the legal system, and may indeed have resulted in comparatively few cases, it since has become an increasingly significant area of the law.

As women have been entering the legal profession and as feminists have been re-examining family law, the status of domestic relations law has been changing as well. The feminist re-examination of family law has challenged the traditional perception of family law as involving only matters that should be resolved privately, without state involvement. Instead, family law is reconceptualized to emphasize the many ways in which it structures the lives of women and men, thereby redefining notions of a public or private sphere. [200]

Family law thus involves the interaction of both public and private elements. [201] While the family ideologically represents a private and safe haven, this privacy exists only because public laws and decisions have created it and protected it, at least when the family conforms to traditional norms. Outside of those norms, however, the family has not functioned as a safe haven, and the state, together with "dogooders," has attempted to control behavior. [202] While recently there has been a move to increase the private ordering of (and within) families, [203] this has been possible only because of the application to the family of more "public" doctrines such as constitutional law principles and law and economics theories. As theories developed outside of the family law have been applied, many state-imposed distinctions based on legitimacy and marital status, such as those between ***1113** children born in or out of marriage, have been declared unconstitutional. [204] Without these state restrictions, individuals can choose more freely how to structure their family life. Yet this private ordering is possible only because the state, through either the legislature or the courts, has allowed it.

While the state powerfully affects the family through regulation of the family per se, its actual influence is much more broad. As Professor Martha Minow has noted, family law is "underneath" other areas of law not just in the sense of status, but also in the sense of its connection to so many other areas of the law. [205] Its

importance, its interrelationship with other forms of law, is becoming more visible, more public. [206] Central to this awakening is the recognition that women's family roles as wives and mothers are interrelated with their work roles. [207]

At a basic level, workplace participation depends on family roles and responsibilities. [208] The debate within the feminist community over how to treat pregnant workers-whether to treat the pregnancy as a disability or as a difference from men [209] -is still, at bottom, concerned with how to allow women and men to work. The goal is to make women and men "equal" at work, by accommodating their reproductive roles. [210] Pregnant women are still often perceived as not being serious about their jobs, [211] while the loyalty of men with pregnant wives is virtually unquestioned. Women with young children are primarily responsible for their care, while fathers are ***1114** often "volunteers" when it comes to child care. [212] Expectations relating to alimony and child support have affected many women's decisions about continuing to work after their children are born. [213] Because laws governing family relationships influence expectations, they have a profound effect on the workplace and workforce.

In turn, the workplace structures family lives. The "ideal worker" is a person who can work at least forty hours per week, without needing to rush home early to take care of children or leave for childbirth. [214] Even the Family and Medical Leave Act requires that an employee work at least 1250 hours in the year preceding the leave. [215] Men with stay-at-home wives have been able to conform to this image, but only by sacrificing time with (and presumably connection to) their children. The amount of time men work affects the amount of time they can spend with their children (and spouse), and at divorce, may affect child custody issues. [216] Nonetheless, men's traditional roles within the family also have been questioned. [217] The Family and Medical Leave Act is gender-neutral, providing job security for both women and men who take leave for child-related reasons. The Act thus recognizes the importance of men within the family, [218] which in turn may cause men to see how family law affects them.

Family law remains devalued in both federal and state courts. It is still perceived as involving "women's issues." [219] But it is finally becoming more ***1115** of a public issue as it increasingly becomes a national issue. [220] Federal courts' continued treatment of domestic relations as a state matter overlooks the changes that have occurred over the past 200 years as family law has become subject to federal

regulation and as individuals have become more mobile. While family law may have been primarily a local matter at the time of the American Revolution, the situation has changed substantially. Concern over usurping state power in our federalist system should have faded long ago.

V. JUSTIFICATIONS FOR DIVERSITY JURISDICTION IN DOMESTIC RELATIONS CASES

Although *Ankenbrandt* represents some progress in the position of family law in the federal courts, it still signifies federal court opposition to conventional domestic relations issues. The Court reiterated that those conventional issues belong in, and to, the state judicial systems. Nonetheless, reconsideration of the role federal courts can and should play in family law is appropriate in light of increasing federal family law legislation, the recognition of family law's significance in American society, and the simple observation that federal courts continue to decide other diversity cases.

Given the hostility of federal courts to family law, it could be argued that they would be of little utility on family law questions, no better able than state courts to adjudicate domestic relations cases and, indeed, ***1116** reluctant to give full attention to them. Moreover, federal court family law decisions may differ little from those of state courts because, while the litigants would have access to federal procedural rules, which may be somewhat more advantageous, federal courts must still apply state substantive law. [221] The consequent "redundancy" may simply lead to judicial inefficiency, rather than protection of litigants' rights. [222] Alternatively, federal judges might apply a more rule-based jurisprudence because they feel obligated to hear these cases. To some extent as well, family law cases are different from other diversity cases simply because of the longstanding judicial reluctance to hear them.

While the objections to federal court competence in deciding family law cases have some merit, they must be balanced against the benefits diversity jurisdiction can provide. The area of domestic relations trenchantly illustrates the possibility of state court bias against the out-of-state litigant. In an era of increasing population mobility, interstate family litigation is likely to increase, expanding this potential danger. In addition to the procedural protections available, federal courts may provide a less biased forum than the state courts, as well as more uniform interpretations of relevant federal legislation.

A. Jurisdiction and Competence of the federal Courts

Family law cases resemble other cases federal courts hear pursuant to their diversity jurisdiction, but which they prefer were beyond their jurisdiction. Even outside of the domestic relations area, there is an ongoing debate over whether diversity jurisdiction has outlived its usefulness, and various judges and commentators have suggested that it be limited or abolished altogether. [223] Concerns about overcrowding the federal courts ***1117** strengthen this move. [224] However, although legislation to limit diversity jurisdiction has been introduced into Congress, it has never been enacted. As Professor Dan Coenen points out, at least so far in our country's history, "The people, through Congress, have entrusted diversity cases to the federal courts; those courts may not give short shrift to diversity cases because they involve 'only' state law issues." [225]

Moreover, when the Court does decide family law issues under federal question jurisdiction, it is able to apply state law, thus suggesting that recognizing diversity jurisdiction in family law cases would neither lie outside of federal judicial competence, nor pose substantial difficulties for the federal courts. Deciding these cases would not, arguably, be any more difficult than deciding novel state law claims in other areas of the law, a task federal courts must frequently, albeit reluctantly, undertake. For example, in *De Sylva v. Ballentine,* the Court needed to decide whether the meaning of "children" under the federal copyright statute includes an illegitimate child. [226] The Court looked to the law of the state in which the child lived and stated: "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." [227] The Court then construed California state law to find the illegitimate child included in the statute. In *Caban v. Mohammed,* the Court considered what rights a natural father had against the mother's new husband; not only did the Court have to review the relevant state adoption statute, it also had to examine the relationships the children had with both men. [228] When the Court finds it necessary and important to do ***1118** so, applying state family law is possible. [229]

B. The Possibility of Bias in Interstate Domestic Relations Cases

Not only is the exercise of diversity jurisdiction in family law cases possible, it also may offer protections needed in many of these cases. Federal diversity jurisdiction probably was created to protect out-of-state litigants, especially commercial

litigants, against local prejudice,[230] although there may have also been other reasons.[231] To ensure the greatest protection, the Judiciary Act of 1789 granted diversity jurisdiction to the circuit courts, probably on the theory that trial court judges were more susceptible to influence.[232] Since then, federal courts have also provided procedural advantages to litigants, such as better discovery and evidentiary rules.[233]

Whether local bias existed and continues to exist, thus constituting a sufficient justification for diversity jurisdiction, is a disputed issue.[234] In general diversity cases, empirically, attorneys at least perceive local bias.[235] Family law cases provide ample anecdotal evidence of home state bias, an increasingly important observation in our highly mobile society. While little data has been collected on post-dissolution relocation of family members, the available evidence shows that, within the four years following divorce or separation, seventy-five percent of custodial mothers will move at least ***1119** once.[236] While not all post-dissolution relocation is out-of-state, it is likely to become increasingly so, as the population continues to become more mobile. In custody, child support, and alimony disputes, however, the parties remain confined to the local courts of one parent's state.[237]

State court family law decisions, especially child custody cases, illustrate the need for a forum that will not favor the home state litigant. In *Thompson* and *California,* the two cases discussed above that "arose" under the PKPA, all relevant lower courts had decided in favor of the in-state litigant against the foreign parent, even if the foreign parent had physical custody of the child. According to many practitioners, this is a frequent problem in child custody cases: State courts favor the home state litigant.[238] Even though all fifty states and the District of Columbia have enacted some version of the Uniform Child Custody Jurisdiction Act,[239] and notwithstanding the federal PKPA, the parent's local court continues to have difficulty consistently respecting another state's jurisdiction and/or custody determination.[240]

In addition to the potential bias of state judges, state court procedures may present problems as well. Each state can adopt its own domestic relations rules, which may differ substantially from federal or state civil rules. Because these rules possibly advantage the home state family member, conflicting decrees are a strong possibility. On the one hand, the lack of uniformity benefits parents who are disadvantaged by the rules of the state in which the other parent resides. Out-of-state defendants may benefit from the rules of their own state, or if they do not,

the possibility of exit provides an opportunity to take advantage of more favorable rules elsewhere. On the other hand, both parties have the option of moving to another state, thus increasing the chance that each will receive a favorable ruling. The mobility, which may be encouraged by the lack of uniform ***1120** domestic relations rules, thus can hurt either parent, provide even less stability for the child, and prolong the litigation.

Allowing federal courts to hear these domestic relations cases might prevent the protracted litigation that results when two state courts decide the same case and issue conflicting decrees. While there is no guarantee that the federal courts would reach a different result than the state courts, [241] federal judges are at least somewhat insulated from local pressures, [242] and federal court rules may eliminate some problems of procedural bias from family court rules. Providing an additional and alternative forum through diversity jurisdiction thus may lead to improved results for unfairly disadvantaged litigants. As a result, an out-of-state defendant might be less likely to commence parallel litigation in a second state court when given the option of removing the case to federal court. In addition, although a federal court's judgment presumably would not have any greater binding effect than that of a state, some state courts do give extra weight to federal court decisions. Thus, a plaintiff might choose to start a case in federal court rather than in her home state court, or a case may be removed to federal court in order to avoid protracted litigation.

C. Objections

By making a case for federal court jurisdiction, I am not suggesting that federal courts will be a panacea and will always issue fair family law decisions. Many theoretical and practical reasons counsel against allowing federal court judges to hear and decide these cases. I turn now to address two possible objections to abrogating the Domestic Relations Exception. First, federal courts are inappropriate because not only are they less creative than state courts when it comes to construing state law in diversity cases, but they also are increasingly hostile to expanding diversity jurisdiction. Second, state courts are more appropriate for a variety of reasons: state judges are community members who will apply community norms; state judges decide a broad spectrum of these cases covering people of different classes and presenting diverse legal issues; and ultimately, state courts really do have a special competence in these cases. [243] While these arguments have some validity, they do not justify continuing to keep these cases out of federal courts when other diversity prerequisites are met.

1121** ***1. "Federal Courts are Inappropriate"

In post-*Erie* diversity cases, federal courts must apply state law to substantive issues.[244] Because this means they must interpret state law as would the highest court of the state, federal courts are somewhat reluctant to reach beyond existing precedent to find novel approaches to the law.[245] This conservatism has led federal courts to develop a fairly strong rule-based approach to interpreting state law rather than using creativity or discretion in fashioning new law. Given the need in family law to examine the context of every case because it involves such personal issues,[246] such a rule-based approach may lock the parties into the status quo. According to this argument, the federal court approach is especially harmful for women, who may have been historically disadvantaged by rules biased against them. In the ethic of care, as developed through the work of Carol Gilligan and others, it is important for decisionmakers to be able to examine relationships and connection rather than relying solely on a standard rule-based approach.[247] The traditional hierarchy of rules (the ethic of right) has not captured the way that many women think, and thus excludes them.[248] Instead, rules need to be applied more contextually, with more discretion to accommodate the real-life experiences of the parties.[249]

***1122** This argument raises difficult issues relating to the equality of men and women and the need for context-based decision-making. But it overlooks the benefits of definitive rules and standards in the family law area. As Professor Jane Murphy points out, states have faced strong pressure to develop fixed rules, rather than discretionary principles.[250] While this pressure is due, in part, to the economic costs of litigating difficult family law dissolution cases, it more importantly results from "the simple recognition that decisions produced in the discretionary system are unjust."[251] Because fixed rules curb discretion, they allow for greater uniformity, predictability, and consistency. Although they limit the authority of judges to take into account the context of the particular case before them, rules provide a guaranteed safety net that may be beneficial, especially given the nature of gender bias in the courts.[252]

Finally, in an era of tremendous criticism of the diversity grant, it may seem foolhardy to argue that this jurisdiction should be expanded in any way. In this context, not allowing domestic relations in federal courts could be seen as simply a casualty of the general objections to diversity. This, however, overlooks

the convoluted history of the Domestic Relations Exception and its peculiar distinction from other diversity cases. The argument here concerns not the existence of diversity jurisdiction, but instead its nondiscriminatory exercise. As long as diversity jurisdiction continues to exist, the federal courts' historical discrimination against domestic relations cannot justify its continued exclusion. If diversity jurisdiction is to be limited, limitations should not be based solely on bias against the issues and litigants involved in certain cases.

2. "State Courts are Always More Appropriate"

A second objection to abrogating the Domestic Relations Exception is based on the related beliefs that family law is, and should be, an expression of community morality, and that state court judges may empathize better with the litigants. Historically, states have adopted non-uniform laws regulating the family on such issues as divorce, alimony, and property distribution.[253] The variations in these laws have allowed for local articulation of the value of divorce, embodying each state's perceptions concerning divorce's (im)morality and potential for damaging the family. Throughout the country, family law has traditionally reflected community norms,[254] ***1123** and as previously discussed, the federal courts have attempted to protect the local character of domestic relations law. From a civic republican perspective, local control also recognizes the interests of citizens in establishing the public goals of their own community.[255] Outcomes in which citizens feel involved facilitate the maintenance of a democracy. Such an approach also allows for flexibility in family law, enabling communities to respond to changing social and economic situations.

The belief in local control over family law, however, beyond suggesting an inevitability to this means of family regulation, also overlooks the negative aspects of the community. While community can be a powerfully positive force, it can also be an extremely confining form of authority.[256] The courts' examination of whether certain customs are based in community traditions, for instance, may enshrine majoritarian conventions such as a ban on gay marriage or certain consensual sex.[257] Within certain communities, expectations are that women will be confined within traditional roles, thus hindering women's efforts to achieve equality.[258] The many and various state regulations held unconstitutional by the Supreme Court provide yet further examples of the danger of trusting family law to community mores.[259]

Thus, that local control of family law vests power in the communities where families actually live may not necessarily be a positive aspect of domestic relations law that should be perpetuated. Congress already ***1124** regulates significant aspects of family law; allowing federal courts to decide domestic relations cases pursuant to diversity jurisdiction merely recognizes the role the federal government already plays in this area of the law. Moreover, the "intrusion" by the federal courts would be less substantial than congressional involvement. Because federal court judges must still apply state law to domestic relations cases arising under diversity jurisdiction, communities still would control the substance of the laws, just not their application.

A related objection concerns the differing sensibilities of state and federal court judges. In many state court systems, judges are elected or appointed for set terms. Article III judges, however, have life-tenure and, consequently, may be more distant and aloof from family law issues than state court judges.[260] Moreover, the experience of federal court judges in domestic relations cases may be ad hoc, and unlike state court judges, their colleagues on the bench are similarly unlikely to develop any substantial experiential basis from which to provide advice. Employing state courts' social services agencies for assistance, such as recommending appropriate child custody disposition, may help compensate for this problem.[261] At least to some extent, however, the issue of aloofness remains. It may be that this is simply a necessary risk of allowing federal courts to hear these cases, similar to the risks of allowing federal court judges to hear any type of state law case that might otherwise be heard in a state court or by a more specialized tribunal.

Other potential problems might result from allowing federal courts to hear family law cases.[262] Indeed, federal court judges may simply replicate existing problems in state courts, and create new ones. This scenario merits serious exploration before wholesale abolition of the Domestic Relations Exception. Nonetheless, potential drawbacks to diversity jurisdiction must be considered in the context of the damage caused by potential state court bias against particular litigants and by the general bias against family law in the federal courts.

*1125 VI. CONCLUSION

In light of the need for federal courts to overcome state court bias, the lack of a constitutional basis for preventing federal courts from hearing domestic relations cases, and the questionable basis for a domestic relations exception under the

diversity statute, the federal courts logically should exercise jurisdiction in all types of domestic relations cases. Rather than perpetuating different treatment of family law cases, the federal courts should treat them like any other diversity cases.

This is not to say that federal courts must always hear family law cases presented to them under diversity jurisdiction. Other writers who have examined this issue, as well as Justice Blackmun in his *Ankenbrandt* concurrence, have concluded that abstention doctrines provide a continuing and appropriate basis for federal courts to decline to exercise jurisdiction in divorce, custody, and alimony cases. [263] Particularly persuasive arguments supporting the utility of the abstention doctrines center on state interests. Because "state courts have developed a specialized expertise in divorce and custody matters ... f ederal court adjudication ... may undermine ... substantive state policies." [264] According to this argument, divorce, alimony, and child custody cases may be appropriate for abstention, while those involving contracts and torts are not. [265]

Certainly, federal courts should continue to have access to abstention doctrines in domestic relations cases to the same extent as they do in other diversity cases. The doctrines, however, are not particularly useful for, nor particularly applicable to, these cases. There is no reason inherent in either the diversity statute or even under federalism concerns that counsels federal courts to abstain from divorce, alimony, and child custody cases. *Burford* abstention, for example, is typically used when there is a complex regulatory scheme under state law, and important state interests are at stake. [266] In family law today, the state regulatory scheme may not be sufficiently complex. In addition, as federal interests become increasingly important, the states' domestic relations laws are increasingly subject to federal authority, rendering family law a shared federal and state interest, ***1126** and thus diminishing the applicability of *Burford* abstention. [267]

Although the abstention reasoning differs substantially from that underlying the jurisdictional bar of *Ankenbrandt,* the effect of this approach may be similar. Invoking abstention doctrines may simply perpetuate the Domestic Relations Exception under another name, [268] allowing federal courts to continue to consign traditional family law issues to state courts. In light of the increasing federalization of family law, which may foster additional federal question cases, family law is no longer solely a matter of state concern, and federal courts have no justification to continue to discriminate against family law cases.

Instead, recognizing the increasing federalization of family law as well as past discrimination against these issues, federal courts should treat family law cases like any other diversity cases. Such an approach does not preclude using the abstention doctrines, but it limits their applicability in any domestic relations case, including divorce, alimony, and child custody. This means that federal court judges must overcome the myths about the importance of family law. Domestic relations issues are of paramount importance to the litigants who bring these cases; these litigants deserve as much respect as litigants in any other diversity case.

When federal courts lack certain capabilities, such as social services support, the courts can refer issues to the local agencies. Professor Resnik suggests that federal and state courts should cooperate in family law cases, assuming that both sets of judges recognize the need for the different exercises of jurisdiction and the importance of working on family law matters. [269] This provides one model for cases with overlapping issues. As federal courts actually confront these problems, there will be ample opportunity for more creativity.

Footnotes

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1 Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992); *see* Judith Resnik, "Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. Rev. 1682, 1739-50 (1991) (discussing the history of the Domestic Relations Exception). As discussed infra, the federal courts will hear other types of family law cases. The probate exception to federal diversity jurisdiction is a comparable, and linked, exception. *See* John J. Cound et al., Civil Procedure: Cases and Materials 245 (4th ed. 1985) (discussing probate exception and noting that it is far from absolute); infra notes 83, 221 and accompanying text.

2 Federal court judges (as well as many others) have sought repeatedly to curtail existing diversity jurisdiction. *See, e.g.,* Judicial Conference of the United States, Federal Courts Study Comm., 1 Report of the Federal Courts Study Committee 38 (1990); Akhil R. Amar, The Two-Tiered Structure of the Judiciary Act of 1789, 138 U. Pa. L. Rev. 1499 (1990) (presenting an academic view of challenges to diversity jurisdiction). *See generally* Thomas D. Rowe, Abolishing Diversity Jurisdiction: Positive Side Effects and Potential for Further Reforms, 92 Harv. L. Rev. 963 (1979) (reviewing traditional arguments against diversity jurisdiction and pointing out other benefits of its abolition).

3 *See* Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 Va. L. Rev. 1141, 1143-44 (1988) (defining Federalist vision of the relationship between state and federal courts). Others, though they do not label themselves Federalists, have argued that federal court diversity jurisdiction allows federal judges to usurp state law. *See, e.g.,* Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism,

78 Va. L. Rev. 1671 (1992) (arguing that federal judges often make state law in diversity cases and that such a function is inappropriate for federal courts).

4 *E.g.,* De Sylva v. Ballentine, 351 U.S. 570, 581-82 (1956) (applying state law definition of "children" in an action arising under the federal Copyright Act); Jana B. Singer, Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction, 30 Harv. J. on Legis. 43, 47-53 (1993) (discussing Supreme Court decisions regarding nondischargeability of marital obligations in bankruptcy).
Determining when the Court has considered family law cases is difficult because the definition of family law is itself so complex. *See* Martha Minow, Introduction to Family Matters: Readings on Family Lives and the Law xiii, xiii-xiv (Martha Minow ed. 1993) (discussing the wide range of topics encompassed by family law). On one level, family law deals with issues such as marriage, divorce, child custody and adoption, post-dissolution financial allocations (e.g., alimony, child support, property distribution), and child abuse and neglect. On another level, however, each of these topics implicates other areas of law. For example, state laws restricting access to marriage or divorce may touch constitutional law, property allocation may require resolution of issues arising under federal pension statutes, a child custody determination may require application of an international treaty setting out standards for international disputes, and the establishment of child support may implicate federal child support and welfare law. Many of these issues may arise under federal question jurisdiction, and when they are heard by the federal courts, the cases are not deemed family law cases, but are instead labelled as constitutional, bankruptcy, or international law cases. Thus, while the federal courts fairly commonly resolve disputes between a family member and the state under federal question jurisdiction, they less commonly resolve disputes between family members that arise under diversity jurisdiction. Even in this latter type of case, the courts often do resolve intrafamily disputes, such as in tort or contract.
At yet a third level, defining family law involves examining what constitutes a family, an issue that implicates sociology, politics, religion, economics, and other areas typically viewed as outside the law.

5 The parity debate among federal courts scholars over the relative values of federal and state courts has focused on federal question issues. *See* infra note 223. In diversity cases, however, the issue is not which court system is "better," but whether federal courts should be forced to decide such "unimportant," often fact-based cases.

6 *See* Resnik, supra note 1, at 1749 (noting that federal court jurisprudence is relatively silent on issues relating to women and attributing this silence to an assumption that such issues are unrelated to the "national issues" to which the federal judiciary should devote its attention).

7 112 S. Ct. 2206 (1992)

8 *E.g.,* Lannan v. Maul, 979 F.2d 627, 630-32 (8th Cir. 1992) (allowing daughter's suit to regain proceeds from insurance policy that father was ordered to maintain during divorce settlement to proceed because it involved a third party beneficiary claim based on breach of contract). *Ankenbrandt* itself was a tort case.

9 The traditional justification for diversity jurisdiction has been fear of bias against out-of-state litigants, although other explanations, such as the need to encourage interstate commerce and to make available "superior" federal courts also have been suggested. *See* infra notes 230-31 and accompanying text.

10 The requirement of "complete diversity" was first articulated in Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806).
The $50,000 amount in controversy requirement of 28 U.S.C. § 1332 will probably be met when a plaintiff requests alimony or child support that, in the aggregate, meets the jurisdictional amount, or when the issue is property distribution and the parties have built up equity in a home.

11 Indeed, some feminists might oppose the more rule-based nature of federal court diversity jurisdiction. *But see* Jane C. Murphy, Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment, 70 N.C. L. Rev. 209 (1991) (arguing that a system of determinate rules provides greater benefits to divorce litigants than does a system of discretionary justice). *See* infra notes 247-52 and accompanying text.

12 62 U.S. (21 How.) 582 (1859). *See* Ankenbrandt v. Richards, 112 S. Ct. 2206, 2209 (1992); Sosna v. Iowa, 419 U.S. 393, 404 (1975) (citing *Barber*).

13 *E.g.,* Barry v. Mercein, 46 U.S. (5 How.) 103, 108 (1847); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 627-28 (1819).

14 *Barber,* 62 U.S. (21 How.) at 599.

15 Id. at 584. The author of the majority opinion may have felt the need to clarify the nature of the case since the dissent characterized the case as involving alimony.

16 Id. at 600, 602 (Daniel, J., dissenting).

17 Id. They also stated that the "Government" should have no power to regulate domestic relations. By "Government," the dissenters appeared to be referring only to the federal government, not to state governments; they did acknowledge that the "particular communities of which those families form parts" could regulate families. Id.

18 *Barber,* 62 U.S. (21 How.) at 604.

19 Id. at 605.

20 Id.

21 Id.

22 Id.

23 Although Taney did not write the dissent in *Barber,* he did join it.

24 Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856). *See* Alfred L. Brophy, Note, Let Us Go Back and Stand Upon the Constitution: Federal-State Relations in *Scott v. Sandford,* 90 Colum. L. Rev. 192, 215-19 (1990) (describing the Taney Court's contrived move in *Dred Scott* and later cases toward increasing state power); *see also* Cheryl Harris, Whiteness as Property, 106 Harv. L. Rev. 1707, 1716 (1993) ("The hyper-exploitation of Black labor was accomplished by treating Black people themselves as objects of property.").

25 *See* Girardeau Spann, Pure Politics, 88 Mich. L. Rev. 1971, 2003 (1990) (expressing outrage at this decisional basis); *see also* Don E. Fehrenbacher, The Dred Scott Case: Its Significance in American Law and Politics 340-54 (1978) (exploring Taney's confused reasoning on this issue). This point developed out of conversations with Professor Paul Butler, George Washington University National Law Center (Sept. 22, 1994).

26 60 U.S. (19 How.) at 426-27; *see* Fehrenbacher, supra note 25, at 559-60 (arguing that Taney's reasoning in *Dred Scott* was based on an emotional committment to preserving southern life and values).

27 In mid-nineteenth century America, married women had very few rights, to property or otherwise. *See* Richard Chused, Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1368 (1983) (noting that "wives were treated as civilly dead persons in many situations"). *See generally* Norma Basch, In the Eyes of the Law: Women, Marriage, and Property in Nineteenth Century New York (1983). Nineteenth century feminists claimed that their subordination to men meant that they were a form of "property." Of course, the situation of slaves and of free women were very different. *See* Hazel V. Carby, Reconstructing Womanhood: The Emergence of the Afro-American Novelist 40-61 (1987); Harriet A. Jacobs, Incidents in the Life of a Slave Girl (Jean Fagan Yellin ed. 1987).

28 The territorial jurisdiction cases with domestic relations issues are: De La Rama v. De La Rama, 201 U.S. 303, 307 (1906) (upholding territorial jurisdiction over a divorce, while disclaiming diversity jurisdiction over domestic relations cases because husband and wife could not be citizens of different states and divorce involved no pecuniary value); Simms v. Simms, 175 U.S. 162, 167-68 (1899) (noting that while domestic relations was generally excluded from Congress and the federal courts, this exclusion did not apply to territorial courts

and legislatures); Maynard v. Hill, 125 U.S. 190, 196-97 (1888) (upholding divorce granted by Oregon's territorial legislature, drawing on English precedent under which Parliament could grant absolute divorces, while ecclesiastical courts were limited to divorce from bed and board).

29 136 U.S. 586 (1890).

30 Id. at 597.

31 Id. at 593-94.

32 Anthony B. Ullman, Note, The Domestic Relations Exception to Diversity Jurisdiction, 83 Colum. L. Rev. 1824, 1830 n.43 (1983). *See* Rogers v. Platt, 814 F.2d 683, 691 (D.C. Cir. 1987); Goins v. Goins, 777 F.2d 1059, 1061 (5th Cir. 1985); Thompson v. Sundholm, 726 F. Supp. 147, 149 (S.D. Tex. 1989); Petersen v. Petersen, 640 F. Supp. 719, 720 (S.D.N.Y. 1986); Solomon v. Solomon, 516 F.2d 1018, 1031 (3d Cir. 1975) (Gibbons, J., dissenting) ("*Burrus* stands for no such proposition [that federal courts are without subject matter jurisdiction to decide child custody cases] and the occasional reference to it by secondary authorities, and even cases, for that proposition, displays a propensity for reliance on headnotes.").

33 Ohio ex rel. Popovici v. Agler, 280 U.S. 379 (1930). *See* Barbara Ann Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L.J. 571, 578-84 (1984) (discussing *Popovici* and other cases from which the Domestic Relations Exception evolved); Barbara Freeman Ward, A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction, 30 Vill. L. Rev. 307, 317-22 (1985) (same).

34 280 U.S. at 383. The Court did not address concurrent jurisdiction.

35 Article III provides: "The judicial power shall extend ... to all Cases affecting Ambassadors, other public Ministers and Consuls.... In all Cases affecting Ambassadors, other public Ministers and Consuls ... the supreme Court shall have original jurisdiction ...." Moreover, the Framers were especially concerned that suits against ambassadors be handled with due respect for the national interest. *See* The Federalist No. 80 (Alexander Hamilton) (discussing jurisdiction over cases involving ambassadors).

36 280 U.S. at 383.

37 Id. at 384.

38 *E.g.,* Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 512-15 (2d Cir. 1973).

39 Welker v. Metropolitan Life Ins. Co., 502 F. Supp. 268, 270 (C.D. Cal. 1980) (holding no jurisdiction over request for a declaration of putative marriage, reasoning that a case involving the status of husband and wife was a "matter reserved exclusively to the states and not within the power granted to the federal courts by the Constitution"); Ullman, supra note 32, at 1832 n.54. *See* Doe v. Doe, 660 F.2d 101, 105 (4th Cir. 1981) (discussing *Popovici*); Bergstrom v. Bergstrom, 623 F.2d 517, 520 (8th Cir. 1980) (citing *Popovici*); Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968) (same); Thrower v. Cox, 425 F. Supp. 570, 572-73 (D.S.C. 1976) (stating that *Popovici* "not only recognizes the exception in the area of diversity jurisdiction but completely renounces *any* federal jurisdiction whatsoever in the fields of domestic relations. [sic] and consigns jurisdiction in that area of the law exclusively to the states") (footnote omitted).

40 Many lower courts declined to exercise diversity jurisdiction over what they termed "core" cases concerning the granting of divorce or separation, and related cases, such as child custody awards or alimony and child support awards. They differentiated between "core" family law cases, *see* Amicus Curiae Brief of the ACLU for Petitioner at 5, Ankenbrandt v. Richards, 112 S. Ct. 2206 (1992) (No. 91-367), and those involving tangential family law issues, such as cases involving enforcement of alimony or some family torts. *See* Fernos-Lopez v. Figarella Lopez, 929 F.2d 20, 22-23 (1st Cir. 1991) (holding that the Domestic Relations Exception did not bar constitutional attack on the validity of alimony statute); Drewes v. Ilnicki, 863 F.2d 469, 471-72 (6th Cir. 1988) (discussing cases and finding the Exception inapplicable to intentional infliction of emotional distress tort claim arising from alleged interference with child visitation rights); MacIntyre v. MacIntyre, 771 F.2d 1316, 1318 (9th

Cir. 1985) (holding state law claim alleging wrongful interference with custodial rights not encompassed by the Exception, noting that such a claim "falls within neither a status nor coercive relief category of domestic relations issues"); Lloyd v. Loeffler, 694 F.2d 489, 492-93 (7th Cir. 1982) (holding tort suit for wrongful interference with child custody "not within the core of the domestic relations exception"); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C. Cir. 1982) (stating that federal courts cannot exercise diversity jurisdiction "to grant a divorce, determine alimony or support obligations, or resolve parental conflicts over the custody of their children," but can exercise such jurisdiction over cases involving some intrafamily aspects "whose essence is in, for example, tort or contract, and which do not require the federal court to exceed its competence"). The *Bennett* court found jurisdiction over a tort claim for wrongful interference with child custody, but found no jurisdiction to issue an injunction enjoining future wrongful conduct because a decision on this issue would "require an inquiry into the present interests of the minor children." Id. at 1042-43. *See also* Rogers v. Janzen, 891 F.2d 95, 97-99 (5th Cir. 1989) (confirming existence of domestic relations exception to diversity jurisdiction, and refusing to hear case if it presented matters concerning the marital or parent-child relationship).

41 *E.g.,* Spindel v. Spindel, 283 F. Supp. 797, 805-14 (E.D.N.Y. 1968) (Weinstein, J.) (finding Domestic Relations Exception and abstention inapplicable to determination of validity of a foreign divorce decree, criticizing the "sweeping" application of the Exception by other lower courts).

42 Ms. Ankenbrandt also sued Debra Kesler, the companion of Mr. Richards who was, like him, a Louisiana resident.

43 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2209 n.1 (1992); Brief for Petitioner at 1, *Ankenbrandt* (No. 91-367). There were also felony charges pending against Mr. Richards for his abuse, although these were ultimately dismissed. Amicus Curiae Brief of the ACLU for Petitioner at 2-3, *Ankenbrandt* (No. 91-367).

44 Ankenbrandt v. Richards, No. 89-4244, 1990 U.S. Dist. LEXIS 17068 (E.D. La. Dec. 10, 1990), *aff'd without op.* 934 F.2d 1262 (5th Cir. 1991).

45 Justice White found that Article III's limitations on federal court jurisdiction to "Cases, in Law and Equity," "Cases," and "Controversies" did not inherently preclude domestic relations cases from being heard in federal courts. Ankenbrandt v. Richards, 112 S. Ct. 2206, 2210-11 (1992).

46 This language was drawn from the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789). In 1948, Congress amended the diversity jurisdiction section to include "all civil actions." 1948 Judicial Code & Judiciary Act, 62 Stat. 930 (1948) (codified as amended at 28 U.S.C. § 1332 (1988)). While the change in terms might appear to undercut the rationale that cases formally under ecclesiastical jurisdiction could not be heard in federal court, the Revisor's Notes to 28 U.S.C. § 1332 submit that there was no intention to affect the scope of federal court jurisdiction. Revisor's Notes to 28 U.S.C. § 1332; *see* Spindel v. Spindel, 283 F. Supp. 797, 801, 806-09 (discussing Revisor's Note and criticizing historical jurisdiction rationale for the Domestic Relations Exception, noting that neither the Colonial courts nor the English Chancery courts were without power in cases involving matrimonial affairs).

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

48 Id. at 2213.

49 Id. The Court explained that when Congress amended the diversity statute in 1948 to include all "civil actions," this did not change previous interpretations of its scope. Id. Justice Blackmun noted: "The 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." 112 S. Ct. at 2218 (Blackmun, J., concurring).
I am not here considering Congress's ability to define the jurisdiction of federal courts; rather, I am simply discussing how the Supreme Court interprets Congress's jurisdictional grant in domestic relations cases. For some of the extensive commentary on the former issue, see Barry Friedman, A Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction, 85 Nw. U. L. Rev. 1 (1990) (criticizing the congressional control approach to defining federal court jurisdiction and proposing that the contours of such jurisdiction be resolved through an interactive process between Congress and the Supreme Court); Akhil R. Amar, Taking Article III Seriously:

A Reply to Professor Friedman, 85 Nw. U. L. Rev. 442 (1991) (criticizing Professor Friedman's article); Mark V. Tushnet, The Law, Politics, and Theory of Federal Courts: A Comment, 85 Nw. U. L. Rev. 454 (1991) (supporting Friedman's article).

50 Ankenbrandt v. Richards, 112 S.Ct. 2206, 2213 (1992).

51 Id. at 2214-15.

52 136 U.S. 586 (1890). For a devastating critique of *Burrus,* see Solomon v. Solomon, 516 F.2d 1018, 1032 (3d Cir. 1975) (Gibbons, J., dissenting).

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

54 Id. at 2215.

55 Id. at 2222 (Stevens, J., concurring).

56 Id. at 2217 (Blackmun, J., concurring).

57 Id.

58 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2221 n.8 (1992) (Blackmun, J., concurring).

59 Finding a constitutional basis might also have precluded federal courts from hearing domestic relations issues under federal question jurisdiction. Ullman, supra note 32, at 1832 n.56.

60 An early comment on the case discusses this possibility. Maryellen Murphy, Comment, Domestic Relations Exception to Diversity Jurisdiction: *Ankenbrandt v. Richards,* 28 New Engl. L. Rev. 577, 600 (1993).

61 For excellent discussions of abstention in domestic relations cases, see Atwood, supra note 33, at 603-17, and Sharon E. Rush, Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective, 60 Notre Dame L. Rev. 1, 20-25 (1984).

62 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2216 (1992). For example, must a court abstain if a wife brings an interspousal tort suit against her husband in the federal court at the same time she sues him for divorce in state court?
The Court held that *Burford* abstention might be appropriate, even outside the divorce, alimony, and child custody area, when difficult state law questions with significant policy implications exist. Even then, the Court acknowledged that federal courts could appropriately retain jurisdiction under some circumstances. Id. at 2216 & n.8.

63 Id. at 2215.

64 *Compare* Kahn v. Kahn, 21 F.3d 859, 861-62 (8th Cir. 1994) (holding tort action alleging breach of fiduciary duty, conversion, constructive fraud and fraud precluded by Exception because court would be forced to reexamine wrongful conduct which is "inextricably intertwined" with issues already considered in property settlement of initial divorce action) *with* Ernst v. Children & Youth Servs. of Chester County, No. CIV.A.91-3735, 1993 U.S. Dist. WL 343375, at *10 (E.D. Pa. Sept. 3, 1993) (discussing Domestic Relations Exception in a federal question case, concluding that the Exception did not apply to grandmother's action for damages and injunctive relief in response to County removing child from her custody, and reasoning that "[a]ppraisal of Ernst's claims has required review of many of the same facts the state courts considered but not the merits of those courts' decisions. The federal and state court issues are connected but not so intertwined that subject matter jurisdiction is lacking.").

65 In Johnson v. Thomas, 808 F. Supp. 1316 (W.D. Mich. 1992), the district court chose to analogize a domestic partnership agreement to a "nontraditional marriage," rather than to a contract, and an action for its dissolution, to divorce. The court reasoned it was being asked to perform the same function in dividing the property. Therefore, the action was precluded by the Domestic Relations Exception. Id at 1320.

66 *See* Durr v. Mobley, No. 92 Civ. 8349(SS), 1993 U.S. Dist. LEXIS 4601, at *6 (S.D.N.Y. Apr. 8, 1993) (holding child support and child custody to be quintessential Domestic Relations Exception claims precluded by *Ankenbrandt*); *see also* Karen Czapanskiy, Child Support and Visitation: Rethinking the Connections, 20 Rutgers L.J. 619 (1989) (exploring interrelationship of custody, visitation, and child support); Murphy, supra note 11, at 215-16 (examining traditional state child support statutes).

67 *See* Robert G. Spector, The Nationalization of Family Law, An Introduction to the Manual for the Coming Age, 27 Fam. L.Q. 1 (1993).

68 Other possible areas for confusion over federal jurisdictional parameters include pre-nuptial agreements, and visitation disputes that are joined with tort suits so as to reach the requisite amount in controversy. Pre-*Ankenbrandt* examples of such potentially confusing areas include: Ellison v. Sadur, 700 F. Supp. 54, 55-58 (D.D.C. 1988) (holding no jurisdiction over enforcement of a separation and property decree because the decision would affect the existing and future relationship between the parties); Casida v. Casida, 580 F. Supp. 857, 858-59 (D. Colo. 1984) (dismissing suit by divorced husband against his former wife which alleged that she obstructed his visitation rights because although the case raised tort claims, it arose out of a continuing domestic dispute); Olsen v. Olsen, 580 F. Supp. 1569, 1571-72 (N.D. Ind. 1984) (holding no jurisdiction over child support order because it could be modified at any point by state court).
The distinction between diversity and federal question cases also presents an area of potential confusion. This might seem capable of straightforward resolution, as the diversity and federal question statutes are clearly different. Nonetheless, for a century, the federal question case of *Burrus* has been used in diversity cases. *See also Ernst,* U.S. Dist. WL 343375, at *10 (considering applicability of Domestic Relations Exception in a post-*Ankenbrandt* federal question case).

69 On the use and misuse of precedents, see Naomi R. Cahn et al., The Case of the Speluncean Explorers: Contemporary Proceedings, 61 Geo. Wash. L. Rev. 1755, 1760 (1993).

70 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2211 (1992).

71 Id. at 2212-13.

72 In re Burrus, 136 U.S. 586, 596 (1890).

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

74 The post-*Erie* requirement that federal court judges apply state law in diversity cases is perhaps the most fundamental difference between the two types of jurisdiction.

75 *See* supra notes 46-49.

76 *Ankenbrandt,* 112 S. Ct. at 2218 (Blackmun, J., concurring).

77 For example, in a 1994 securities case, Central Bank of Denver v. First Interstate Bank of Denver, 114 S. Ct. 1439, 1452 (1994), the Court rejected the argument that Congress, "by silence, [has] acquiesced in the judicial interpretation" of a statute, noting that it could not equate Congressional failure to act with Congressional approval.
See William N. Eskridge, Interpreting Legislative Inaction, 87 Mich. L. Rev. 67 (1988) (criticizing the Court's use of the legislative inaction doctrine and suggesting alternative approaches); William N. Eskridge, Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331, 397-402 (1991) (exploring the indeterminate nature of stare decisis in the context of the Court's statutory construction precedents).
Professor Eskridge has shown that the Court is inconsistent when it comes to the appropriate inference to be drawn from so called "acquiescence cases," in which the Court concludes that Congress adopted an earlier judicial interpretation of a statute because it failed to override that interpretation, and "reenactment cases," in which Congress has reenacted the statute without relevant changes. Eskridge, Interpreting Legislative Inaction, supra, at 71, 90-91. He suggests, instead, that the Court accepts "building block" interpretations-those that are authoritative, on which private parties have relied, and upon which public decision-makers have depended.

Id. at 114. This provides a better explanation for the *Ankenbrandt* decision than does reliance on notions of Congressional intent, given the difficulties with assuming that Congress thought about the Domestic Relations Exception in 1948. As Professor Eskridge also explains, however, such building block approaches may benefit established interests at the expense of other, less traditional interests. Id. That is arguably what happened in *Ankenbrandt,* in which the Court, at least rhetorically, indicated that family law was still not important enough for the federal courts.

78 This discussion is inspired by Aviam Soifer's exploration of similar themes in Deshaney v. Winnebago County Dept. of Social Servs., 109 S. Ct. 998 (1989). Aviam Soifer, Moral Ambitions, Formalism, and the "Free World" of *Deshaney,* 57 Geo. Wash. L. Rev. 1513 (1989); *see also* Lynne N. Henderson, Legality and Empathy, 85 Mich. L. Rev. 1574 (1987) (favoring expanded role for empathetic understanding in legal discourse); Cynthia R. Farina, Conceiving Due Process, 3 Yale J. L. & Fem. 189 (1991) (addressing the importance of using human interconnectedness in the administrative state).

79 The Court explicitly notes this with respect to Ms. Kesler. Ankenbrandt v. Richards, 112 S. Ct. 2206, 2215 n.7 (1992).

80 "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, ... -to Controversies between two or more States; ... -between Citizens of different States". U.S. Const. art. III, § 2.
There is a heated debate over whether Congress *must* grant this jurisdiction to the federal courts. *See* Amar, supra note 49 (arguing that Congress must grant some forms of jurisdiction to federal courts, but need not do so in party-based jurisdictional cases); Robert N. Clinton, A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III, 132 U. Pa. L. Rev. 741 (1984) (arguing that Article III requires that some federal courts have jurisdiction over all federal cases); Daniel J. Meltzer, The History and Structure of Article III, 138 U. Pa. L. Rev. 1569 (1990) (arguing that relatively few restrictions on Congressional discretion exist). Given that Congress *has* granted at least some types of diversity jurisdiction to the federal courts, my concern is with the limits of that statutory jurisdiction.

81 Act of Sept. 24, 1789, ch. 20, § 11.

82 28 U.S.C. § 1331 (1988). Congress amended the statute in order to conform it to Rule 2 of the Federal Rules of Civil Procedure, and there is little legislative history on any other considerations it may have had. H.R. Rep. No. 308, 80th Cong., 1st Sess., at A114-15 (1947).
The Federal Rules had been amended in 1937. In 1935, Chief Justice Hughes had announced that the Court intended to merge law and equity into one form of "civil action" in order to simplify proceedings, without infringing "substantive rights." Alexander Holtzoff, Origin and Sources of the Federal Rules of Civil Procedure, 30 N.Y.U. L. Rev. 1057, 1062 (1955) (quoting Chief Justice Hughes, Address at the American Law Institute (May 9, 1935)).

83 *See* Dragan v. Miller, 679 F.2d 712, 713-14 (7th Cir. 1982) (Posner, J.) (discussing the probate exception to federal jurisdiction); Gregory Gelfand & Howard B. Abrams, Putting *Erie* on the Right Track, 49 U. Pitt. L. Rev. 937, 951 n.47 (1988) (noting that "[f]amily law is an area which the federal courts have for a long time left as an 'enclave' for the states"). *See generally* Allan D. Vestal & David L. Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 Minn. L. Rev. 1 (1956).
In addition to the disagreement over congressional discretion to grant diversity jurisdiction, *see* supra note 49, there is also a debate over whether the federal courts properly can apply discretion in deciding whether to exercise jurisdiction that the Constitution or Congress has granted. *Compare* David L. Shapiro, Jurisdiction and Discretion, 60 N.Y.U. L. Rev. 543 (1985) (arguing that federal court judges can apply discretion in deciding whether to exercise the jurisdiction accorded them through the Constitution and statutes) *with* Martin H. Redish, Abstention, Separation of Powers, and the Limits of the Judicial Function, 94 Yale L.J. 71 (1984) (arguing that federal judges have no discretion, and must exercise jurisdiction conferred on them).

84 *See* supra notes 46-48 and accompanying text.

85 Joel P. Bishop, New Commentaries on Marriage, Divorce, and Separation § 155, at 70 (1891).

86 For a good summary of reasons that federal courts have declined to exercise jurisdiction, see Atwood, supra note 33, at 585-603; Comment, Domestic Relations-Federal Courts Held to Have Jurisdiction to Declare Divorce Invalid, 44 N.Y.U. L. Rev. 631, 636-38 (1969).

87 De La Rama v. De La Rama, 201 U.S. 303, 304 (1906); Barber v. Barber, 62 U.S. (21 How.) 582, 605 (1858) (Daniels, J., dissenting); 13B Charles A. Wright et al., Federal Practice and Procedure §§ 3609, 3610 (1984); Shapiro, supra note 83, at 567.

88 *E.g.,* Bennett v. Bennett, 682 F.2d 1039, 1043 (D.C. Cir. 1982).

89 Vestal & Foster, supra note 83, at 23-28.

90 For example, the court in Solomon v. Solomon noted:
It is true that the rationale upon which [the exception] is premised has shifted from conceptions regarding the powers of ancient ecclesiastical courts, the non-diversity of married couples, and the lack of monetary value of divorce, to the modern view that state courts have historically decided these matters and have developed both a well-known expertise in these cases and a strong interest in disposing of them.
516 F.2d 1018, 1025 (3d Cir. 1975) (citations omitted). The historical context has influenced the rationale used to explain why domestic relations cases do not belong in federal courts. For example, with the rise of family law courts in the early twentieth century, it has been easier for federal courts to defer to the alleged state court expertise.

91 *See* Spindel v. Spindel, 283 F. Supp. 797, 802-03 (E.D.N.Y. 1968); Thomas H. Dobbs, Note, The Domestic Relations Exception is Narrowed After Ankenbrandt v. Richards, 28 Wake Forest L. Rev. 1137, 1146-47 (1993).

92 1 William Blackstone, Commentaries *80-84; Dobbs, supra note 91, at 1147.

93 Lawrence Stone, Road to Divorce: England 1530-1987, at 46-47 (1990). *See* Ullman, supra note 32, at 1834-39.

94 Such bills were infrequent, however, because divorce itself was rare. 1 William S. Holdsworth, A History of English Law 623 (7th ed. 1956); M.M. Knappen, Constitutional and Legal History of England 513-14 (1987).

95 *E.g.,* Terrell v. Terrell, Tothill 61, 21 Eng. Rep. 123 (Ch. 1581). For further discussion, see *Spindel,* 283 F. Supp. at 806-09, and Dobbs, supra note 91, at 1148.
Under the Saxon constitution, there was only one court with jurisdiction over civil and spiritual cases, a General Council. 3 William Blackstone, Commentaries *61; *see also* 1 Holdsworth, supra note 94, at 61.

96 Colonial Society of Massachusetts, Law in Colonial Massachusetts 1630-1800, at 521 (1984) (Court of Assistants, which included governor, issued divorces); Charles Cowley, Our Divorce Courts: Their Origin and History; Why They are Needed; How They Are Abused; And How They May Be Reformed 10 (1879); Roderick Phillips, Untying the Knot: A Short History of Divorce 40, 70 (1991); Henry S. Cohn, Connecticut's Divorce Mechanism: 1636-1969, 14 Am. J. Legal Hist. 35, 39 (1970); *see* Richard Chused, Legislative Divorce: Politics and Family in Maryland from 1790-1850 (forthcoming).

97 *See, e.g.,* Elizabeth B. Clark, Church-State Relations in the Constitution-Making Period, *in* Church and State in America: A Bibliographical Guide: The Colonial and Early National Periods 151 (John F. Wilson ed. 1986); Ullman, supra note 32 at 1839 n.95 (comparing the chuch-state relationship in eighteenth century English courts with the American colonial courts); *see also* Timothy L. Hall, Roger Williams and the Foundations of Religious Liberty, 71 B.U. L. Rev. 455, 463 (1991) (noting that unlike England, the Massachusetts Bay Colony had no ecclesiastical courts). While individual states had established religions, others did not, nor did the federal government. Moreover, as the family has become increasingly "divorced" from religious morality, *see* Janet L. Dolgin, The Family in Transition: From *Griswold* to *Eisenstadt* and Beyond, 82 Geo. L.J. 1519, 1553 (1994), an explanation based on yielding to ecclesiastical courts becomes even more attenuated.

98 Dobbs, supra note 91, at 1146.

99 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2215 (1992).

100 Elizabeth Pleck, Domestic Tyranny 136 (1987); Frederick Ward, Jr. & Tully L. McCrea, Applying the Family Court Act, 5 Crim. & Delinq. 200, 200 (1959). Prior to the development of specialized courts, domestic relations cases were handled by courts of equity applying English equity law, or if a state did not have an equity court, in the common law courts. *See* Phillips, supra note 96, at 70. The development of family law courts reflects the nature of changes occurring in the family itself, as divorce became more common.

101 For one judge's perspective on these courts, see Lois G. Forer, Unequal Protection: Women, Children, and the Elderly in Court (1991).

102 *E.g.,* Margaret Beyer & Ricardo Urbina, An Emerging Judicial Role in Family Court 1-2 (1986); Patrick R. Tamilia, A Response to Elimination of the Reasonable Efforts Required Prior to Termination of Parental Rights Status, 54 U. Pitt. L. Rev. 211, 227-28 (1992). And, as Judith Resnik notes, state court judges often exhibit gender bias in family law cases. Resnik, supra note 1, at 1755-56; *see, e.g.,* Maryland Special Joint Comm. on Gender Bias in the Courts, Gender Bias in the Courts (1989). For a critique of one aspect of family law courts, see Monrad G. Paulsen, Juvenile Courts, Family Courts, and the Poor Man, 54 Cal. L. Rev. 694 (1966).

103 Moreover, states as yet have developed little expertise in considering increasingly complex family law issues such as the disposition of frozen embryos.

104 Martha A. Fineman, Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking, 101 Harv. L. Rev. 727, 740-41 (1988).

105 Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545 (1991).

106 Id. at 1549-50; *see also* Lisa G. Lerman, Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women, 7 Harv. Women's L.J. 57 (1984)(exploring problems with mediation in domestic violence cases).

107 Fineman, supra note 104, at 762.

108 *See, e.g.,* id.; Martha A. Fineman & Anne Opie, The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce, 1987 Wis. L. Rev. 107.

109 *See* Comment, supra note 86, at 637 (questioning the argument that state tribunals have a special expertise to decide domestic relations issues).
And, federal courts continue to have access to abstention doctrines, comparable to those available in any other diversity case. *See* infra notes 195, 264-68.

110 *See also* McIntyre v. McIntyre, 771 F.2d 1316, 1319 (9th Cir. 1985) (finding federal jurisdiction over diversity cases alleging tortious interference with visitation would not interfere with state's ability to supervise child custody). For further discussion of cooperation between federal and state court systems, see infra note 261 and accompanying text.

111 In his discussion of whether federal courts of appeal should continue to defer to district court construction of state law, Professor Dan Coenen explains that this deferral is often based on notions of the district courts' expertise. Dan T. Coenen, To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law, 73 Minn. L. Rev. 899, 920 (1989). He shows that this rationale lacks "persuasive punch." Id.

112 Vestal & Foster, supra note 83, at 31. For a contemporary discussion of marital status, arguing that states are dissolving status distinctions, see Jana B. Singer, The Privatization of Family Law, 1992 Wis. L. Rev. 1443, 1447-56.

The Vestal and Foster property-status distinction did not include child custody issues; they identified considerations of *parens patriae* as the basis for the failure of federal courts to exercise jurisdiction over these cases. Vestal & Foster, supra, at 31-36.

113 Although contemporary discussions of status include sexual orientation, race, gender, or class, Vestal and Foster refer simply to the status of marriage between husband and wife.

114 In *Ankenbrandt,* the Court explained that in cases outside of the core three areas, abstention might properly be invoked in cases where "the suit depended on a determination of the status of the parties." Ankenbrandt v. Richards, 112 S. Ct. 2206, 2216 (1992). *See also* Thompson v. Thompson, 798 F.2d 1547, 1549-50 (9th Cir. 1986) (applying diversity limitations to implied federal cause of action case), *aff'd on other grounds,* 484 U.S. 174 (1987); Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir. 1968) (refusing to consider paternity and child support issues); Dobbs, supra note 91, at 1156-57 (discussing the property/status approach).
In Turpin v. Turpin, 415 F. Supp. 12, 14 (W.D. Okla. 1975), the trial court accepted jurisdiction of a case involving breach of a divorce settlement agreement, noting that the legal issues did not involve the status of the parties.

115 *See* Linda A. Oulette, Note, The Domestic Relations Exception to Diversity Jurisdiction: A Re-Evaluation, 24 B.C. L. Rev. 661, 676-84 (1983) (examining two courts' use of the property/status distinction to arrive at different results in substantially similar cases). Barbara Atwood argues that the Vestal-Foster status-property distinction does not adequately explain the Supreme Court's actions in the domestic relations area, especially given that the Court has not prevented lower courts from making status determinations. Atwood, supra note 33, at 593-95.

116 *E.g.,* Brandtscheit v. Britton, 239 F. Supp. 652, 654 (N.D. Cal. 1965).

117 *See* Charles A. Reich, The New Property, 73 Yale L.J. 733, 771-74 (1964) (defining various entitlements as property rights, and pointing out that new forms of property provide a basis for status); *see also* Mary Ann Glendon, The New Family and the New Property 3 (1981) (discussing Reich in the context of family law).

118 Vestal & Foster, supra note 83, at 31. In a footnote, they differentiate between a lack of jurisdiction and the applicable law which may prevent a wife from recovering a judgment from her husband. Id. at 31 n.146.

119 For discussions of this controversy, see sources cited supra note 3; infra text at page 1122; *see also* Hearing on Proposals Concerning Diversity of Citizenship Jurisdiction Before the Senate Subcomm. on Improvement in Judicial Machinery, 95th Cong., 2d Sess. (1978).

120 I am not alone in this conclusion. Barbara Atwood explains that "[t]oday concerns of federalism provide the primary basis for the exception," although she focuses on "State Interests and Managerial Concerns," while I focus on the development of a separate sphere for family law. Atwood, supra note 33, at 574, 598-603.
As Judith Resnik points out, the construction of state and federal court jurisdictions are mutually interdependent. Judith Resnick, Dependent Sovereigns: Indian Tribes, States, and the Federal Courts, 56 U. Chi. L. Rev. 671, 729-34 (1989).

121 For early commentary on the powers reserved to the states under the Constitution, see The Federalist No. 45 (James Madison), and No. 84 (Alexander Hamilton). Like Mr. Bishop, *see* supra note 85 and accompanying text, the Court seems to accept that family law is such a state function, which, because of its local nature, should be left outside the federal courts. The assignment of family law to the states, however, is not an inevitable result of a legal system based on the English common law. In Canada, for example, family law authority is shared between the federal and state governments. Martha A. Field, The Differing Federalisms of Canada and the United States, 55 Law & Contemp. Prob. 107, 108 (1992); Resnik, supra note 1, at 1698-99.

122 U.S. Const. art. I, § 8. *See* Andrzej Rapaczynski, From Sovereignty to Process: The Jurisprudence of Federalism After Garcia, 1985 Sup. Ct. Rev. 341, 354 ("The enumeration technique ... constitutionalize[s] the issue of state sovereignty by proposing a rigid, *a priori* distinction between the separate domains.").

123 U.S. Const. amend. X. The Court distinguished between its two methods of determining whether congressional legislation is precluded by principles of state sovereignty:
In some cases the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I of the Constitution.... In other cases the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by the Tenth Amendment.... If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.
New York v. United States, 112 S. Ct. 2408, 2417 (1992).

124 South Carolina v. Baker, 485 U.S. 505, 511 n.5 (1988) ("We use 'the Tenth Amendment' to encompass any implied Constitutional limitation on Congress' authority to regulate state activities, whether grounded in the Tenth Amendment itself or in principles of federalism derived generally from the Constitution.").
Some of the many articles written on the confusing status of the Tenth Amendment are: Louise Weinberg, The Federal-State Conflicts of Laws: "Actual" Conflicts, 70 Tex. L. Rev. 1743 (1992); Philip P. Frickey, Lawnet: The Case of the Missing (Tenth) Amendment, 75 Minn. L. Rev. 755 (1991); George D. Brown, State Sovereignty Under the Burger Court-How the Eleventh Amendment Survived the Death of the Tenth: Some Broader Implications of *Atascadero State Hospital v. Scanlon,* 74 Geo. L.J. 363 (1985).

125 National League of Cities v. Usery, 426 U.S. 833, 852 (1976).

126 Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (holding the activities of individual restaurant to be subject to congressional regulation under the Commerce Clause); United States v. Darby, 312 U.S. 100, 115 (1941) (holding that employers engaged in production of goods for interstate commerce are subject to Fair Labor Standards Act of 1938 under the Commerce Clause); *see* McCullough v. Maryland, 17 U.S. (4 Wheat.) 316, 406-25 (1819) (holding constitutional act chartering national bank).
Notions of state sovereignty often seem based in a "romantic" vision of citizen participation in local community. Paul W. Kahn, Interpretation and Authority in State Constitutionalism, 106 Harv. L. Rev. 1147 (1993) (critiquing this concept). The Court appears to "protect" states only when Congress threatens their existence, however defined. Field, supra note 121, at 112. Professor Field argues that the Constitution provides little support for affirmative state rights. Id.; *see* Martha A. Field, The Supreme Court, 1984 Term: Comment: *Garcia v. San Antonio Metropolitan Transit Authority*: The Demise of a Misguided Doctrine, 99 Harv. L. Rev. 84, 95-103 (1985).

127 469 U.S. 528 (1985).

128 112 S. Ct. 2408 (1992).

129 *Garcia,* 469 U.S. at 547-54.

130 *New York,* 112 S. Ct. 2408, 2417-35 (1992). *See* The Supreme Court, 1991 Term: Leading Cases, 106 Harv. L. Rev. 163, 173 (1992) (noting "pronounced vacillations" in the Court's Tenth Amendment jurisprudence). Professor Ira C. Lupu comments that *New York* continues the distinction between federal legislation regulating the state and legislation regulating individuals within states. Ira C. Lupu, Statutes Revolving in Constitutional Law Orbits, 79 Va. L. Rev. 1, 48, 57 (1993).
Over the past 200 years, just as the Court has used different tests, so too it has changed what subjects are appropriate for federal or state regulation. Similarly, the domain of federal courts has changed dramatically.

131 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938); *see* Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 881, 902 (1986); Gelfand & Abrams, supra note 83, at 943-44.

132 As Erwin Chemerinsky points out, the Court has "aggressively used federalism as the basis for limiting federal *judicial* power, but has almost completely refused to employ federalism as the grounds for limiting federal *legislative* power." Erwin Chemerinsky, The Values of Federalism 3-4 (Nov. 1993) (on file in The University of Iowa College of Law Library).

It may be simply that the changes in family law over the past 200 years, discussed infra, justify a rethinking of whether domestic relations cases belong in the federal courts.

133 458 U.S. 502 (1982).

134 Id. This was the Court's first habeas case involving a parent whose children were in state custody. In earlier decisions, the Court had repeatedly refused to use the habeas statute to intervene in private custody disputes between two family members. *E.g.,* Matters v. Ryan, 249 U.S. 375, 377 (1919); In Re Burrus, 136 U.S. 586, 593-94 (1890); DeKrafft v. Ryan, 67 U.S. (2 Black) 704, 714 (1862); Barry v. Mercein, 46 U.S. (5 How.) 103, 120 (1847).

135 458 U.S. at 516 (citation omitted). *See* Atwood, supra note 33, at 590 n.124 (noting the internal inconsistency of the *Lehman* holding). The interests at stake when a state takes custody of children are inherently different than those at issue when two parents each seek custody.

136 Mike Seidman, Speech at the Federalist Society, at 7 (1993) (on file in The University of Iowa College of Law Library); *see* Deborah Maranville, Welfare and Federalism, 36 Loy. L. Rev. 1, 2 (1990) (arguing that "[r]eferences to state or federal control serve as a proxy for a variety of underlying normative concerns").

137 Gene R. Shreve & Peter Raven-Hansen, Understanding Civil Procedure 115 (2d ed. 1994).

138 While federal court judges often disdain interpreting state law, *see* Gelfand & Abrams, supra note 83, at 952 n.49, they certainly hear many other complex, fact-based cases involving the application of state law in, for example, the contracts and tort areas. Indeed, when the Federal Courts Study Committee recommended that federal diversity jurisdiction be limited or abolished, it made an exception for complex litigation. Federal Courts Study Comm., Report of the Federal Courts Study Committee 44-45 (1990). Ironically, much of the complex litigation on products liability for personal injury centers on devices or drugs, such as the IUD or DES, that were produced for women. Joan E. Steinman, Women, Medical Care, and Mass Tort Litigation, 68 Chi.-Kent L. Rev. 409, 410-14 (1992). Even these cases, however, which require that the courts consider women's issues, do not require that courts examine the family.

139 Judith Resnik, Housekeeping: The Nature and Allocation of Work in Federal Trial Courts, 24 Ga. L. Rev. 909, 961 (1990).

140 Id. at 954-55.

141 *See* Singer, supra note 112, at 1562 n.554 (suggesting that federal court reluctance to hear domestic relations cases shows that, to some extent, these matters are not considered sufficiently worthy).

142 Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 837, 843 (1990).

143 Resnik, supra note 1, at 1696.

144 Id.

145 Ninth Cir. Task Force on Gender Bias, Executive Summary of the Preliminary Report of the Ninth Circuit Task Force on Gender Bias, 45 Stan. L. Rev. 2153 (1993).

146 Resnik, supra note 1, at 1685-89. The federal courts have, however, changed their approach. The Judicial Conference has encouraged every circuit judicial council to undertake gender bias studies. Report of the Proceedings of the Judicial Conference of the United States 28 (March 16, 1993) (on file in The University of Iowa College of Law Library).

147 ABA Jud. Admin. Div. Recommendation, Report to the House of Delegates (1992) (opposing provision in S.15 that creates federal civil rights action for gender biased crimes) (on file in the University of Iowa College of Law Library); *see* Judith Resnik, Revising the Canon: Feminist Help in Teaching Procedure, 61 U. Cin. L. Rev. 1181, 1183 (1993) (noting judiciary's concern that providing federal jurisdiction would embroil courts in domestic

relations and flood the courts with cases traditionally within the province of the states). For a discussion of federal court opposition of the VAWA, see infra notes 187-94 and accompanying text.

148 Susan G. Mezey, In Pursuit of Equality: Women, Public Policy, and the Federal Courts (1992).

149 *See* Ruth B. Cowan, Women's Rights Through Litigation: An Examination of the American Civil Liberties Union Women's Rights Project, 1971-1976, 8 Colum. Hum. Rts. L. Rev. 373 (1976); Mary Ellen Gale & Nadine Strossen, The Real ACLU, 2 Yale J.L. & Fem. 161 (1989); Ruth Bader Ginsburg & Barbara Flagg, Some Reflections on the Feminist Legal Thought of the 1970s, 1989 U. Chi. Legal F. 9; Deborah Markowitz, In Pursuit of Equality: One Woman's Work to Change the Law, 11 Women's Rts. L. Rptr. 73 (1989). One study found that the Court had become more responsive to women over the past 20 years. Merle H. Weiner, Faludi Fights Back: A Review of Backlash: The Undeclared War Against American Women, 69 Denv. U. L. Rev. 243, 251 n.63 (1993) (citing Tracey E. George & Lee Epstein, Womens' Rights Litigation in the 1980s: More of the Same?, 74 Judicature 314, 314-15 (1991)). David Cole notes, however, that many of these cases involved men. David Cole, Strategies of Difference: Litigating for Women's Rights in a Man's World, 2 Law & Ineq. J. 33, 34 n.4 (1984).

150 *E.g.,* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992); Anita Allen, In the Wake of the Abortion Debate: For Women, Some Solace, New Concern, Legal Times, July 6, 1992, at 23 (citing examples of strong feminist language in *Casey*). On the other hand, the Court's abortion decisions make distinctions between women based on their income, illustrating the problems of generalizing about "women." *See* Harris v. McRae, 448 U.S. 297, 316-17 (1980) (holding poor women on Medicaid not entitled to publicly-funded abortion).
Abortion crosses boundaries. While it is, in part, a family law issue, the legal issues are framed in terms of women's rights, fetal rights, and the state's rights. Throughout the abortion decisions, when a restriction is found unconstitutional, the reasoning is based on women's autonomy. The Court, however, has become increasingly likely to uphold state laws that support traditional authority structures of parental control over children. *See, e.g., Casey,* 112 S. Ct. 2791; Ohio v. Akron Center for Reproductive Health, 497 U.S. 502 (1990).

151 The pregnancy discrimination cases provide an interesting illustration of this. In the mid-1970s, the Court held that pregnancy discrimination was not a form of sex discrimination because not all women were pregnant. General Electric Co. v. Gilbert, 429 U.S. 125, 133-36 (1976); Geduldig v. Aiello, 417 U.S. 484, 496-97 & n.20 (1974). While these decisions manifest a total lack of understanding of women's lives and realities, the Court nonetheless treated all women as potential workers, as the same as men, and as totally separate from their family roles. In essence, women who are just like men cannot be discriminated against, while women who act differently, who are incapacitated because of pregnancy, should be treated differently. In *Johnson Controls,* as well, the Court refrained from mixing women's home and work roles, carefully (and correctly) treating women the same as men in the workplace. Automobile Workers v. Johnson Controls, Inc., 499 U.S. 187, 197-211 (1991). Only in *Cal. Fed.,* written by Justice Marshall, did the Court acknowledge, at least somewhat, the interrelationship of women's different roles. California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 288-89 (1987).

152 Sylvia Law notes that it has been far easier for women to challenge inequalities in economic and political life than to challenge familial structures that are based on the subordination of women. Sylvia Law, The Founders on Families, 39 U. Fla. L. Rev. 583, 611 (1987). *See also* Janet L. Dolgin, Just a Gene: Judicial Assumptions about Parenthood, 40 UCLA L. Rev. 637, 637 (1993) (noting that judicial response to changing families has been conservative).
Even outside of the family law cases, however, some women are less successful than others in the federal courts, again illustrating the difficulties of generalizing about "women." For example, in the employment discrimination area, black women have had difficulty gaining recognition for the dual discrimination they experience. Regina Austin, Sapphire Bound!, 1989 Wis. L. Rev. 539; Kimberle Crenshaw, Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics, 1989 U. Chi. Legal F. 139. Lesbians, like gay men, also have met with little success. *E.g.,* DeSantis v. Pacific Tel. & Tel. Co., Inc., 608 F.2d 327, 329-31 (9th Cir. 1979) (holding Title VII's prohibition of sex discrimination does not include discrimination based on sexual orientation).

153 Much recent feminist theory has explored the interrelationship between women and families, between the ideologies of each. *See, e.g.,* Martha Minow, "Forming Underneath Everything that Grows": Toward a History of Family Law, 1985 Wis. L. Rev. 819.

154 A more accurate picture of the situation can be captured in a Venn diagram with overlapping circles between federal courts, family law, and women:

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

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155 Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139, 141 (1872) (Bradley, C.J., concurring); Richard H. Chused, Married Women's Property Law: 1800-1850, 71 Geo. L.J. 1359, 1414 (1983). One of the themes in the dissent to Barber v. Barber was that the Court should not regulate "habits of the different members of private families in their domestic intercourse." 62 U.S. (21 How.) 582, 602 (1859).
While the sphere ideology seems to have been imposed on passive women, the situation is actually somewhat more complex. *See* Linda K. Kerber, Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History, 75 J. Am. Hist. 9, 18 (1988) (suggesting a new stage in the ideology of public/private spheres in which we examine how the private "sphere was socially constructed both *for* and *by* women") (emphasis in original). Nonetheless, through its form of intervention in the family, the Court supports a gender-structured family.

156 *See* Spector, supra note 67, at 1-2 (concluding that federal law traditionally examined state regulation of the family only when the states exceeded their authority).
As Barbara Atwood points out, the Court has considered family law issues arising under a variety of jurisdictional provisions. Letter from Professor Barbara Atwood, Univ. of Arizona College of Law, to Professor Naomi R. Cahn, George Washington Univ. Nat'l. Law Center (May 21, 1994) (on file in The University of Iowa College of Law Library). Cases that begin in lower federal courts may be more significant exercises of jurisdiction than those in which the Court reviews state court judgments. Id. Nonetheless, in both types of cases, the Court has taken the opportunity to make broad pronouncements on the importance and impact of selected family law issues.

157 *See* Walter Wadlington, The Parent-Child Relationship and the Current Cycle of Family Law Reform, 45 Ohio St. L.J. 307, 307 (1984) (explaining that until recently, it was not "evident that courts would apply a constitutional yardstick to guage the validity of state laws on marriage and the family in other than very special circumstances").

158 The cases discussed in this section can be classified as constitutional law cases, and are often so characterized in constitutional law casebooks; nonetheless, they also appear in family law casebooks. As noted supra note 156, the Court decided some of the cases pursuant to its jurisdiction to review the judgments of the highest state courts. Nonetheless, for purposes of the following analysis, what is important is that the Court has had to construe state domestic relations statutes; family law necessarily appears in the decisions without any balancing test that recognizes the traditional role of state regulation. Correspondingly, when the Court upholds state regulation, it is far more likely to note the appropriateness of deferral to state authority. *See* infra notes 170-71.

159 434 U.S. 374 (1978).

160 Id. at 385.

161 Id. at 396-99. Justice Powell concurred in the judgment, but emphasized that the opinion was too broad for an area traditionally subject to state regulation. Id. at 407. Justice Rehnquist dissented, viewing the statute as a legitimate exercise of state power over the family. Id.

162 406 U.S. 205, 232 (1972).

163 405 U.S. 645, 651 (1972).

164 Republican theory conceptualizes the current family form as an entity in which there is "a mother supreme in her sphere," holding to "the notion of the relative autonomy of the family as a unit, presumed to function with a minimum of governmental interference." Emily Field Van Tassel, Judicial Patriarchy and Republican Family Law, 74 Geo. L.J. 1553, 1562 (1986) (book review); *see* Linda K. Kerber, Women of the Republic: Intellect and Ideology in Revolutionary America 283, 287 (1980) (discussing the mother's pivotal role in the domestic sphere under Republican theory). The majority of families in the United States do not conform to this stereotype. Study Suggests New Definitions of Family, Christian Sci. Monitor, Aug. 26, 1992, at 8.
For examinations of the difficulties confronting alternative family forms, see Law & Sexuality Symposium, 1 Tul. J. L. & Sexuality 1 (1991); Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and other Nontraditional Families, 78 Geo. L.J. 459 (1990).

165 Lee E. Teitelbaum, Family History and Family Law, 1985 Wis. L. Rev. 1135, 1144-46; Anne C. Dailey, Constitutional Privacy and the Just Family, 67 Tul. L. Rev. 955, 956-58 (1993).
In the context of political philosophy, Susan Moller Okin persuasively shows that family life is unexamined, although its existence in a traditional form is critical to the political sphere. Susan M. Okin, Justice, Gender, and the Family (1989). She focuses on contemporary political theorists, including John Rawls, Bruce Ackerman, Ronald Dworkin, and Roberto Unger, showing how they virtually ignore issues of justice within the family when constructing their ideal society. The problems with their theories arise, she believes, from positing public and private spheres and relegating the family to the latter. They assume a just family, without addressing what and who constitutes this family and how this family is formed. Unless it does not conform to this image, the family's composition and the roles of men, women, and children are neither examined nor challenged.
See also Sarah E. Burns, Apologia for the Status Quo, 74 Geo. L.J. 1791, 1797 (1986) (book review) (critiquing constitutional law casebook for leaving out the family). The only chapters at all relevant to families in Susan Mezey's book on women, public policy, and the federal courts concern pregnancy discrimination in the workplace and abortion rights. *See* Mezey, supra note 148, at 111-37, 210-31, 235-64. Judith Resnik points out that Mezey does not critique this omission, only noting that domestic relations is controlled by state law. Resnik, supra note 1, at 1749 n.351. Mezey does briefly address the Court's illegitimate father cases. Mezey, supra, at 27-28.

166 *See* Michel Foucault, Discipline and Punish (1977); Jana Sawicki, Disciplining the Body (1990). The Court will protect the "privacy" of traditional families against state encroachment, thus reinforcing traditional family roles. *See* Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (striking down state compulsory education statute because it "unreasonably interfered with the liberty of guardians and parents to direct the upbringing of children under their control"); Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (same); Dailey, supra note 165, at 960 (arguing that the view of the family as a private entity underlies the development of the privacy doctrine in constitutional law). Accordingly, when family members request that states be forced to take affirmative obligations, the Court refuses. *E.g.,* Suter v. Artist M., 112 S. Ct. 1360, 1367-70 (1992) (federal questions) (holding the Adoption Assistance and Child Welfare Act of 1980 does not give private parties right to require states to make reasonable efforts to prevent removal of abused and neglected children from homes or to facilitate reunification of families when removal had occurred); DeShaney v. Winnebago County Dep't of Social Servs., 489 U.S. 189, 194-203 (1989) (federal question) (holding that a state has no constitutional duty to protect a child from his father's violence).
Even the states are reluctant to regulate intact ongoing families. *See* Joseph Lindgren & Nadine Taub, The Law of Sex Discrimination 310 (1988) (citing McGuire v. McGuire, 59 N.W.2d 376 (Neb. 1953) as an example); Mary Ann Glendon, The Transformation of Family Law: State, Law, and Family in the United States and Western Europe 291-292 (1989) (discussing traditional assumptions that while government should regulate some aspects of the family, it should leave intact families alone); Dolgin, supra note 152, at 690-94 (same).
The Court will not protect, however, nontraditional families. The Court supports the existence of traditional families that consist of two (heterosexual) adults married to each other. *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (upholding state's choice of rights of marital family unit over those of unmarried, biological father); Dolgin, supra note 152, at 663-72 (discussing the Court's refusal to recognize a biological

father's constitutional right to a relationship with his child unless that relationship is within the context of a traditional family unit). Martha Fineman notes an interesting aspect of this dichotomy:
Mothers who fail to conform are "made public"-portrayed as in chronic need of state supervision .... The "public" nature of their perceived inadequacies justifies their regulation, supervision, and control. "Private" families, by contrast, are protected, as they exemplify the "natural" form (husband, wife, and child) ....
Martha A. Fineman, Intimacy Outside the Natural Family: The Limits of Privacy, 23 Conn. L. Rev. 955, 958-59 (1991).

167 Robert A. Burt, The Constitution of the Family, 1979 Sup. Ct. Rev. 329, 338-40, 350-52; *see also* Frances E. Olsen, The Myth of State Intervention in the Family, 18 U. Mich. J.L. Ref. 835, 850 (1985) (noting how courts are expected to bolster parental authority over children); Peter Gabel & Paul Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law, 11 N.Y.U. Rev. L. & Soc. Change 369, 377 (1982-83) (noting that the Supreme Court seeks to reinforce "the legitimacy of the dominant national culture").

168 Dailey, supra note 165, at 959. What occurs in the public realm of the courts inevitably affects the private realm of the family. Teitelbaum, supra note 165, at 1166-67; Olsen, supra note 167, at 835.

169 This section discusses federal question, not diversity, cases. Nonetheless, state interests in family law do not figure prominently when the Court strikes down state regulations, while, as discussed infra, they do when the Court upholds a state statute. Moreover, in these cases, the Court tends to support the traditional nuclear family structure, to uphold the justness of families, and to protect the existence of such families without investigating their interpersonal dimensions.

170 Sosna v. Iowa, 419 U.S. 393 (1975).

171 Id. at 404.

172 Whether women and families have inhabited a private sphere, subject to little regulation, seems irrelevant to the ideology. Indeed, the "private" sphere of the family has always been subject to public regulation, *see* Teitelbaum, supra note 165, at 1147-64, Dailey, supra note 165, at 997-1008, but the all-important rhetoric is to the contrary.

173 Frances Olsen, The Sex of Law, *in* The Politics of Law 453-467 (David Kairys ed., 1990) (discussing dichotomies); *see* Resnik, supra note 120, at 734 ("Doctrines of deference to other court systems assume that those court systems are 'other.'").
This assertion about the "other" status of state courts is controversial among federal court scholars, who have debated this issue primarily in the context of federal constitutional law. *Compare* Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977) (examining preference for federal forum) and Amar, supra note 2, at 1509-10 (stressing structural superiority of federal courts) *with* Paul Bator, The State Courts and Federal Constitutional Litigation, 22 Wm. & Mary L. Rev. 605 (1981) (arguing that state courts should and will continue to play a substantial role in the elaboration of federal constitutional principles). For a summary, see Richard Fallon, supra note 3, at 1141.
Nonetheless, the language used by the Court concerning the traditional functions of the state shows that the Court does not consider family law "profound" enough for the federal courts. *See* supra notes 133-36 and accompanying text.

174 In addition, the family situations presented by domestic relations cases challenge the Court's assumption of a just family, and extending federal court protection to litigants in these situations would undermine the Court's enforcement of a traditional family structure.

175 The discussion that follows is limited to domestic law. The Hague Convention on the Civil Aspects of International Child Abduction, implemented in the United States by the International Child Abduction Remedies Act, 42 U.S.C. § 11601 (1988), sets out procedures for resolving international child custody abduction disputes. United States federal courts have interpreted that statute as allowing courts of the receiving country to decide whether there has been an abduction but not the underlying custody issues. *E.g.,* Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1983); Currier v. Currier, 20 Fam. L. Rptr. (BNA) 1259 (D.N.H. 1994). Congress

provided that federal and state courts would have concurrent jurisdiction under the Act. 42 U.S.C. § 11603(a) (1988).

176 28 U.S.C. § 1738A (1988). The PKPA also declared that Congress intended the Department of Justice to apply the Fugitive Felon Act to parents who abducted their children. 18 U.S.C. § 1073 (1988). This was necessary because the Federal Kidnapping Act, which makes interstate kidnapping a federal crime, exempts parents who abduct their children. 18 U.S.C. § 1201 *et seq.* (1988); *see also* United States v. Sheek, 990 F.2d 150, 151-52 (4th Cir. 1993) (interpreting "parent" to include mother whose parental rights had been terminated).

177 *E.g.,* Joan M. Krauskopf, Remedies for Parental Kidnapping in Federal Court: A Comment Applying the Parental Kidnapping Prevention Act in Support of Judge Edwards, 45 Ohio State L.J. 429, 453-54 (1984).

178 Meade v. Meade, 812 F.2d 1473, 1476 (4th Cir. 1987); Flood v. Braaten, 727 F.2d 303, 312 (3d Cir. 1984).

179 482 U.S. 400 (1987).

180 484 U.S. 174 (1988).

181 482 U.S. at 415-16 (Stevens, J., dissenting).

182 Id. at 420-22.

183 *Thompson,* 484 U.S. at 179.
Much of the Court's opinion, written by Justice Marshall, attempts to show that Congress intended the PKPA merely to extend the federal full faith and credit statute, and consequently that the PKPA applies only to states, not the federal government. *E.g.,* id. at 181-83. Marshall used the 1904 case of Minnesota v. Northern Sec. Co., 194 U.S. 48 (1904), to show that the full faith and credit statute did not give rise to a federal cause of action. *Thompson,* 484 U.S. at 182. In that case, Minnesota argued that its statutes were entitled to full faith and credit when other states enacted legislation affecting property rights in Minnesota, and that Article IV gave federal courts jurisdiction to hear controversies involving that legislation. *Northern Sec.,* 194 U.S. at 72. The Court rejected that argument, interpreting the full faith and credit clause as providing a rule on the weight courts must give during pending cases to the public acts of another state. Id. The Court did not address the question of federal court jurisdiction when two state courts issue conflicting orders pursuant to rules set out by a federal statute.

184 *Thompson,* 484 U.S. at 186. (Of course, federal courts have decided many traditional state-law questions with which they may have little expertise.) In a footnote, the Court rejected the petitioner's argument that the jurisdictional finding would not involve the federal courts in substantive custody law, because state court jurisdiction under the PKPA could be based on the "best interests" of the child. Id. at 186 n.4.
For the dangers of allowing "the courts to play Solomon," see Ann Althouse, Beyond King Solomon's Harlots: Women in Evidence, 65 S. Cal. L. Rev. 1265 (1992); Marie Ashe, Abortion of Narrative: A Reading of the Judgment of Solomon, 4 Yale J.L. & Fem. 81 (1991).

185 *Thompson* is properly viewed as a case in which the Court expressed hostility to finding an implied right of action, and, indeed, Justice Scalia expressly denigrated the doctrine. 484 U.S. at 188 (Scalia, J., concurring). Especially given the lack of clarity in the legislative history as to whether the statute provided such a cause of action, the decision is arguably correct. Nonetheless, in cases decided during the same time period, but outside of the family law area, the Court interpreted legislative histories to find implied causes of action. *E.g.,* Wilder v. Virginia Hosp. Assn, 496 U.S. 498, 509-20 (1990); Wright v. Roanoke Redev. and Housing Auth., 479 U.S. 418, 423-29 (1987). The Court's decisions on implied causes of action are difficult to characterize because while the decisions evidence a trend toward not implying them, the Court has created many exceptions. In this context, the unanimity of *Thompson* is surprising.
At least one court has invoked *Thompson* as authority to hold that even when a federal statute does, at least on its surface, provide a cause of action, this does not "trump" the Domestic Relations Exception. Union Pacific R.R. Co. v. Bolton, 840 F. Supp. 421, 427-28 (E.D. La. 1993).

186 In another recent case, the Court again refused to decide family law issues that arguably arose under a federal statute. Suter v. Artist M., 112 S. Ct. 1360 (1992). *Suter* was brought pursuant to the Adoption Assistance and Child Welfare Act of 1980. 42 U.S.C. §§ 620-28, 670-79a (1988). The Act, which establishes a federal reimbursement program for expenses incurred by states in administering foster care and adoption services, was designed to encourage preventive services to families to allow children to remain in their homes, to minimize the number of children in foster care, and to encourage, when appropriate, adoption. To receive reimbursement, a state must submit a plan for approval to the Secretary of Health and Human Services. Id. § 671(a)(3). Among other items, the plan must provide that "reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home." Id. § 671(a)(15).

The plaintiffs in *Suter* sued the Illinois Department of Children & Family Services (DCFS), claiming that DCFS failed to make the "reasonable efforts" required by the statute to prevent children from being removed and to reunify the children with their natural families. 112 S.Ct. at 1364.

The Supreme Court held that the Act merely required the state to have a plan that was approved by the Secretary and that included the listed items. Id. at 1367. That is, the state was required to do nothing more than include language in compliance with the statute. The Court found no additional statutory language concerning the meaning of "reasonable efforts." It was "left up to the State" to decide how to comply with this requirement. Id. at 1368.

Suter reaffirmed the principle that the state should have broad discretion to develop what it believes is best for families, id. at 1369, and Congress could not have intended to embroil the federal courts in family law issues, id. at 1369 n.15.

187 The VAWA was Title IV of the 1994 crime bill. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796. For an earlier proposal, see S. 11, 103d Cong., 1st Sess. (1993) (introduced by Sen. Biden).

188 In his 1991 Report, Chief Justice Rehnquist warned that "Judges will have less time to spend on individual cases." 1991 Report on the Federal Judiciary, *reprinted in* Chi. Daily L. Bull., Jan. 2, 1992, at 2; *see also* Stanley S. Harris, Crippling the Courts, Wash. Post, Oct. 16, 1991, at A27 (cautioning that the VAWA "threatens to drag thousands of domestic relations cases into the federal courts").

189 *E.g.,* Edward B. McConnell, Planning for the State and Federal Courts, 78 Va. L. Rev. 1849, 1856 (1992) (citing draft report of the National Judicial Council of State and Federal Courts (Feb. 5, 1992)); Judicial Conference Opposes Expanded Role for Federal Courts, The Third Branch 1 (Oct. 1991); William H. Rehnquist, Welcoming Remarks: National Conference on State-Federal Judicial Relationships, 78 Va. L. Rev. 1657, 1660 (1992) (also citing his 1991 Report on the Federal Judiciary, supra note 188).

190 The Judicial Impact Statement prepared by the Administrative Office suggests otherwise, but both its accuracy and motivation are suspect. First, as the Senate Report on the VAWA notes, the case statistics in the Judicial Impact Statement include random crimes and all domestic violence cases, crimes that are not included in the Act. S. Rep. No. 197, 102d Cong., 1st Sess. 70 (1991). Second, the Report summarizes a study of civil rape cases, which found that over a 10-year period, only 255 cases resulted in trial verdicts. Id. Even if all of the victims had brought cases under the VAWA, this is hardly an overwhelming number of cases for the federal courts to handle. Interestingly, the Administrative Office has not prepared Judicial Impact Statements for other recent civil rights bills. Neither the Americans with Disabilities Act of 1990, nor the 1991 Civil Rights Restoration Act includes Impact Statements, yet they clearly will have a substantial impact on the federal courts.

There is a related concern that women will rush into the federal courts with false allegations under the VAWA. The availability of alternative forms of relief or additional causes of action, however, does not warrant an assumption that false claims will overwhelm the courts. The spectre of an overwhelming number of interspousal cases arising under the VAWA is reminiscent of similar fears that were expressed concerning the possibility that domestic violence statutes would add a new cause of action to every divorce case, or that allowing child sexual abuse allegations to be raised in custody proceedings would lead to many unfounded such allegations. *See* C. Gordon, False Allegations of Abuse in Child Custody Disputes, The Mass. Fam. L.J., Nov. 1985, at 54. Neither of these dire predictions has come true. Indeed, false child sexual abuse allegations in custody proceedings

are "exceedingly rare." Nancy Thoennes & Jessica Pearson, Summary of Findings from the Sexual Abuse Allegations Project, *in* Sexual Abuse Allegations in Custody and Visitation Cases 1, 14 (E. Bruce Nicholson ed., 1988). In addition, various procedures to penalize parties and their attorneys for bringing frivolous lawsuits remain applicable. *E.g.,* Fed. R. Civ. P. 11.

The focus of this concern on women suggests that, at least in part, gender bias fueled opposition to the VAWA. Even though the legislation is titled the Violence Against Women Act, it is gender-neutral, so men who are the victims of gender-based assaults can bring suit as well. As Senator Biden explained, it is somewhat ridiculous to expect that women will suddenly have a greater propensity to file false claims than men will. Violence Against Women: Hearing Before the Subcomm. on Crime and Crim. Justice of the House Comm. on the Judiciary, 102nd Cong., 2d Sess. 11 (1992).

191 Chief Justice Rehnquist dramatically warned that, because of the breadth of both the definition of the new crime of violence against women and the new private cause of action, the federal courts could be involved "in a whole host of domestic relations disputes." 1991 Report on the Federal Judiciary, supra note 188; *see also* Violence Against Women, Hearing before the Subcomm. on Crime and Crim. Justice of the House Comm. on the Judiciary, 102d Cong., 2d Sess. 25 (1992) (statement of Rep. Sensenbrenner, mentioning the "flood" of communications from the Chief Justice and other federal judges objecting to the expansion of jurisdiction). The Judicial Conference and the Conference of Chief Justices similarly warned that the new cause of action could "be invoked as a bargaining tool within the context of divorce negotiations and add a major complicating factor to an environment which is often acrimonious as is." 1991 Report on the Federal Judiciary, supra note 188. In a 1993 report, the Judicial Conference agreed to take no position on the VAWA, but did reiterate its concerns about the federalization of state law actions. Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States 28 (March 16, 1993) (on file in The University of Iowa College of Law Library). *See also* Resnik, supra note 147, at 1183 n.16.

192 S. Rep. No. 197, at 69 (question of Sen. Grassley) (acknowleging that "[s]pousal abuse is a serious problem," but questioning whether "clogging" the "busy" federal courts with these cases is appropriate).

193 Indeed, in response to these concerns, the 1993 House legislation explicitly provided that the VAWA did not authorize the federal courts to hear some types of traditional domestic relations disputes. H.R. 1133, § 301(d)(3) provides that the civil rights cause of actions shall not "be construed, by reason of a claim arising under [it], to confer on the courts of the United States jurisdiction of any State law claim seeking the establishment of divorce, alimony, or a child custody decree." This language was suggested by one of the women's advocacy groups. Memorandum from Sally Goldfarb, Nat'l. Org. for Women Legal Defense and Education Fund (Jan. 14, 1993) (on file in The University of Iowa College of Law Library).

194 S. Rep. No. 197, at 48.

195 *E.g.,* Atwood, supra note 33, at 603-17; Rush, supra note 61, at 21-25; *see* infra notes 264-68 and accompanying text.

196 Kathryn Christensen, Breaking the Bank - Disputes over Money and Children Swamp U.S. Divorce Courts, Wall St. J., Jan 28, 1980, at 1 (stating that divorce cases comprise over half of all civil actions filed in the nation's trial courts).

197 Minow, supra note 4, at xiii, xiv; *see* Judith Areen, Baby M Reconsidered, 76 Geo. L.J. 1741, 1743 (1988) (contrasting importance of family and contract law).

198 *See* Marjorie M. Schultz, The Gendered Curriculum: Of Contracts and Careers, 77 Iowa L. Rev. 55, 68 (1991) (noting that family law is seen as a second-class profession); *see also* Resnik, supra note 147, at 1195 (suggesting that the term "complex litigation" may create a hierarchy in which "one-on-one" cases are of lower status).

199 *See generally* Glendon, supra note 166; Lawrence M. Friedman, A History of American Law 204-08 (2d ed. 1985); Michael Grossberg, Governing the Hearth: Law and Family in Nineteenth Century America (1985); Jamil

Zainaldin, The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851, 73 Nw. U.L. Rev. 1038 (1979).

200 Professor Frances Olsen has explored the myth of state non-intervention in the family, showing that intervention and non-intervention are meaningless concepts, given the state's role in structuring and controlling families. Olsen, supra note 167; *see also* Teitelbaum, supra note 165, at 1135 (arguing that through doctrine of family privacy, law ratified power relationships of family). The term "state" can be taken to refer to any governmental authority. It is the state that decides who can marry, how they can divorce, and what happens to children and property at divorce; the state also decides the rights of unmarried couples. It was the state that, until recently, refused to consider intimate violence a "public" crime. *See generally* Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1 (1992) (discussing the states' role in permitting domestic assaults).

201 *See* Teitelbaum, supra note 165, at 1180-81 (discussing how the terms "public" and "private" are interpretational categories).

202 *See* Linda Gordon, For Their Own Good (1988); Pleck, supra note 100, at 7-8 (identifying the family ideal of two parents and minor children as the "single most consistent barrier to reform").

203 Singer, supra note 112, at 1443; *see* Judith C. Areen, Cases and Materials on Family Law vi (3d ed. 1992); *see also* Naomi R. Cahn, Intimate Relationships and Contractual Arrangements (Jan. 14, 1994) (unpublished manuscript, on file in The University of Iowa College of Law Library) (exploring increased use of contracting in intrafamily relationships).

The move towards private ordering is linked with a diminution in the impact on the family of state-defined fault and morality. *See* Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. Rev. 1803 (1985). Nonetheless, many areas of the family continue to be profoundly affected by religious morality. *See e.g.,* Dean v. District of Columbia, No. CIV.A.90-13892, 1992 WL 685364, at *5-7 (D.C. Super. June 2, 1992) *aff'd,* No. 92-CV-737, 1995 WL 21117 (D.C. App., Jan. 19, 1995) (upholding refusal to authorize same-sex marriage); William N. Eskridge, A History of Same-Sex Marriage, 79 Va. L. Rev. 1419, 1497-98 (1994) (noting that modern christian churches remain adamant in their belief that marriage should be enjoyed only by heterosexual couples).

204 *See* Singer, supra note 112, at 1448-49.

205 Minow, supra note 153, at 819.

206 Glendon, supra note 166, at 295.

207 *See* Wendy W. Williams, Notes from a First Generation, 1989 U. Chi. Legal F. 99, 108-09 (noting the widespread agreement among feminists that the workplace is structured to respond to the life pattern of male workers, but not to that of female workers).

208 *See* Arlie Hochschild, The Second Shift: Working Parents and The Revolution at Home (1989); Joan Williams, Gender Wars, 66 N.Y.U. L. Rev. 1559, 1599-1600 (1991) (arguing that many women decide not to work outside of the home because of their disproportionate share of domestic responsibilities). For women who have always worked (generally poor and/or black), they often have been employed as domestics or at a lower wage rate than men because they are women. *See generally* Symposium, The Gender Gap in Compensation, 82 Geo. L.J. 27-158 (1993).

Girls and boys are socialized as to sex-specific norms about which jobs are appropriate for them. Mary E. Becker, Politics, Differences and Economic Rights, 1989 U. Chi. Legal F. 169, 173; Rosemary Hunter, Afterword: A Feminist Response to the Gender Gap in Compensation Symposium, 82 Geo. L.J. 147, 150-51 (1993).

209 *See, e.g.,* Williams, supra note 207, at 99; Christine A. Littleton, Reconstructing Sexual Equality, 75 Cal. L. Rev. 1279, 1297 (1987); Does it Still Make Sense to Talk About Women, 1 UCLA Women's L.J. 15, 23 (1991); Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 Colum. L. Rev. 1118, 1162 (1986).

210 While reproductive capacity does not determine family responsibilities, woman, as potential childbearer, has been associated with woman as caretaker. This is especially clear in a law and economics approach to these issues.

211 *See* testimony collected in Legislative History of the Pregnancy Discrimination Act of 1978, 96th Cong., 2d Sess. (Comm. Print 1979). I know this, anecdotally, from the many friends who hesitate to tell their employers that they are pregnant lest it have an adverse impact on their jobs.

212 Karen Czapanskiy, Volunteers and Draftees: The Struggle for Parental Equality, 38 UCLA L. Rev. 1415 (1991); *see* Nancy E. Dowd, Work and Family: Restructuring the Workplace, 32 Ariz. L. Rev. 431, 454-55 (1990) (observing that society views men who participate in caretaking as extraordinary).
Until recently, employers made such roles explicit. *E.g.,* Philips v. Martin Marietta, 400 U.S. 542, 544 (1971) (considering company policy that excluded from hiring women with preschool-aged children, but not men with such children). The Court would have allowed a showing that care of young children was relevant to the hiring of women versus men. Id.

213 Czapanskiy, supra note 212, at 1461-62.

214 Joan C. Williams, Deconstructing Gender, 87 Mich. L. Rev. 797, 833 (1989).

215 Pub. L. No. 103-3, 107 Stat. 6, § 101(2)(A)(i). *See* Dowd, supra note 212, at 447-49 (noting that existing benefits in the workplace offer little to workers with family responsibilities).

216 The effect is not simple. Judges may view men as more stable because they work, at least when men seek custody. Nancy Polikoff, Why are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations, 7 Women's Rts. L. Rptr. 235, 237-41 (1983). Spending time at work rather than with their families, however, may also affect men's desire for custody. *See* Robert H. Mnookin et al., Private Ordering Revisited: What Custodial Arrangements are Parents Negotiating?, *in* Divorce Reform at the Crossroads 37, 72 (Stephen Sugarman & Herma Hill Kay eds. 1990) (discussing factors that may dissuade fathers from requesting the form of custody they desire).

217 *But see* Littleton, supra note 209 (arguing that reform efforts should not focus on eliminating social gender differences, such as the tendency of women and not men to become homemakers).

218 *See also* Katharine Bartlett & Carol Stack, Joint Custody, Feminism and the Dependency Dilemma, 2 Berkeley Women's L.J. 9, 32-33 (1986) (addressing the importance of assumptions about equal caretaking within the family to changing gender role expectations).

219 *See generally* Carol Tavris, The Mismeasure of Woman (1992).

220 Naomi R. Cahn, Family Issue(s), 61 U. Chi. L. Rev. 325 (1994) (reviewing Elizabeth Bartholet, Family Bonds (1993)).
Intertwined with the feminist reevaluation of family law has been the appearance of new dilemmas that challenge states' ability to handle them. Issues of who constitutes a family and how families are formed have become significant in an era of no-fault divorce, in-vitro fertilization, and gay marriage. *See* Eskridge, supra note 203, at 1434 (discussing same-sex marriage as a social construct and the resulting impact on legal debate); DeBoer v. Schmidt, No. 96366, 1993 Mich. LEXIS 1659 (Sup Ct. Mich. July 2, 1993) (holding that Michigan was bound to enforce Iowa decision granting custody of child to biological father, terminating custody of married couple who had petitioned for adoption); In re B.G.C., 496 N.W.2d 239 (Iowa 1992) (granting custody of child to biological father after mother's rights had been terminated and another married couple had petitioned for adoption); Elizabeth Bartholet, Family Bonds 233 (1993) (calling for increased regulation of infertility treatment and new child production methods). While these issues can be resolved through analogies to family law problems handled by existing state statutes, they present new and visible problems, as well as a potential need for national uniformity. *See, e.g.,* Davis v. Davis, 842 S.W.2d 588, 590 n.2 (Tenn. 1992) (discussing lack of statutes and common law precedents dealing with the disposition of unwanted frozen embryos).
For example, experience with the Uniform Child Custody Jurisdiction Act has shown that state by state variances have an enormous, not necessarily positive, impact on conflicts in child custody decisionmaking. *See* Anne

B. Goldstein, The Tragedy of the Interstate Child: A Critical Reexamination of the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act, 25 U.C. Davis L. Rev. 845, 852-68 (1992) (arguing that the subjective nature of the "best interests of the child" standard encourages parents who are dissatisfied with a state court decision to seek another ruling in a different jurisdiction). While a need to allow experimentation by different states in the family law area remains, there is also a need to mandate minimum standards in at least some areas of family law.

Unlike congressional enactments, diversity jurisdiction will not, of course, provide this national uniformity. Nonetheless, an expanded diversity jurisdiction would indicate that federal courts appropriately decide all types of domestic relations cases, and would thus reinforce the national significance of family law.

221 Prior to *Erie,* federal courts applied federal common law in domestic relations cases. *E.g.,* Sothern v. United States, 12 F.2d 936 (E.D. Ark. 1926); Ullman, supra note 32, at 1843-44. Of course, post-*Erie,* federal courts in diversity cases are supposed to sit as "only another court of the State." Guaranty Trust Co. v. York, 326 U.S. 99, 108 (1945).

In a pre-*Erie* probate case (probate being the other typical "local" matter left to state courts, and traced back to ecclesiastical court jurisdiction) the Supreme Court held that "the mere construction of a will by a state court does not ... constitute a rule of decision, for the courts of the United States." Lane v. Vick, 44 U.S. 464, 476 (1845). Justices Taney and McKinley dissented.

222 As Robert Cover and Alexander Aleinikoff brilliantly explain in the federal question context, however, "redundancy" between state and federal courts helped develop constitutional rights for prisoners. Dialectical Federalism: Habeas Corpus and the Court, 86 Yale L.J. 1035, 1046-47 (1977); *see* Robert H. Cover, The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation, 22 Wm. & Mary L. Rev. 639, 648 (1981) (exploring how availability of alternative fora can help litigant receive a different outcome).

223 *See* Sloviter, supra note 3, at 1687; Report of the Federal Courts Study Comm., supra note 2, at 117.

A somewhat comparable and longstanding debate in federal court jurisprudence exists over whether the federal and state courts are equivalent for federal question cases. The concept of "parity" typically has been addressed in the context of whether state courts can give a fair hearing on substantive constitutional claims. *See, e.g.,* Erwin Chemerinsky, Parity Reconsidered: Defining a Role for the Federal Judiciary, 36 UCLA L. Rev. 233 (1988); Burt Neuborne, The Myth of Parity, 90 Harv. L. Rev. 1105 (1977); Michael Wells, Behind the Parity Debate: The Decline of the Legal Process Tradition in the Law of Federal Courts, 71 B.U.L. Rev. 609, 609-11 (1991). Michael Wells suggests the debate really concerns whether the state or an individual will receive the substantive advantage in the litigation through using a particular forum. Wells, supra, at 611. Although the concern over diversity jurisdiction is typically phrased in terms of whether out-of-state litigants would be *dis* advantaged, there may be similar fears that out-of-state litigants obtain advantages in diversity cases in the federal courts that they do not receive in the state courts.

224 *E.g.,* Jon O. Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System, 56 U. Chi. L. Rev. 761, 771 (1989) (suggesting that diversity cases initiated by in-state litigants may not "merit" federal court jurisdiction); *see also* James C. Hill & Thomas E. Baker, Dam Federal Jurisdiction!, 32 Emory L.J. 3 (1983) (discussing need to curtail federal jurisdiction).

One proposal is to increase the amount in controversy requirement in order to decrease the number of cases on the federal docket. This has been advanced by, among others, Martin Redish, as a way of ensuring that only the most important cases- those with the most money, where the risk of local bias is higher-are heard by federal courts. *See* Martin H. Redish, Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "The Martian Chronicles," 78 Va. L. Rev. 1769, 1806 (1992).

225 Coenen, supra note 111, at 961.

226 351 U.S. 570 (1956).

227 Id. at 580. The Court continued, "This is especially true where a state deals with a familial relationship; there is no federal law of domestic relations, which is primarily a matter of state concern." Id.

228 441 U.S. 380 (1979). Other cases addressing the rights of illegitimate fathers presented similar issues. *See* Michael H. v. Gerald D., 491 U.S. 110, 118-30 (1989) (holding that the presumption that a child born to a married woman who is living with her husband is legitimate does not infringe upon the due process rights of a man wishing to establish paternity); Lehr v. Robertson, 463 U.S. 248, 256-68 (1983) (holding that neither the Due Process Clause nor the Equal Protection Clause prevents states from according lesser legal rights to parents who have abandoned or have never established a relationship with their children than to those who have an established custodial relationship); Quilloin v. Walcott, 434 U.S. 246, 254-56 (1978) (upholding application of state laws which deny an unwed father authority to prevent the adoption of his illegitimate child); Stanley v. Illinois, 405 U.S. 645, 649-58 (1972) (finding that a state cannot presume that unmarried fathers are unsuitable and neglectful parents).

229 Bankruptcy is another obvious example of an area in which the courts have considered family law issues. *See, e.g.,* Singer, supra note 4, at 43.

230 John Frank, Historical Bases of the Federal Judicial System, 13 Law & Contemp. Probs. 2, 22-28 (1948); Paul M. Bator, Hart & Wechsler's The Federal Courts and the Federal System 1052 (2d ed. 1973) (quoting Frank); *see also* Patrick J. Borchers, The Origins of Diversity Jurisdiction, the Rise of Legal Positivism, and a Brave New World for *Erie* and *Klaxon,* 72 Tex. L. Rev. 79, 86-98 (1993) (discussing possible interpretations of the "prejudice" which the diversity grant was designed to counteract). *See generally* Henry J. Friendly, The Historical Basis of Diversity Jurisdiction, 41 Harv. L. Rev. 483 (1928).
In a survey of 600 cases removed to federal court from state court, Neal Miller found that many attorneys continued to fear local bias against out-of-state litigants. Neal Miller, An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction, 41 Am. U. L. Rev. 369, 407-13 (1992).

231 *See* Adrienne J. Marsh, Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts, 48 Brook. L. Rev. 197, 199-200 (1982) (noting that other frequent rationales include making available superior federal courts and encouraging interstate commerce).

232 *See* Friendly, supra note 230, at 495-97 (explaining that diversity jurisdiction was also based on the need to provide stability, given debtor-oriented state legislatures that unduly influenced state court judges).

233 *See* Miller, supra note 230, at 419-20.

234 For a listing of empirical studies on the existence of local bias, see Victor E. Flango, Attorneys' Perspectives on Choice of Forum in Diversity Cases, 25 Akron L. Rev. 41, 42 n.3 (1991).

235 *See* id.; Miller, supra note 230, at 381 n.46 (citing articles addressing attorneys' preference for invoking diversity jurisdiction).

236 Janet Bowermaster, Sympathizing with Solomon: Choosing Between Parents in a Mobile Society, 31 J. Fam. L. 791, 796 (1992-93) (citing Mary Jo Bane & Robert Weiss, Alone Together, the World of Single-Parent Families, 2 Am. Demographics, May 1980, at 11, 12). Professor Bowermaster also notes that 11.5 million children under age 18 change their residences each year. Id. at 795 (citing Bureau of Census, U.S. Dept. of Commerce, Housing Characteristics of Recent Movers: 1989, H121/91-2 Current Housing Reports 1 (1989)).

237 It is interesting that, as in *Barber,* enforcement of an alimony decree may be within the jurisdiction of federal courts, while enforcement of a custody decree may not be.

238 This observation is based on my conversations with local lawyers. *See* Goldstein, supra note 220, at 863 (noting that local litigants are typically advantaged by local judges: "Courts appear particularly reluctant to defer to an out-of-state litigant when the dispute involves a local family or there is an abundance of local evidence."); *see also* Areen, supra note 203, at 652-53 ("Parents who lose the initial [custody] decision often can find a basis for relitigating the issue, particularly in a different jurisdiction."). In the highly controversial DeBoers/Clausen adoption case, both the Michigan and Iowa trial courts decided in favor of the in-state parents. *See* Lucinda Franks, The War for Baby Clausen, The New Yorker, Mar. 22, 1993, at 56.

239 The Act sets out standards for when state courts have jurisdiction to decide child custody.

240 *See* Goldstein, supra note 220, at 854-55 (noting problems with second states refusing to defer to custody orders of entering states); *see, e.g.,* Esser v. Roach, 19 Fam. L. Rptr. (BNA) 1465, 1465-66 (E.D. Va. 1993) (refusing to decide a case involving conflicting state court custody decrees issued in favor of the home state parent).

241 Indeed, the local state and federal courts in *California* and *Thompson* found in favor of the home state parent. Nonetheless, different case outcomes are more probable when there is a choice between two fora. Miller, supra note 230, at 438.

242 Federal judges, of course, may be subject to other influences. *See* Judith Resnik, On the Bias: Feminist Reconsiderations of the Aspirations for our Judges, 61 S. Cal. L. Rev. 1877, 1877 (1988) (citing Wisconsin Supreme Court Justice Shirley S. Abrahamson on the effect of experience upon views of law, life, and decision-making); Cover, supra note 222, at 666-67 (noting that federal and state court judges may come from different "social orders," and may have different ideologies that affect their judging).

243 Another argument, not discussed below, concerns the fear of overwhelming federal courts with additional cases.

244 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78-80 (1938).

245 *E.g.,* Tritle v. Crown Airways, 928 F.2d 81, 84 (4th Cir. 1990) (stating that federal court generally has no authority to suggest expansion of state law); Anderson v. Marathon Petroleum Co., 801 F.2d 936, 942 (7th Cir. 1986) ("[F]ederal court is not the place to press innovative theories of state law."); Afram Export Corp. v. Metallurgiki Halyps, 772 F.2d 1358, 1370 (7th Cir. 1985) ("Federal judges are disinclined to make bold departures in areas of law that we have no responsibility for developing."); Dayton v. Peck, Stow & Wilcox Co., 739 F.2d 690, 694-95 (1st Cir. 1984) (declining to consider innovative theories of state law); *see also* Essex Univ. Corp. v. Yates, 305 F.2d 572, 580 (2d Cir. 1962) (Friendly, J., concurring) (exploring difficulties in predicting state court interpretation of relevant law, and constraints on federal court judges).

246 *See* Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 Harv. L. Rev. 1685, 1702-04 (1976) (quoting the views of Pound and Tribe on principles guiding legislators in deciding whether to apply rules or standards in areas including family law); Murphy, supra note 11, at 210 (explaining that family law is perceived as needing a contextual approach).

247 *See* Resnik, supra note 242, at 1911-12 (noting Carol Gilligan's conclusion that men and women deal differently with conflict). For a thoughtful discussion of the differences between a rule-based and a discretionary approach to child support guidelines, see Karen Czapanskiy, Gender Bias in the Courts: Social Change Strategies, 4 Geo. J. Legal Ethics 1, 9-14 (1990).

248 *See, e.g.,* Leslie Bender, Changing the Values in Tort Law, 25 Tulsa L.J. 759, 771 (1990) ("If women had designed tort remedies, we probably would have done it very differently."); Lucinda M. Finley, A Break in the Silence: Including Women's Issues in a Torts Course, 1 Yale J.L. & Fem. 41, 41-42 (1989) ("'[O]bjective' rules are too often formed by a collection of male perspectives ...."); Resnik, supra note 242, at 1906 ("Women's viewpoints have been submerged, oppressed, invisible, and voiceless.").

249 *See also* Cahn et al., supra note 69, at 1763 (remanding ficticious case with explicit instructions to consider defendants' experiences); Austin Sarat & William L.F. Felstiner, Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer's Office, 98 Yale L.J. 1663, 1668 (1989) (noting that the critical legal studies movement seeks to undermine rule-based formalism).

250 Murphy, supra note 11, at 219.

251 Id. at 220.

252 *See* Czapanskiy, supra note 247, at 20-22 (giving qualified endorsement of fixed child support guidelines).

253 *See* Friedman, supra note 199, at 204-07.

254 *See* Eric Stein, Uniformity and Diversity in a Divided-Power System: The United States' Experience, 61 Wash. L. Rev. 1081, 1092 (1986) ("If there is any field in which one would expect a particularly intimate link between legal norms and local culture, it is family law."); Lynn D. Wardle, Family Law in Practice and Theory, 45 Ohio State L.J. 499, 510 (1984) (describing family law courses as unavoidably local in both substance and procedure). Michael Grossberg traces the development of family law, and focuses on its local nature, in Governing the Hearth 295 (1985). Bruce Hafen explains that domestic relations has been left to the states because the regulation of family life includes social interests beyond the individual and the state, while constitutional law solely concerns the relationship between the individual and the state. Bruce Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy-Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 470 (1983).

255 S. Candice Hoke, Preemption Pathologies and Civic Republican Values, 71 B.U. L. Rev. 685, 710-14 (1991).

256 *See* Sally E. Merry, Getting Justice and Getting Even 173 (1991) (arguing that litigiousness of American society is based on a desire to escape the bonds of community). Professor Katharine Bartlett argues that not only communities be coercive, but a solitary focus on individual rights can be as well. Katharine T. Bartlett, Re-Expressing Parenthood, 98 Yale L.J. 293, 304-05 (1988).

257 *See, e.g.,* Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding state statute criminalizing sodomy, reasoning from tradition and majority sentiments); Dean v. District of Columbia, No. CIV.A.90-13892, 1992 WL 685364, at *4 (D.C. Super. June 2, 1992), *aff'd,* No. 92-CV-737, 1995 WL 21117 (D.C. App., Jan. 19, 1995) (upholding refusal to authorize same-sex marriage, reasoning that it was not a right rooted in history and tradition).

258 *See* Nilda Rimonte, A Question of Culture: Cultural Approval of Violence Against Women in the Pacific-Asian Community and the Cultural Defense, 43 Stan. L. Rev. 1311 (1991); Leti Volpp, (Mis)Identifying Culture: Asian Women and the "Cultural Defense", 17 Harv. Women's L.J. 57 (1994); Elizabeth M. Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse, 67 N.Y.U. L. Rev. 520, 534-35 (1992) (noting that community in which abuse occurs often shapes women's reactions).

259 *E.g.,* Turner v. Safly, 482 U.S. 78, 94-99 (1987) (striking down requirement that inmates get permission for marriage from prison superintendent); Zablocki v. Redhail, 434 U.S. 374, 383-91 (1978) (striking down statute prohibiting marriage of noncustodial parents who have child support obligations); Boddie v. Connecticut, 401 U.S. 371, 374-83 (1971) (striking down statute denying divorce to those who could not pay court fees and costs). I do not mean to suggest that the Supreme Court routinely strikes down state laws affecting the family. Rather, I am arguing that because the Court has found such statutes unconstitutional, state control over the family is not a uniformly positive matter that reflects a benign administration of community norms, nor, for that matter, is family law immune from federal law.

260 Barbara Atwood raised this issue in these terms. Atwood, supra note 156.

261 Federal courts may find it difficult to obtain access to these agencies, which operate on limited budgets and often have substantial backlogs. The financial problems may be surmountable, however, if federal and state courts negotiate payment for the services of the court agencies.
There is also the issue of continuing jurisdiction over child custody and child support issues. Once a decree has been entered, the issuing court generally retains jurisdiction to modify it. Because federal courts themselves do not have social service agencies and a modification of a child custody order may not reach the requisite amount in controversy, this may prove problematic. If, however, such a situation occurs, and the court no longer has jurisdiction, then the party may be forced to bring the modification in state court. Assuming that federal courts can work with state social service agencies, then the continuing jurisdiction issue is capable of resolution; state courts will have easy access to the requisite information.

262 For example, the amount in controversy requirement under diversity jurisdiction might prevent low income people from using the federal courts, thereby perpetuating a hierarchy between state courts for poor people, and federal courts for wealthier ones. If plaintiffs can aggregate claims for child support and alimony, however, this problem largely could be resolved.

263 Ankenbrandt v. Richards, 112 S. Ct. 2206, 2221 (1992); Atwood, supra note 33, at 604-05; Resnik, supra note 1, at 1759 n.384.

264 Atwood, supra note 33, at 604. She suggests that *Burford* abstention may be appropriate for divorce, alimony, and child custody and support cases because these issues are particularly important to the state, that *Younger* abstention is useful in preventing courts from entering injunctions with respect to pending state court domestic relations proceedings, that *Colorado River* allows abstention when there is simultaneous state court litigation on the same issues between the parties, and that *Pullman* abstention may be appropriate where the litigant seeks a ruling on a constitutional claim before state courts have had the opportunity to resolve a question of state law that may be dispositive of the constitutional claim. Id. at 605-17.

265 Id. at 618-19.

266 Burford v. Sun Oil Co., 319 U.S. 315 (1943). This was the abstention doctrine to which the *Ankenbrandt* opinion referred as being relevant to domestic relations cases even beyond divorce, custody, and alimony. 112 S. Ct. at 2216; *see* supra notes 195, 264 and accompanying text.

267 For an excellent discussion of the problems with *Burford* abstention in the domestic relations area, see Atwood, supra note 33, at 606-11.

268 For example, in a post-*Ankenbrandt* decision, the Second Circuit upheld the use of *Burford* abstention in a tort action for interference with custody, even though many other federal courts had allowed similar cases to proceed. R. Minot v. Eckardt-Minot, 13 F.3d 590, 593-95 (2d Cir. 1994).

269 Resnik, supra note 1, at 1758; *see* Resnik, supra note 147, at 1190 n.41 (noting need to determine how federal and state courts should share jurisdiction).

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