

# Is the Family a Federal Question?

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## *Abstract*

*There has long been conflict over the relationship between the states and the federal system vis-à-vis the family. The traditional account of domestic relations describes family law as the exclusive domain of the states, and federal courts have credited this account in the "domestic relations exception." Although scholars have analyzed and critiqued the exception's applicability to diversity jurisdiction, the intersection of federal question jurisdiction and this exception remains largely unexplored. This Article describes and critiques, on both instrumental and deeper normative terms, federal courts' willingness to expand the "domestic relations exception" to include federal question cases.*

*The Article proceeds in three parts. In Part II, I describe the emerging trend in federal courts of avoiding decision on federal questions implicating the family, either by expanding the domestic relations exception, or by using other avoidance doctrines as proxies to accomplish the same result. I also explain how Supreme Court dicta in *Elk Grove Independent School District v. Newdow* has exacerbated this trend. In Part III, I assess critically how and why federal courts are avoiding these questions, considering the potential doctrinal and policy bases for an expansive exception, and evaluating its potential scope. I conclude that there is no principled doctrinal or policy basis for an expanded domestic relations exception that includes federal questions.*

*Part IV shifts to a more normative perspective, evaluating whether federal courts should defer to the states when facing federal questions affecting the*

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\* Acting Assistant Professor, New York University School of Law. For their insightful comments on earlier drafts, I thank Kerry Abrams, Mary Anne Case, Nestor Davidson, Peggy Cooper Davis, Robert Ferguson, Barry Friedman, Martin Guggenheim, Pratheepan Gulasekaram, Helen Hershkoff, Clare Huntington, Risa Kaufman, Ben Kingsley, Caren Myers Morrison, Melissa Murray, Burt Neuborne, Carol Sanger, Colin Starger, Jonathan Todres, and my colleagues in the Lawyering Faculty Scholarship Colloquium. I am also grateful for the generous feedback I received from faculty members during the AALS faculty recruitment process. Julie Martin, Natasha Merle, Vanessa Pai-Thompson, Joseph Snee, Zachary Wool, and particularly Caroline Waldner provided excellent research assistance. I also thank the editors of the *Washington and Lee Law Review* for their thorough editing of the piece. Thanks, especially, to my family.

family. Here, I argue that there is instrumental and normative value in preserving a federal forum. I also maintain that, because an expanded domestic relations exception would subordinate litigants, cause expressive harm, and potentially trigger negative cultural consequences, federal courts should resist expansion. The Article concludes by reflecting on the implications of my analysis and emphasizes the important role of federal courts in supporting, empowering, and protecting contemporary American families.

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The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the United States.

-United States Supreme Court

*In re Burrus*,<sup>1</sup> 1890

[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition.

-United States Supreme Court

*Smith v. Organization of Foster Families for Equality and Reform*,<sup>2</sup> 1977

[T]he Court's duty to refrain from interfering with state answers to domestic relations questions has never required that the Court should blink at clear constitutional violations . . . .

-United States Supreme Court

*Santosky v. Kramer*,<sup>3</sup> 1982

### I. Introduction

What if, rather than considering the constitutionality of Virginia's anti-miscegenation law or a Florida custody decision based on race, a federal court had dismissed *Loving v. Virginia*<sup>4</sup> or *Palmore v. Sidoti*,<sup>5</sup> and observed that "in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts?"<sup>6</sup> What message might such a ruling have sent to the states and society about the relative importance of family liberty? How might constitutional rights of the family have developed in response to such a ruling? Would piecemeal decisions at the state-court level have had the same symbolic and unifying power? In light of increasing federal

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1. 136 U.S. 586, 593–94 (1890).

2. 431 U.S. 816, 845 (1977) (internal quotations omitted).

3. 455 U.S. 745, 768 n.18 (1982) (internal quotations omitted).

4. 388 U.S. 1, 11–12 (1967) (finding statute that restricts freedom to marry solely on racial classifications violated central meaning of Equal Protection Clause).

5. 466 U.S. 429, 434 (1984) (finding that effects of racial prejudice did not justify removing infant from custody of natural mother if mother is found fit to have such custody).

6. *Elk Grove Indep. Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004).

court reluctance to hear federal questions implicating the family, this Article considers these questions for future family law cases raising federal questions.<sup>7</sup>

The relationship between the states and the federal system vis-à-vis the family has been perennially vexed. There have long been deep clashes over the role of federal courts in domestic relations, and historically they have had an uneasy relationship with the substance of family law.<sup>8</sup> A longstanding legal narrative describes family law as a quintessentially state issue. This narrative is informed by the more general phenomenon of "family law exceptionalism": The view that the family and family law are—or should be—unique and exceptional.<sup>9</sup> The paradigmatic example is the "Domestic Relations Exception," which creates an exception to diversity jurisdiction when litigants seek divorce, custody, or support decrees.<sup>10</sup>

But despite this persistent account of family law, federal courts regularly have considered federal question cases implicating the family.<sup>11</sup> Over the last

7. This hypothetical, of course, does not precisely capture the problem presented in this Article, because both *Loving* and *Palmore* originated in state court. *Palmore v. Sidoti*, 466 U.S. 429, 430 (1984); *Loving v. Virginia*, 388 U.S. 1, 3–4 (1966). But many significant Supreme Court cases concerning constitutional family law rights in fact originated in the lower federal courts. *See, e.g., Zablocki v. Redhail*, 434 U.S. 374, 376 (1978) (originating in U.S. District Court for Eastern District of Wisconsin); *Carey v. Population Servs. Int'l*, 431 U.S. 678, 681–82 (1977) (originating in U.S. District Court for Southern District of New York); *Roe v. Wade*, 410 U.S. 113, 116, 120 (1973) (originating in U.S. District Court for Northern District of Texas); *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972) (originating in U.S. District Court for District of Massachusetts); *Boddie v. Connecticut*, 401 U.S. 371, 372 (1971) (originating in U.S. District Court for District of Connecticut); *Pierce v. Society of Sisters*, 268 U.S. 510, 510 (1925) (originating in U.S. District Court for District of Oregon).

8. *See* Jill Elaine Hasday, *Federalism & the Family Reconstructed*, 45 UCLA L. REV. 1297, 1298 (1998) ("Throughout the debate on federalism, family law emerges as the one clear case in which federal involvement is inappropriate . . ."). Although the meaning of "family law" is contested, for the purposes of this Article, I rely on Jill Hasday's definition: Family law determines what constitutes a family and who may be family members. *Id.* at 1372. It structures the creation and dissolution of family relationships, including marriage, divorce, annulment, alimony, child support, custody, property division, paternity, and the termination of parental rights. *Id.* at 1373. It establishes the rights and obligations family members have because of their family status. *Id.* Here, I will use the terms "family law" and "domestic relations" interchangeably.

9. *See* Press Release, Program on Law & Soc. Thought & the European Law Soc., Harvard Law Sch., Up Against Family Law Exceptionalism, A Conference (Feb. 2007), available at <http://www.law.harvard.edu/faculty/jhalley/plst/UAFLEprogram2.07.pdf> (describing some reasons why "[f]amily and family law are often treated as exceptional").

10. *See generally* *Ankenbrandt v. Richards*, 504 U.S. 689 (1992).

11. *Cf.* Martha A. Field, Comment, *Garcia v. San Antonio Metropolitan Metro Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 100 (1985) (explaining that Reconstruction Amendments, which include the Fourteenth Amendment, "have transformed the everyday concerns of citizens from matters exclusively of state regulation to matters also within the federal sphere").

century, the Supreme Court has introduced and refined the concept of family liberty: "marriage, procreation, contraception, family relationships, child rearing, and education . . . involve[] . . . choices central to personal dignity and autonomy, [and] are central to the liberty protected by the Fourteenth Amendment."<sup>12</sup> These developments have been important, not only for the evolution of constitutional family law, but also for the development of constitutional law more generally, particularly substantive due process.

The Supreme Court has decided numerous constitutional questions relating to the family—about who can marry, who can have sex, who can procreate or choose not to procreate, and the rights of parents and children<sup>13</sup>—frequently acting as a check on state prerogatives. The Court established the fundamental right to marry, striking down laws prohibiting interracial marriage,<sup>14</sup> prohibiting marriage for those behind on child support obligations,<sup>15</sup> or placing unreasonable burdens on the availability of divorce.<sup>16</sup> The Court also recognized constitutional protection for personal decisions relating to procreation and contraception, striking down state laws imposing compulsory sterilization,<sup>17</sup> prohibiting contraception and abortion,<sup>18</sup> and prohibiting sexual

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12. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (citation omitted).

13. *See Developments in the Law: The Constitution & the Family*, 93 HARV. L. REV. 1156, 1161–66 (1980) [hereinafter *The Constitution & the Family*] (providing general overview of cases in which Supreme Court established constitutional protection of family rights).

14. *Loving v. Virginia*, 388 U.S. 1, 2 (1966).

15. *See Zablocki v. Redhail*, 434 U.S. 374, 375–77 (1978) (affirming lower court's decision to find unconstitutional Wisconsin statute that prohibited marriage for those behind on child support obligations).

16. *See Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (finding unconstitutional state statute requiring payment of fees and costs to institute divorce proceedings). However, the Court has not always considered challenges to state marriage legislation to present a federal question. *See Baker v. Nelson*, 409 U.S. 810, 810 (1972) (refusing to grant certiorari in appeal of Minnesota Supreme Court's ruling that Minnesota's statute prohibiting same-sex marriage did not violate Constitution, on basis of want of substantial federal question).

17. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541–42 (1942) (finding Oklahoma statute that provided for sterilization for some individuals convicted of two or more felonies violated Equal Protection Clause of Fourteenth Amendment), *remanded to* 155 P.2d 715 (Okla. 1945).

18. *See, e.g., Carey v. Population Servs., Int'l* 431 U.S. 678, 681–82 (1977) (affirming unconstitutionality of state statute that restricted advertisement and sale of contraceptives); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (concluding "that the right of personal privacy includes the abortion decision"); *Eisenstadt v. Baird*, 405 U.S. 438, 440 (1972) (affirming lower court decision to declare as unconstitutional Massachusetts state statute that restricted sale of contraceptives); *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (finding laws prohibiting use of contraceptives violate married couple's right to privacy under Fourth Amendment).

activity between same-sex partners.<sup>19</sup> The Court further acknowledged fundamental rights in the areas of child custody, child rearing, and the rights of children. It invalidated state actions dictating parental choices about education,<sup>20</sup> making custody decisions based on race,<sup>21</sup> terminating parental rights,<sup>22</sup> and establishing rights for unwed fathers<sup>23</sup> and children born outside of marriage.<sup>24</sup> Some of these decisions have recognized rights outside the traditional, nuclear family form of husband, wife, and child.<sup>25</sup>

Yet despite these developments at the federal constitutional level, the tension over the role of the federal system in domestic relations persists. Congress passed the Defense of Marriage Act in 1996 which, among other things, establishes a federal definition of "marriage" and "spouse."<sup>26</sup> But Congress has been less comfortable with federal involvement at the judicial level: In recent years Congress has attempted to pass jurisdiction-stripping legislation to prevent federal court review of fundamental family rights.<sup>27</sup> And

19. See *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (finding that liberty interest protected by Due Process Clause of Fourteenth Amendment protects sexual activity between same-sex partners).

20. See *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925) (finding that Oregon Compulsory Education Act, which required parents to send children to certain public schools, "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer v. Nebraska*, 262 U.S. 390, 402–03 (1923) (finding that Nebraska state law that prohibited teaching any modern language other than English to children was an unconstitutional infringement upon liberty rights protected under Fourteenth Amendment).

21. *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984).

22. See *Santosky v. Kramer*, 455 U.S. 745, 753–54 (1982) (vacating application of New York statute that terminated parental rights of parents as violative of parents’ liberty interest protected by Due Process Clause).

23. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (holding that under Due Process Clause of Fourteenth Amendment, unwed father was entitled to hearing on parental fitness before children were declared dependents of state after mother’s death).

24. See *Levy v. Louisiana*, 391 U.S. 68, 71–72 (1967) (finding that Louisiana state statute construed to deny right of recovery by illegitimate children violated Equal Protection Clause of Fourteenth Amendment).

25. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (expanding protection to sexual relations between same-sex partners); *Carey v. Population Servs., Int’l* 431 U.S. 678, 681–82 (1977) (allowing for distribution of contraception to minors); *Moore v. City of E. Cleveland*, 431 U.S. 494, 510–12 (1977) (expanding definition of "family" to include grandmother living with grandchildren); *Stanley*, 405 U.S. at 658 (recognizing constitutional rights of unwed fathers); *Levy*, 391 U.S. at 75–76 (prohibiting discrimination against children born outside of marriage).

26. 1 U.S.C. § 7 (2006).

27. See, e.g., We the People Act, H.R. 300, 110th Cong. § 3(1)(B) (2007) (removing federal court jurisdiction to adjudicate "any claim based upon the right of privacy, including any such claim related to any issue of sexual practices, orientation, or reproduction"); We the People

conversely, the federal courts have struck down Congressional attempts to regulate aspects of domestic relations.<sup>28</sup> Now, there are signs that the federal courts themselves are poised to strip their own jurisdiction: Relying on procedural avoidance doctrines and recent Supreme Court language in *Elk Grove v. Newdow*,<sup>29</sup> federal courts are limiting their review of federal question cases that involve family law.

Although scholars have analyzed and critiqued the domestic relations exception to diversity jurisdiction,<sup>30</sup> the intersection of *federal question*

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Act, H.R. 4379, 109th Cong. § 2(7) (2005) ("Supreme Court and lower Federal court decisions striking down local laws on subjects such as religious liberty, sexual orientation, family relations, education, and abortion have wrested from State and local governments issues reserved to the States and the People."); Marriage Protection Act of 2004, H.R. 3313, 108th Cong. § 2(a) (2004) (eliminating federal court jurisdiction to interpret the Defense of Marriage Act, which says no state need accord full faith and credit to a same-sex relationship as marriage even if considered marriage in another state); Life-Protecting Judicial Limitation Act of 2003, H.R. 1546, 108th Cong. § 2(a) (2003) (eliminating federal court jurisdiction over "any abortion-related case").

28. See, e.g., *United States v. Morrison*, 529 U.S. 598, 627 (2000) (finding that Congress lacked authority under Commerce Clause or Section 5 of Fourteenth Amendment to pass statute providing civil remedy for victims of gender-motivated violence); *Thompson v. Thompson*, 484 U.S. 174, 186 n.4 (1988) (finding that Parental Kidnapping Prevention Act of 1980 does not imply federal cause of action).

29. 542 U.S. 1 (2004).

30. See, e.g., Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 627–28 (1984) (advocating use of abstention to limit domestic relations cases heard in federal court); Sharon Elizabeth Rush, *Domestic Relations Law: Federal Jurisdiction & State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 26–27 (1984) (advocating using traditional abstention doctrines in domestic relations cases in combination with general abstention based on principles of comity and federalism); Allan D. Vestal & David L. Foster, *Implied Limitations on the Diversity Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1, 23–31 (1956) (arguing that federal courts should only limit their jurisdiction in domestic cases in which status is involved); Barbara Freedman Wand, *A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction*, 30 VILL. L. REV. 307, 385–87 (1985) (calling for wholesale repudiation of exception). Later commentary focused a feminist critique on the exception, noting that it institutionalized discrimination against the family and reflected institutional sexism within the federal system. See Libby S. Adler, *Federalism and Family*, 8 COLUM. J. GENDER & L. 197, 199 (1999) (arguing that investment in state control over family is incidental to legal culture's larger investment in preserving family's place in private sphere); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1125–26 (1994) (characterizing exception as "discrimination" against domestic relations); Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1690–96 (2001) [hereinafter Resnik, *Naturally*] (arguing that domestic relations exception is no longer an accurate descriptor, and advocating new theories of state and federal jurisdiction that recognize both state and federal involvement).

More recently, the scholarship has focused less on federal court jurisdiction than on federal regulation in the area of domestic relations. See, e.g., Sylvia Law, *Families and Federalism*, 4 WASH. U. J.L. & POL'Y 175, 186–220 (2000) (examining propriety of federal regulation over

*jurisdiction* and family law has not been explored in descriptive or normative depth.<sup>31</sup> This Article fills that gap by uncovering a broad and unrecognized trend among federal courts: The stealth expansion of the domestic relations exception to include federal questions.

The consequences of expansion are significant. Expanding the exception to federal questions undermines the value in preserving a federal forum for family law cases raising federal questions. Using the domestic relations exception to bar consideration of federal questions in federal court may increase the possibility that state courts will decline to extend important federal family rights or, worse yet, undermine them knowing their decisions will never be reviewed by the Supreme Court. And an expanded exception would subordinate family law litigants because of the content of the federal questions

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particular areas of family law); Judith Resnik, Essay, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 619–26 (2002) [hereinafter Resnik, *Essay*] (eschewing "categorical federalism," which assumes one particular rule of law applies to singular type of human action, relies on category to identify locus of control, and presumes exclusive control; advocating "multi-faceted" federalism, which refuses to ascribe singular identity to particular law or case). One exception to this trend is Michael Stein's piece, written after the Supreme Court issued *Ankenbrandt v. Richards*, 504 U.S. 689 (1992). See Michael Ashley Stein, *The Domestic Relations Exception: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 671 (1995) (proposing "new form of abstention whose application would exclude from federal review all core cases as well as suits raising difficult issues of unresolved state law"). And several notable recent articles have examined the historical underpinnings of the exception. See Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1815–42 (2005) (surveying and analyzing early examples of federal involvement in domestic relations cases); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 871–84 (2004) (challenging conventional "canon" of family law in federalism jurisprudence); Hasday, *supra* note 8, at 1298 (challenging "existence of an exclusively local tradition in family law and the uncritical use of historical claims in federalism discourse").

31. A few early articles touched briefly on the issue but seemed to assume, like most commentators, that the exception applied only to diversity jurisdiction, and did not treat the issue in depth. See Atwood, *supra* note 30, at 625–27 (arguing that exception is "wholly inappropriate in actions founded on a federal question"); Rush, *supra* note 30, at 20 (arguing that domestic relations cases raising federal questions should be treated like all other such cases); Wand, *supra* note 30, at 393 (emphasizing importance of federal forum when domestic relations case raises federal question). One student article in the 1980s treated the issue of federal question jurisdiction in slightly more detail. See Bonnie Moore, Comment, *Federal Jurisdiction & the Domestic Relations Exception: A Search for Parameters*, 31 UCLA L. REV. 843, 864–71, 876–83 (1984) (surveying courts' application of exception in federal question cases as of 1984, and proposing that courts analyze federal question domestic relations cases just as they do other federal questions); see also Michael B. Mushlin, *Unsafe Havens: The Case for Constitutional Protection of Foster Children from Abuse and Neglect*, 23 HARV. C.R.-C.L. L. REV. 199, 270 (1988) ("The domestic relations limitation, of dubious validity even in diversity cases, is wholly inappropriate in actions founded on a federal question." (quoting Atwood, *supra* note 30, at 626)).



raised, critically testing fundamental concepts of equality and antisubordination.

Beyond these direct consequences, this expansion causes expressive harm and has cultural implications. An expanded exception manifests an attitude that federal family law questions and litigants are less important or worthy than other federal questions. This expressive message lowers the status of these issues, reinforcing the inferior status of family law issues vis-à-vis the federal courts, and assuring the continued marginalization of family law.

This Article proceeds in three parts. Part II describes the current trend toward a domestic relations exception to federal question jurisdiction. Part III then analyzes the possible doctrinal bases and policy justifications for an expanded exception. In this Part, I conclude that there is no principled, existing doctrinal basis for expansion, and that the policy considerations animating the diversity exception do not similarly justify expansion to the federal question context.

Part IV moves beyond whether federal courts *can* find a principled basis for expanding the exception and considers whether they *should*. Part IV begins by situating the question within the larger debate about the necessity of a federal forum to vindicate federal rights, and considers the instrumental and normative values of the federal forum. This Part argues that because of the causal, expressive, and cultural consequences of expansion, it is imperative that a federal forum remain available to protect fundamental rights of the family.

In addition to exposing this emerging trend in the federal courts, the Article makes two important contributions. First, the Article provides perspective on how relationships between and among the state and federal systems can best balance personal autonomy and state prerogatives for families and family members. Second, by exploring the expressive and cultural consequences of expansion, this Article provides fresh reasons to examine critically the "family law exceptionalism" thesis, rather than embrace it as a normative matter. Especially in a time of dynamic changes within the family—of post-nuclear families and alternative family forms<sup>32</sup>—the work of protecting contemporary American families is work the federal courts must not avoid.

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32. Family compositions have become increasingly complex and include unmarried cohabitants, "blended" families with stepchildren, and grandparents raising their grandchildren. Michelle Harris, Note, *Why a Limited Family Maintenance System Could Help American "Grandfamilies": A Response to Kristine Knaplund's Article on Intestacy Laws & Their Implications for Grandparents Raising Grandchildren*, 3 NAT'L ACAD. OF ELDER L. ATT'YS J. 239, 258 (2007). As of 2005, 63% of children were growing up with both biological parents. *U.S. Divorce Statistics*, DIVORCE MAGAZINE.COM, <http://www.divorcemag.com/statistics/statsUS.shtml> (last visited Feb. 10, 2009) (on file with the Washington & Lee Law Review). And the percentage of children living with two married parents is in decline, from 77% in 1980

## II. Family Law in the Federal Courts

Family law issues arise in federal court in all areas of subject matter jurisdiction: federal question, diversity, supplemental, removal, and—at the Supreme Court level—certiorari review of final judgments of a state’s highest court or a federal appellate court decision.

Federal courts have considered their role in domestic relations cases most frequently and extensively in the context of the domestic relations exception to diversity jurisdiction. The central premise of the exception is that “[t]he whole subject of domestic relations of husband and wife, parent and child, belongs to the laws of the states and not to the United States.”<sup>33</sup> Although seemingly powerful, this language originally appeared as dicta, often cited in cases in which the Supreme Court actually sustained federal court jurisdiction over domestic relations matters.<sup>34</sup>

The rhetoric nevertheless has had considerable traction, particularly among these lower federal courts. The doctrine flourished largely as a creature

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to 67.8% in 2007. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, ANNUAL SOCIAL AND ECONOMIC SUPPLEMENTS, FAMILIES AND LIVING ARRANGEMENT REPORTS, tbl. FAM1.A (1980–2007), available at <http://childstats.gov/americaschildren/tables/fam1a.asp>. As of 2000, more than one in four families with children under eighteen were headed by a single parent, and three out of four of these families were headed by the mother. U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS, 6–7 & tbl.4 (2001), available at <http://www.census.gov/prod/2001pubs/p20-537.pdf>. But men, also, increasingly are becoming single fathers. See, e.g., Mireya Navarro, *The Bachelor Life Includes a Family*, N.Y. TIMES, Sept. 7, 2008, at ST1 (“Statistics on single fathers by choice are few, but there are indications that while they make up a sliver of the demographic pie, their numbers are growing.”). Recent studies estimate anywhere from 1.6 to 14 million children with a gay or lesbian parent. Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 164 (2001); see also GERRY J. GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 5 (2007), available at [www.Urban.org/UploadedPDF/411437\\_Adoption\\_Foster\\_Care.pdf](http://www.Urban.org/UploadedPDF/411437_Adoption_Foster_Care.pdf) (“[Recent datasets] show that many lesbians and gay men are already raising children and many more GLP people would like to have children at some point.”). The divorce rate is in decline compared to the late Twentieth century, but there are 5.5 million unmarried couples living together, 89% of which are male-female. U.S. *Divorce Statistics*, *supra*. Finally, according to the latest census data, same-sex partner households exist in 99.3% of all counties in the United States. Nancy J. Knauer, *Same-Sex Marriage & Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 421, 421 (2008).

33. *In re Burrus*, 136 U.S. 586, 593–94 (1890).

34. Although first articulated in 1859, the Court did not rely on this justification for a holding, as opposed to dicta, until 1930. See *Atwood*, *supra* note 30, at 575–76 (“In the half dozen cases that constitute the source of the domestic relations exception, the Supreme Court suggested in dicta that the federal courts lacked authority to grant divorces, award alimony, or determine child custody. The actual holdings in these cases established a much narrower limitation on federal jurisdiction.”); see also *Ankenbrandt v. Richards*, 504 U.S. 689, 694 (1992) (noting that language in *Barber*, first announcing exception, was “technically dicta”) (citing *Barber v. Barber*, 62 U.S. 582, 584 (1858)).

of these lower courts and—without Supreme Court guidance on the exception's parameters and rationales—became confused and incoherent.<sup>35</sup> Some lower federal courts applied the exception expansively to exclude a broad variety of domestic relations issues from federal review, while other lower courts construed the doctrine narrowly to bar only divorce, custody, and alimony decrees.<sup>36</sup>

The Supreme Court finally considered the doctrine's scope explicitly in *Ankenbrandt v. Richards*,<sup>37</sup> a 1992 case in which a mother had sued her children's father and his partner in diversity for alleged sexual and physical abuse of her children.<sup>38</sup> Despite the breadth of the rhetoric associated with the exception, the Court construed the doctrine narrowly: In what was again arguably dicta,<sup>39</sup> the Court characterized the exception as a limitation on the federal diversity statute, divesting the federal courts of diversity jurisdiction only to issue divorce, alimony, and child custody decrees.<sup>40</sup> By contrast,

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35. See *Ankenbrandt*, 504 U.S. at 692 n.2 (documenting circuit split on applicability of domestic relations exception to tort suits); see also Atwood, *supra* note 30, at 573 ("The Supreme Court has never squarely endorsed a broad jurisdictional exception for domestic relations cases. The doctrine is largely the creation of the lower courts, and, as such, is poorly defined and unevenly applied."); Stein, *supra* note 30, at 671 (noting that "[t]he [Supreme Court] . . . failed to address whether domestic federal exception claims are exempt from district court review" and therefore "the lower federal courts have been left without clear guidance on how to resolve their inconsistent and conflicting approaches to the domestic relations exception"); Anthony B. Ullman, Note, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 83 COLUM. L. REV. 1824, 1825 (1983) (noting that lack of guidance by Supreme Court regarding domestic relations exception resulted in divergent treatment of exception by lower courts); Wand, *supra* note 30, at 325–33 (discussing lower court interpretations of domestic relations exception).

36. See, e.g., *Ankenbrandt*, 504 U.S. at 703 n.6 ("The better reasoned views among the Courts of Appeals have similarly stated the domestic relations exception as narrowly confined to suits for divorce, alimony, or child custody decrees.") (citations omitted); Rush, *supra* note 30, at 7 ("The lower federal courts, however, have considered the exception in a number of contexts. Some courts have interpreted the exception narrowly, while other courts have seen it as a broad exception to federal jurisdiction."); Wand, *supra* note 30, at 326–28 (acknowledging and discussing various interpretations lower federal courts have taken on domestic relations exception).

37. 504 U.S. 689 (1992).

38. *Id.* at 691. The trial court dismissed pursuant to the domestic relations exception and abstained under *Younger v. Harris*, 401 U.S. 37 (1971); the Fifth Circuit affirmed. *Id.* at 692. The Supreme Court granted certiorari to consider whether a domestic relations exception existed, and whether the exception permitted abstention from exercising diversity jurisdiction over a tort action for damages. *Id.*

39. See *id.* at 718 (Stevens, J., concurring) ("I would leave for another day consideration of whether any domestic relations cases necessarily fall outside of the jurisdiction of the federal courts and of what, if any, principle would justify such an exception to federal jurisdiction.").

40. *Id.* at 703.

"claims of a kind traditionally adjudicated in federal courts . . . [were] not excepted from federal court jurisdiction simply because they ar[o]se in a domestic relations context."<sup>41</sup>

Both before and after *Ankenbrandt*, some lower federal courts have viewed the domestic relations exception expansively. As the body of federal constitutional decisions affecting families has grown, the federal courts increasingly have faced federal question claims relating to domestic relations—in particular, constitutional challenges to state action pursuant to Section 1983.<sup>42</sup> These claims, of course, differ in important ways from the state law questions that come to federal court via diversity jurisdiction: They are raising federal constitutional claims.<sup>43</sup>

Nevertheless, some federal courts have been declining consideration of these claims or significantly narrowing review of them. At times, the courts have avoided federal questions about the family via existing abstention doctrines, the *Rooker-Feldman* doctrine,<sup>44</sup> or preclusion doctrines, and at times this avoidance has been consonant with the principles underlying these doctrines. In other instances, however, these

41. *City of Chi. v. Int'l Coll. of Surgeons*, 522 U.S. 156, 190 n.6 (1997) (Ginsburg, J., dissenting).

42. *See* 42 U.S.C. § 1983 (2000 & Supp. V 2005) (creating federal cause of action to vindicate constitutional rights); *Flood v. Braaten*, 727 F.2d 303, 307 n.17 (3d Cir. 1984) (observing that, given Supreme Court's modern recognition of family law rights of constitutional dimension, "it would be difficult to maintain that the domestic relations exception extends to all sources of jurisdiction").

43. As some have persuasively argued, the federal courts have a special role and responsibility as guarantors of federal, constitutional rights; it is one of their "essential functions" by constitutional design. *See, e.g.*, ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 47 (5th ed. 2007); Lawrence G. Sager, *The Supreme Court 1980 Term, Forward: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 HARV. L. REV. 17 (1981). Akhil Amar argues that the structure of the Constitution itself dictates that a federal forum be available to vindicate federal, constitutional rights. Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 650 (1991). This special role becomes more salient when considered in the context of Congress's purpose in enacting Section 1983. "The very purpose of 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights . . ." *Mitchum v. Foster*, 407 U.S. 225, 242 (1977).

44. *See* D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983) ("[United States District Courts] do not have jurisdiction . . . over challenges to state court decisions in particular cases arising out of judicial proceedings even if those challenges allege that the state court's action was unconstitutional."); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415–16 (1923) (finding that federal district court had no power to declare judgment of state supreme court void on theory that state supreme court violated provisions of Constitution).

doctrines have served as proxies for an expanded form of the domestic relations exception.<sup>45</sup>

Even more significant, as the federal courts have faced increasing federal question litigation in the area of family law, a trend has emerged: The extension of the domestic relations exception to federal questions, either through a blanket expansion of the doctrine's scope, or by domestic relations "abstention." In the midst of this development, the Supreme Court took up the relationship between the federal courts and family law in *Newdow*, providing—perhaps unwittingly—powerful language supporting a domestic relations exception for federal questions.

In this Part, I provide an overview of this trend, and describe the ways in which federal courts are addressing federal question cases implicating the family. In Part III, I assess critically how and why the federal courts might be avoiding these federal questions.

#### A. Avoiding the Federal Question

Although the diversity exception has received considerably more play in the case law and commentary, questions of federal jurisdiction and domestic relations matters have never been limited to diversity actions. Several of the earliest cases establishing the exception were in fact federal question cases in which the Supreme Court sustained jurisdiction.<sup>46</sup>

Family law issues arise in federal question cases in a number of ways. Sometimes they exist as either antecedent or supplemental to other federal statutory or constitutional cases, in which a family law determination may be a necessary prerequisite to deciding the federal question. And federal courts frequently are called upon to decide family law issues while answering federal statutory questions in fields like bankruptcy,<sup>47</sup>

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45. *Infra* note 323.

46. Few of what are regarded as the foundational cases arose in the context of diversity jurisdiction. *Compare* *Barber v. Barber*, 62 U.S. 582, 583–84 (1859) (noting that federal jurisdiction arose under diversity jurisdiction), *with* *Ohio ex rel. Popvici v. Agler*, 280 U.S. 379, 382 (1930) (coming before Court on writ of certiorari from Ohio Supreme Court, although federal law was at issue), *De La Rama v. De La Rama*, 201 U.S. 303, 308 (1906) (arising under federal courts' statutory jurisdiction over territorial courts), *Simms v. Simms*, 175 U.S. 162, 168–69 (1899) (arising under federal courts' statutory jurisdiction over the territorial courts), *Perrine v. Slack*, 164 U.S. 452, 453 (1896) (noting that jurisdiction arose pursuant to federal habeas corpus jurisdiction), *and In re Burrus*, 136 U.S. 586, 596–97 (1890) (noting that jurisdiction arose pursuant to federal habeas corpus jurisdiction).

47. *See, e.g.*, 11 U.S.C. § 523(a)(5), (15) (2006) (mandating that domestic support obligations and other debts to spouses, former spouses, and children incurred in domestic

ERISA,<sup>48</sup> and criminal law,<sup>49</sup> as well as when construing federal statutes that expressly implicate domestic relations.<sup>50</sup>

Finally, and most significant for my analysis here, federal courts consider a range of federal constitutional challenges to various state actions affecting families. In general, this range of cases includes procedural due process challenges to state proceedings determining family status, property, custody, or visitation rights; equal protection or due process challenges to official policies regarding custody or visitation rights impacting a particular subclass of citizens; and equal protection or substantive due process challenges to state statutes and regulations affecting marriage, divorce, or child custody/visitation.<sup>51</sup>

Court positions on federal questions have been no more coherent than their consideration of diversity actions and they have noted that the scope of the doctrine is an open question.<sup>52</sup> In the context of statutory federal questions, for example, courts have differed on whether family members could invoke federal habeas corpus jurisdiction over domestic relations disputes,<sup>53</sup> whether the

relations proceedings are not dischargeable in bankruptcy); *see generally* Meredith Johnson, Note, *At the Intersection of Bankruptcy & Divorce: Property Division Debts Under the Bankruptcy Reform Act of 1994*, 97 COLUM. L. REV. 91 (1997) (critiquing bankruptcy law's negative impact on family law issues).

48. *See* Employee Retirement Income Security Act, 29 U.S.C. §§ 1001–1461 (2000 & Supp. V 2005) (providing protection for employees' retirement plans).

49. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 5H1.6 (2007 & Supp. 2008) (stating that family ties are not normally relevant to departure from guidelines, but any such departure requires presence of four circumstances relating to loss of caretaking or financial support).

50. *See, e.g.*, Violence Against Women Act (VAWA), 42 U.S.C. § 13981 (2000 & Supp. V 2005) (creating federal civil rights remedy for gender motivated crimes); *see also* United States v. Morrison, 529 U.S. 598, 627 (2000) (invalidating VAWA's federal civil rights remedy); *supra* note 28 and accompanying text (discussing Court's reasons for striking down the statute in *Morrison*).

51. Atwood, *supra* note 30, at 626. As I discuss, *infra*, to the extent these cases involve challenges to prior or ongoing state proceedings, a variety of federal courts doctrines frequently will operate to preclude review at the federal level.

52. *See, e.g.*, Mandel v. Town of Orleans, 326 F.3d 267, 271 (1st Cir. 2003) ("[T]he courts are divided as to whether the doctrine is limited to diversity claims and this court has never decided that issue."). The Seventh Circuit wrote:

Modern federal constitutional law is so encompassing . . . that parties to domestic relations disputes are sometimes tempted to try to transform a routine domestic relations dispute into a federal case by clothing it in a federal constitutional garb, unmindful of the subtle doctrines that have evolved to prevent that kind of federal power grab.

Newman v. Indiana, 129 F.3d 937, 939 (7th Cir. 1997).

53. *Compare* Fernos-Lopez v. Figarella Lopez, 929 F.2d 20, 22–23 (1st Cir. 1991) (refusing to apply exception because suit was not diversity case and case did not necessitate delving into parties' domestic affairs), *and* Rowell v. Oesterle, 626 F.2d 437, 438 (5th Cir.

Parental Kidnapping Prevention Act (PKPA) created a private right of action,<sup>54</sup> and on the constitutionality of the Child Support Recovery Act (CSRA).<sup>55</sup> Some courts have invoked the domestic relations exception to dismiss such cases,<sup>56</sup> others have not.<sup>57</sup> Courts also have disagreed about when they should

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1980) (noting that exception "has not operated to bar review of constitutional issues, simply because those issues arise in 'domestic' context") (citations omitted), *with Hemon v. Office of Pub. Guardian*, 878 F.2d 13, 14–15 (1st Cir. 1989) (noting long-standing policy of exception extends to entire field of domestic relations and denying federal habeas jurisdiction to review guardianship status), *and Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1113 (1st Cir. 1978) (stating that child custody rulings do not trigger federal habeas cause of action); *see also Huynh Thi Anh v. Levi*, 586 F.2d 625, 632–33 (6th Cir. 1978) (refusing federal court jurisdiction over action brought by grandmother and uncle of Vietnamese children who had been brought to this country and placed with foster parents because grandmother's and uncle's state remedies were adequate); *Tree Top v. Smith*, 577 F.2d 519, 521 (9th Cir. 1978) (denying federal jurisdiction where petitioner reframed custody dispute as petition for habeas corpus); *Lhotan v. D'elia*, 415 F. Supp. 826, 826 (E.D.N.Y. 1976) (noting when denying petition for habeas corpus that "federal courts do not adjudicate cases involving custody of minors or rights of visitation") (emphasis omitted).

54. *Compare Flood v. Braaten*, 727 F.2d 303, 304–05 (3d Cir. 1984) (finding federal courts could exercise jurisdiction to force compliance with PKPA), *with Thompson v. Thompson*, 798 F.2d 1547, 1552 (9th Cir. 1986) (per curiam) ("From our examination of these materials we conclude [the PKPA] does not create a cause of action in federal court.").

55. *See United States v. Bailey*, 115 F.3d 1222, 1226 (5th Cir. 1997) (rejecting argument that CSRA lacked jurisdictional nexus to interstate commerce); *United States v. Johnson*, 114 F.3d 476, 480 (4th Cir. 1997) (concluding CSRA is constitutional exercise of power under the Commerce Clause); *United States v. Lewis*, 936 F. Supp. 1093, 1097 (1st Cir. 1996) ("The CSRA can be upheld as constitutional because the regulation of child support payments is, in itself, the regulation of the channels of interstate commerce."); *United States v. Brashear*, No. 4:97CR37-1, 1997 WL 458490, at \*3–4 (M.D.N.C. July 8, 1997) (rejecting tenth Amendment challenge to CSRA).

56. *See, e.g., Hemon v. Office of Pub. Guardian*, 878 F.2d 13, 15 (1st Cir. 1989) (declining to exercise jurisdiction based on long-standing policy of abstaining from exercising jurisdiction in domestic relations matters); *Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135, 155 (3d Cir. 1981) (concluding court had no jurisdiction over habeas petition involving child custody); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1112 (1st Cir. 1978) ("We think it both more appropriate and more compassionate to leave the determination of custody to state tribunals. . ."); *Lhotan v. D'elia*, 415 F. Supp. 826, 827 (F.D.N.Y. 1976) ("Federal courts do not adjudicate cases involving the custody of minors or right of visitation. That is the function of the States."). The Supreme Court ultimately answered in the negative to the habeas and PKPA questions. *See Thompson*, 484 U.S. at 187 ("In sum, the context, language, and history of the PKPA together make out a conclusive case against inferring a cause of action in federal court to determine which of two conflicting state custody decrees is valid."); *Lehman v. Lycoming Cty. Childrens Servs. Agency*, 458 U.S. 502, 516 (1982) (holding that federal habeas corpus jurisdiction does not permit challenge to state's involuntary parental rights termination).

57. *See Fernos-Lopez v. Figarella Lopez*, 929 F.2d 20, 23 (1st Cir. 1991) (finding federal jurisdiction under habeas); *Heartfield v. Heartfield*, 749 F.2d 1138, 1141 (5th Cir. 1985) ("The district court was correct in exercising federal question jurisdiction."); *Flood*, 727 F.2d at 312 (3d Cir.1984) (finding intervention by federal courts permissible).

entertain federal constitutional challenges to state court policies and proceedings.<sup>58</sup> In this section, I describe the various doctrinal bases by which federal courts have avoided these questions.

### 1. *Subject Matter Jurisdiction*

Not infrequently, courts have dismissed federal question cases for lack of subject matter jurisdiction, citing the domestic relations exception.<sup>59</sup> This has been especially true in the Second and Seventh Circuits. For example, a district court in the Eastern District of New York dismissed a plaintiff's due process challenge to proceedings in which the state court ordered an upward adjustment of child support.<sup>60</sup> While the plaintiff did not ask the court to alter the child support determination, the court nevertheless dismissed his civil rights claims because it "would be forced to re-examine and re-interpret all the evidence brought before the state court in the domestic relations proceedings."<sup>61</sup> The Second Circuit affirmed dismissal of a mother's civil rights suit challenging the

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58. *See, e.g.*, *Williams v. Lambert*, 46 F.3d 1275, 1281–82 (2d Cir. 1995) (remanding to district court to proceed with claim that section of New York Family Court Act violated equal protection where district court had abstained pending state court outcome); *Parker v. Turner*, 626 F.2d 1, 4–6 (6th Cir. 1980) (dismissing complaint alleging pattern of unconstitutional practices in civil contempt proceedings in juvenile court).

59. *See, e.g.*, *Allen v. Allen*, 48 F.3d 259, 262 n.3 (7th Cir. 1995) (applying domestic relations exception to nondiversity dispute); *Hemon v. Office of Pub. Guardian*, 878 F.2d 13, 15 (1st Cir. 1989) (including guardianship of adults in domestic relations exception); *Lehman v. Lycoming County Children's Servs. Agency*, 648 F.2d 135, 147–48 (3d Cir. 1981) (applying domestic relations exception where child was ward of state); *Sylvander v. New England Home for Little Wanderers*, 584 F.2d 1103, 1109 (1st Cir. 1978) (noting federal judges are inexperienced in dealing with domestic issues); *Wilkins v. Rogers*, 581 F.2d 399, 403–04 (4th Cir. 1978) (per curiam) ("It has long been held that the whole subject of domestic relations belongs to the laws of the state and not to the laws of the United States . . . . Therefore, original jurisdiction over Wilkins' claims does not lie."); *Denman v. Leedy*, 479 F.2d 1097, 1098 (6th Cir. 1973) (per curiam) ("[I]t is readily apparent that the substance of this claim is an intrafamily custody battle. As such this court has no jurisdiction to entertain the present suit."); *McArthur v. Bell*, 788 F. Supp. 706, 708–09 (E.D.N.Y. 1992) ("[T]o decide the instant case, this Court would be forced to re-examine and re-interpret all the evidence brought before the state court in the domestic relations proceedings . . . . It is not the role of this Court."); *Neustein v. Orbach*, 732 F. Supp. 333, 339 (E.D.N.Y. 1990) (dismissing action challenging custody and visitation rulings of state court because it would embroil the court in domestic relations dispute); *Lhotan v. D'elia*, 415 F. Supp. 826, 826 (E.D.N.Y. 1976) (noting whole subject of domestic relations belongs to states); *see also Firestone v. Cleveland Trust Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981) ("Even when brought under the guise of a federal question action, a suit whose substance is domestic relations generally will not be entertained in a federal court.").

60. *McArthur v. Bell*, 788 F. Supp. 706, 708–09 (E.D.N.Y. 1992).

61. *Id.* at 709.



removal of her children because it found the domestic relations exception applied.<sup>62</sup> The Seventh Circuit affirmed dismissal of a biological father's civil rights suit challenging an order granting visitation rights to his wife's first husband, explicitly holding that the domestic relations exception applied.<sup>63</sup>

Other courts have entertained federal question cases relating to domestic relations,<sup>64</sup> and some have explicitly refused to extend the exception beyond

62. See *Mitchell-Angel v. Cronin*, No. 95-7937, 1996 WL 107300, at \*2 (2d Cir. Mar. 8, 1996) ("In the present case, Mitchell's second and third causes of action either fall within the domestic relations exception or verge on being matrimonial in nature.").

63. See *Allen v. Allen*, 48 F.3d 259, 261 (7th Cir. 1995) ("Much of Allen's complaint . . . challenges the underlying custody decree. The domestic relations exception to federal jurisdiction prevents the district court from hearing such a claim.").

64. See, e.g., *Johnson v. Rodrigues*, 226 F.3d 1103, 1111–12 (10th Cir. 2000) (finding constitutional challenge to adoption statute outside domestic relations exception); *Catz v. Chalker*, 142 F.3d 279, 291–92 (6th Cir. 1998) (concluding domestic relations exception is inapplicable to declaratory judgment on whether divorce decree violated due process); *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997) ("The [domestic relations exception] . . . is applied only as a judicially implied limitation on the diversity jurisdiction; it has no generally recognized application as a limitation on federal question jurisdiction."); *Ingram v. Hayes*, 866 F.2d 368, 370 (11th Cir. 1988) (per curiam) (finding resolution of federal question would not require court to delve into parties' affairs and so not barred by domestic relations exception); *Witte v. Justice of New Hampshire Superior Court*, 831 F.2d 362, 363 (1st Cir. 1987) (per curiam) (exercising jurisdiction over claim that New Hampshire marital master program was unconstitutional); *Thompson v. Thompson*, 798 F.2d 1547, 1547 (9th Cir. 1986) (per curiam) (finding jurisdiction over PKPA claim); *Hooks v. Hooks*, 771 F.2d 935, 942 (6th Cir. 1985) (concluding trial court erred in relying on exception in refusing to consider merits of damages claim related to deprivation of physical custody of children without due process); *Flood v. Braaten*, 727 F.2d 303, 305 (3d Cir. 1984) ("[W]e cannot agree with the district judge that the PKPA can never support federal question jurisdiction in a lawsuit connected with a child custody dispute. Accordingly, we will remand for further proceedings."); *Ruffalo v. Civiletti*, 702 F.2d 710, 717–18 (8th Cir. 1983) (concluding domestic relations exception did not bar jurisdiction where mother sought return of child relocated under federal Witness Protection Program); *Ellis v. Hamilton*, 669 F.2d 510, 514–16 (7th Cir. 1982) (exercising jurisdiction where state welfare and judicial officers allegedly violated plaintiffs' due process rights and remanding on motion to supplement the record); *Rowell v. Oesterle*, 626 F.2d 437, 438 (5th Cir. 1980) ("[The domestic relations exception] . . . has not operated to bar federal review of constitutional issues, simply because those issues arise in 'domestic' contexts."); *Kirchberg v. Feenstra*, 609 F.2d 727, 730–31 (5th Cir. 1979) (adjudicating claim that Louisiana Civil Code violates equal protection by designating husband head and master of the household); *Duchesne v. Sugarman*, 566 F.2d 817, 821 (2d Cir. 1977) (considering mother's civil rights action to obtain damages for alleged unlawful and unconstitutional action of child welfare bureau); *Thomas v. New York City*, 814 F. Supp. 1139, 1146 (E.D.N.Y. 1993) (concluding court has subject matter jurisdiction over civil rights action claiming abuse in New York City foster care system based on federal statute); *Elam v. Montgomery County*, 573 F. Supp. 797, 801 (S.D. Ohio 1983) (finding jurisdiction in action alleging civil rights violation where child was removed from home by law enforcement); *Roe v. Borup*, 500 F. Supp. 127, 128 (E.D. Wis. 1980) (considering civil rights claim that child was taken by authorities without court hearing); *Wiesenfeld v. New York*, 474 F. Supp. 1141, 1146 (S.D.N.Y. 1979) (exercising jurisdiction to consider constitutional issues of preferential treatment in family court proceedings).

diversity jurisdiction.<sup>65</sup> The First, Third, Eighth, and Tenth Circuits have acknowledged a split among the courts regarding whether the exception is limited to diversity jurisdiction,<sup>66</sup> while Judge Posner in the Seventh Circuit has expressly advocated extending the exception to federal questions.<sup>67</sup> Thus, while no coherent story emerges from the courts' consideration of federal question cases, it is clear that some courts have readily expanded the exception to include federal questions.

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65. See, e.g., *Catz v. Chalker*, 142 F.3d 279, 292 (6th Cir. 1998) (finding question of federal constitutional guarantee of due process a "sphere in which the federal courts may claim an expertise at least equal to that of the state courts"); *United States v. Bailey*, 115 F.3d 1222, 1231 (5th Cir. 1997) ("Because this case clearly arises under this Court's federal question jurisdiction, the domestic relations exception presents no bar."); *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997) ("The 'jurisdictional exception,' in the first place, is applied only as a judicially implied limitation on the diversity jurisdiction; it has no generally recognized application as a limitation on federal question jurisdiction."); *Fernos-Lopez v. Lopez*, 929 F.2d 20, 23 (1st Cir. 1991) (per curiam) (refusing to apply exception to habeas petition because it was not diversity case and did not require inquiry into domestic affairs); *Weller v. Dep't of Soc. Servs. for Balt.*, 901 F.2d 387, 396 (4th Cir. 1990) (noting statutory basis for jurisdiction on claim involving custody transfer); *McLaughlin v. Pemsley*, 876 F.2d 308, 312 (3d Cir. 1989) (concluding domestic relations exception applicable only to diversity cases); *Ingram v. Hayes*, 866 F.2d 368, 370–71 (11th Cir. 1988) (per curiam) (explaining exception applies only to diversity cases); *Agg v. Flanagan*, 855 F.2d 336, 339 (6th Cir. 1988) ("At its core, [the domestic relations exception] concerns federal jurisdiction based on diversity."); *Lynk v. LaPorte Superior Ct. No. 2*, 789 F.2d 554, 558 (7th Cir. 1986) (stating domestic relations exception is persuasive only in cases based on diversity); *Flood v. Braaten*, 727 F.2d 303, 308 (3d Cir. 1984) ("[A]s a jurisdictional bar, the domestic relations exception does not apply to cases arising under the Constitution or laws of the United States."); *Franks v. Smith*, 717 F.2d 183, 185–86 (5th Cir. 1983) (finding subject matter jurisdiction existed based on alleged constitutional violations); *Ellis v. Hamilton*, 669 F.2d 510, 514–16 (7th Cir. 1982) (concluding due process rights not violated by actions of county welfare and judicial officers); *United States v. Lewis*, 936 F. Supp. 1093, 1106 (D.R.I. 1996) (disagreeing that Child Support Recovery Act runs afoul of domestic relations exception).

66. See *Mandel v. Town of Orleans*, 326 F.3d 267, 271 (1st Cir. 2003) ("[T]he courts are divided as to whether the doctrine is limited to diversity claims and this court has never decided that issue. The debate is esoteric but, as federal law increasingly affects domestic relations, one of potential importance."); *Johnson v. Rodrigues*, 226 F.3d 1103, 1111 n.4 (10th Cir. 2000) ("Some district courts in the Second Circuit have applied the domestic relations exception in federal question cases, but other Circuits have held that the exception is limited to diversity suits."); *McLaughlin v. Pemsley*, 876 F.2d 308, 312 (3d Cir. 1989) (recognizing differences in some circuits); *Ruffalo v. Civiletti*, 702 F.2d 710, 717–18 (8th Cir. 1983) ("It is unclear whether the domestic-relations exception applies to cases brought under the federal-question statute.").

67. See *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006) (remarking that domestic exception probably intended to apply to federal question cases). *But see Lynk v. LaPorte Super. Ct. No. 2*, 789 F.2d 554, 558 (7th Cir. 1986) (refusing to dismiss case under domestic relations exception because it was not based on diversity jurisdiction).

In contrast to the lower federal courts, the Supreme Court has never explicitly extended the subject matter limitation beyond diversity jurisdiction, although the language in *Newdow* seems to belie this.<sup>68</sup>

## 2. Abstention

The abstention doctrines authorize federal courts to decline jurisdiction even when all jurisdictional and justiciability requirements are met. They are primarily concerned with comity between the state and federal courts and "Our Federalism," described as

a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.<sup>69</sup>

There are three general categories of abstention: abstention to permit state-court resolution of unclear state law (including *Pullman*,<sup>70</sup> *Thibodeaux*,<sup>71</sup> and *Burford*<sup>72</sup> abstention), abstention to avoid interfering with pending state

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68. The Court has nevertheless achieved the same practical result and often alludes to the special role of the states in domestic relations. See, e.g., *Lehman v. Lycoming County Children's Servs. Agency*, 458 U.S. 502, 504 (1982). In *Lehman*, a mother whose parental rights had been terminated challenged the constitutionality of the state statute and sought the return of her children via a writ of habeas corpus to the federal courts. *Id.* at 502. In construing the word "custody" in the federal habeas statute, the Court held that the term did not include children in the custody of their natural or adoptive parents, and that federal habeas had never been available to challenge parental rights or child custody. *Id.* at 511–12. Although the Court did note that "federal courts consistently have shown special solicitude for state interests in the field of family and family-property arrangements," and cited concerns about federalism and the need for finality in child-custody disputes, *id.* at 511–14 (quoting *United States v. Yazell*, 382 U.S. 341, 352 (1966)) (internal quotations omitted), the Court did not base its opinion on the domestic relations exception. Instead, the Court narrowly interpreted "custody" in the federal habeas statute as never having contemplated the relief the plaintiff sought. *Id.* at 508–12, 515–16.

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

70. See *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941) (deciding federal courts should allow state courts an opportunity to rule on constitutionality of state enactments before ruling).

71. See *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27–30 (1959) (recognizing wisdom of allowing state opportunity to interpret statute of great local importance before federal courts become involved).

72. See *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–19 (1943) (allowing federal court sitting in diversity jurisdiction to abstain where area of state law is particularly complex).

proceedings (*Younger*<sup>73</sup> abstention), and abstention to avoid duplicative litigation (*Colorado River*<sup>74</sup> abstention).<sup>75</sup>

As might be expected, these three categories of abstention sometimes have served as the basis for federal court avoidance of federal question cases implicating domestic relations.<sup>76</sup> But beyond these established doctrines, lower

73. *Younger*, 401 U.S. at 41.

74. *Colo. River Cons. Dist. v. Akin*, 424 U.S. 800, 817 (1976).

75. See CHEMERINSKY, *supra* note 43, at 783–817 (exploring various federal abstention doctrines in detail).

76. The federal courts generally have applied *Younger* abstention in a variety of cases implicating underlying state-court domestic relations cases. See, e.g., *Moore v. Sims*, 442 U.S. 415, 423–35 (1979) (applying abstention to challenge of constitutionality of child abuse statutes); *Chapman v. Oklahoma*, 472 F.3d 747, 749–50 (10th Cir. 2006) (applying abstention where plaintiff alleged constitutional violations of family court system); *Parejko v. Dunn County Circuit Court*, 209 F. App'x 545, 546–48 (7th Cir. 2006) (finding abstention applied where plaintiff alleged divorce statutes violated due process); *Cormier v. Green*, 141 F. App'x 808, 812–15 (11th Cir. 2005) (per curiam) (applying abstention in challenge to state alimony provisions); *Mandel v. Town of Orleans*, 326 F.3d 267, 273 (1st Cir. 2003) (invoking abstention where plaintiff alleged violations of constitutional rights when she was charged with kidnapping and lost custody of her children); *Meyers v. Franklin County Court of Common Pleas*, 23 F. App'x 201, 205–06 (6th Cir. 2001) (per curiam) (invoking abstention where parents alleged violation of constitutional rights when juvenile court granted temporary custody to county without full evidentiary hearing); *H.C. v. Koppel*, 203 F.3d 610, 613–14 (9th Cir. 2000) (concluding abstention applied where plaintiff sought injunction to vacate child custody orders); *Kelm v. Hyatt*, 44 F.3d 415, 419–21 (6th Cir. 1995) ("Here, the district court found that the pending divorce implicated important state issues regarding the resolution of domestic disputes . . . . [T]he district court correctly dismissed on the basis of the *Younger* doctrine."); *Malachowski v. City of Keene*, 787 F.2d 704, 708 (1st Cir. 1986) (per curiam) (applying abstention to custody proceedings); *Carson P. ex rel Foreman v. Heineman*, 240 F.R.D. 456, 523 (D. Neb. 2007) (concluding court should abstain where child custody determination was subject to continuing jurisdiction of juvenile court system); *Lomtevas v. New York State*, No. 05-CV02779, 2006 WL 229908, at \*4 (E.D.N.Y. Jan. 31, 2006) ("Abstention is proper regarding plaintiff's request that the court declare Clark's order of support to have been without legal basis and, therefore, unconstitutional."); *Thomas v. New York City*, 814 F. Supp. 1139, 1149 (E.D.N.Y. 1993) (abstaining where parental rights were being adjudicated in family court).

Courts have used *Burford* abstention infrequently in the context of federal question family law cases. See *Farkas v. D'Oca*, 857 F. Supp. 300, 303–04 (S.D.N.Y. 1994) (abstaining because resolution of federal RICO claim depended on determination of property ownership in state divorce proceeding). *Farkas* appears to be the textbook case referred to in *Ankenbrandt*, in which the federal case was "filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties." *Ankenbrandt v. Richards*, 504 U.S. 689, 706 (1992); see also *Dubroff v. Dubroff*, 833 F.2d 557, 562 (5th Cir. 1987) (abstaining where case presented "novel and dubious questions of state family law"); *Swayne v. L.D.S. Soc. Servs.*, 670 F. Supp. 1537, 1546 (D. Utah 1987) ("[T]his court has determined that it is appropriate to exercise discretion by requiring resolution by the state courts of the questions here presented."). In *Zablocki v. Redhail*, the Supreme Court determined that a federal challenge to a state statute prohibiting marriage for individuals behind on their child-support obligations did not "involve complex issues of state law, resolution of which would be

federal courts have also abstained from exercising jurisdiction over federal question cases *simply because* they implicate family law.<sup>77</sup> Some courts have said explicitly that the domestic relations exception can be restated as a doctrine of abstention in federal question cases, provided an alternative forum is

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‘disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.’” *Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978) (citations omitted). It therefore refused to apply *Burford* abstention.

Courts have also sometimes found *Pullman* abstention appropriate in domestic relations cases. *See* *Belotti v. Baird*, 428 U.S. 132, 146–48 (1976) (finding district court should have abstained pending construction of statute by state courts where statute required parental consent to obtain abortion); *Ziegler v. Ziegler*, 632 F.2d 535, 538–39 (5th Cir. 1980) (per curiam) (concluding posture of divorce action required abstention to allow state to first construe the statute); *Magaziner v. Montemuro*, 468 F.2d 782, 786–87 (3d Cir. 1972) (applying abstention where issues of state law remained unresolved); *Swayne*, 670 F. Supp. at 1537 (abstaining where father brought civil rights action to gain custody of child mother had surrendered for adoption).

Finally, *Colorado River* abstention occasionally serves as the basis for abstention in federal question cases implicating domestic relations. *See, e.g.,* *Cerit v. Cerit*, 188 F. Supp. 2d 1239, 1248–49 (D. Haw. 2002) (dismissing father’s petition for return of child when state and federal proceedings were parallel and there was a risk of inconsistent results).

The Central District of California and Ninth Circuit courts recently exercised *Pullman* abstention to avoid deciding the constitutionality of California’s marriage laws, which limited marriage to civil contracts between men and women. *See* *Smelt v. County of Orange*, 447 F.3d 673, 678–82 (9th Cir. 2006) (concluding all factors of *Pullman* analysis pointed to abstention in challenge on statutory prohibition of same-sex marriage); *Smelt v. County of Orange*, 374 F. Supp. 2d 861, 865–70 (C.D. Cal. 2005), *aff’d in part, rev’d in part on other grounds*, 447 F.3d 673 (9th Cir. 2006) (abstaining in challenge of statute prohibiting same-sex marriage). The California Supreme Court subsequently decided that California’s statutes violated the California constitution. *See In re Marriage Cases*, 183 P.3d 384, 451 (Cal. 2008) (“[W]e conclude that the state interest in limiting the designation of marriage exclusively to opposite-sex couples, and in excluding same-sex couples from access to that designation, cannot properly be considered a compelling state interest for equal protection purposes.”). This case was subsequently abrogated by amendment to the state constitution. *Infra* note 284.

77. *See, e.g.,* *Mitchell-Angel v. Cronin*, No. 95-7937, 1996 WL 107300, at \*2 (2d Cir. Mar. 8, 1996) (“In the present case, Mitchell’s second and third causes of action either fall within the domestic relations exception or verge on being matrimonial in nature.”); *Am. Airlines v. Block*, 905 F.2d 12, 15 (2d Cir. 1990) (per curiam) (stating district court intruded on state law matrimonial jurisdiction); *Coats v. Woods*, 819 F.2d 236, 237 (9th Cir. 1987) (“This case, while raising constitutional issues, is at its core a child custody dispute.”); *Peterson v. Babbitt*, 708 F.2d 465, 466 (9th Cir. 1983) (“There is no subject matter jurisdiction over these types of domestic disputes.”); *Huynh Thi Anh v. Levi*, 586 F.2d 625, 632–33 (6th Cir. 1978) (acknowledging policies supporting state court resolution of adoption dispute); *Tree Top v. Smith*, 577 F.2d 519, 521 (9th Cir. 1978) (explaining that even if res judicata did not bar action, principle of abstaining in domestic relations dispute does); *Magaziner v. Montemuro*, 468 F.2d 782, 787 (3d Cir. 1972) (“Traditionally, it has been the policy of federal courts to avoid assumption of jurisdiction in [domestic relations cases].”); *Smith v. Pension Plan of Bethlehem Steel Corp.*, 715 F. Supp. 715, 718 (W.D. Pa. 1989) (“[W]e hold that the domestic relations exception is one of several factors to be considered in determining whether to abstain from a federal question matter which implicates domestic relations issues.”).

available.<sup>78</sup> Others abstain in cases "where domestic relations problems are involved tangentially to other issues determinative of the case."<sup>79</sup> Finally, courts have abstained from considering federal question claims that are "on the verge of matrimonial."<sup>80</sup>

These cases rely on the view of state exclusivity in domestic relations as a justification for abstention. So, to the extent this justification relates to the more general concerns about federalism and comity expressed in abstention jurisprudence, the cases bear some relationship to existing doctrine. What distinguishes them, however, is that courts deem their domestic relations content—separate and apart from the more specific concerns addressed by existing abstention doctrines—as sufficient to trigger abstention. If a case involves domestic relations—even tangentially—that fact alone will warrant abstention, even when the more specific factors implicating a particular abstention doctrine are not present.

### 3. Other Avoidance Doctrines

In addition to federal question jurisdiction and "domestic relations abstention," the federal courts have used existing federal court doctrines to avoid ruling on federal questions in family law cases.

The *Rooker-Feldman* doctrine, which bars cases in which a state-court litigant essentially seeks to appeal a state judgment in federal court, also precludes review of family law matters in federal courts.<sup>81</sup> The *Feldman* court

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78. *Lynk v. La Porte Super. Ct.* No. 2, 789 F.2d 554, 563 (7th Cir. 1986).

79. *Csibi v. Fustos*, 670 F.2d 134, 137 (9th Cir. 1982).

80. *Am. Airlines v. Block*, 905 F.2d 12, 14 (2d Cir. 1990); *see also* *Lomtevas v. Cardozo*, No. 05-CV-2779, 2006 WL 229908, at \*3 (E.D.N.Y. Jan. 31, 2006) (concluding abstention warranted to avoid embroilment in matrimonial matters); *Mitchell-Angel v. Cronin*, No. 95-7937, 1996 WL 107300, at \*2 (2d Cir. Mar. 8, 1996).

81. *See, e.g.,* *Mandel v. Town of Orleans*, 326 F.3d 267, 271 (1st Cir. 2003) (indicating domestic relations exception need not be resolved because injunction was constrained by broader *Rooker-Feldman* constraint); *Sturgeon v. Benton*, 242 F.3d 378, No. 99-3515, 2000 WL 1673389, at \*1 (8th Cir. Nov. 8, 2000) (unpublished table decision) (declining to exercise jurisdiction in connection with divorce decree challenge because it would require review of state court decision); *Newman v. State of Indiana*, 129 F.3d 937, 942 (7th Cir. 1997) (finding relitigation of due process violation claims related to adoption barred by *Rooker-Feldman*); *A.N. v. Williams*, No. 8:05-CV-1929-T-27MSS, 2005 WL 3003730, at \*5 (M.D. Fla. Nov. 9, 2005) (dismissing federal challenge to court-ordered immunizations under, *inter alia*, *Rooker-Feldman*); *Rohling v. New York*, No. 1:04 CV 1083 GLS DRH, 2004 WL 3623341, at \*2 (N.D.N.Y. Nov. 15, 2004) (applying *Rooker-Feldman* where plaintiff alleged discrimination by statute against non-custodial parents); *Anderson v. State of Colo.*, 793 F.2d 262, 263 (10th Cir. 1986) (finding lawsuit attempting to undo custody decision of state court within parameters of *Rooker-Feldman* doctrine).

admonished that district courts cannot hear constitutional claims that, although not squarely presented in state court, were "inextricably intertwined" with state court judgments.<sup>82</sup> Although the Supreme Court recently has sought to clarify and narrow the doctrine,<sup>83</sup> the "inextricably intertwined" language remains unclear. This language is particularly susceptible to broad interpretations in the context of family law cases: Courts can easily construe federal question cases as "inextricably intertwined" with prior state court judgments. In fact, federal courts frequently invoke this language in domestic relations cases even when *Rooker-Feldman* is not at issue.<sup>84</sup>

Related to but distinct from *Rooker-Feldman*, traditional preclusion doctrines also sometimes operate to preclude federal court review of domestic relations cases raising federal questions.<sup>85</sup> Federal courts must accord collateral estoppel and res judicata effects to state proceedings.<sup>86</sup> Because the Court has expressly rejected an exception for federal civil rights litigation,<sup>87</sup> preclusion

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82. D.C. Court of Appeals v. Feldman, 460 U.S. 462, 486 (1983).

83. See *Lance v. Dennis*, 546 U.S. 459, 464 (2006) ("Neither *Rooker* nor *Feldman* elaborated a rationale for a wide-reaching bar on the jurisdiction of lower federal courts, and our cases since *Feldman* have tended to emphasize the narrowness of the *Rooker-Feldman* rule."); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005) ("The *Rooker-Feldman* doctrine, we hold today, is confined to cases of the kind from which the doctrine acquired its name . . .").

84. See, e.g., *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 n.5 (2004) ("[T]he disputed family law rights [were] entwined inextricably with the threshold standing inquiry."); *Allen v. Allen*, 48 F.3d 259, 262 (7th Cir. 1995) (concluding due process claims inextricably intertwined with state custody claims); *Kahn v. Kahn*, 21 F.3d 859, 860 (8th Cir. 1994) (stating tort claims "inextricably intertwined with prior property settlement"); *Lopez-Rodriguez v. City of Levelland*, No. Civ. A. 5:02-CV-073-CV, 2004 WL 1836729, at \*2 (N.D. Tex. Aug. 16, 2004) (dismissing, in part, because "disputed family law rights are entwined inextricably with the threshold standing inquiry").

85. Both Supreme Court precedent and federal statute confirm that state court judgments will have preclusive effect in subsequent federal litigation. See 28 U.S.C. § 1738 (2006) (requiring federal courts to accord full faith and credit to authenticated proceedings of any state court); *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 246 (1998) ("Full faith and credit requires courts . . . 'to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.'") (citation omitted).

86. See CHEMERINSKY, *supra* note 43, at 588–91 (discussing Supreme Court cases applying collateral estoppel and res judicata to state proceedings).

87. See *id.* at 589 ("The Supreme Court . . . has held that state court proceedings are preclusive in subsequent federal court §1983 litigation."); see also *Migra v. Warren City Sch. Dist.*, 465 U.S. 75, 83–84 (1984) ("[W]e must reject the view that § 1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case."); *Allen v. McCurry*, 449 U.S. 90, 98–99 (1980) (concluding Congress did not intend to repeal or restrict the traditional doctrines of preclusion with § 1983).

doctrines have served to bar federal court review of federal questions relating to family law.<sup>88</sup>

*B. The Justiciability of the Family: Elk Grove Independent School District v. Newdow*

The Supreme Court has not squarely considered the scope of the domestic relations exception since *Ankenbrandt*, but its decision in the *Newdow* case raises new questions about the doctrine's scope. Though *Newdow* is most frequently associated with the First Amendment and Pledge of Allegiance, because the Court did not reach the merits, it may ultimately have more impact on federal jurisdiction than First Amendment jurisprudence.<sup>89</sup>

Michael Newdow, a noncustodial parent, sued state and federal actors seeking a declaration that the federal statute adding "under God" to the Pledge was unconstitutional, and seeking to enjoin his daughter's school district from requiring daily recitation of the Pledge.<sup>90</sup> The district court dismissed his claims, but the Ninth Circuit reversed, holding that Newdow had standing to pursue his claims, and upholding his challenge to the school Pledge policy.<sup>91</sup>

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88. See *Newman v. Indiana*, 129 F.3d 937, 942 (7th Cir. 1997) (finding religious discrimination claim against numerous agencies and officials regarding adoption barred by *Rooker-Feldman* and res judicata); *Tree Top v. Smith*, 577 F.2d 519, 521 (9th Cir. 1978) (finding preclusion where petition related to merits of custody dispute already litigated in state court).

89. The briefing submitted to the Court, as well as the oral arguments, make clear that domestic relations were also at issue. See, e.g., Transcript of Oral Argument at \*3–4, *Newdow*, 542 U.S. 1 (2004) (No. 02-1624), 2004 WL 736416 ("Respondent seeks to invoke the aid of a Federal court to override the state family law court in an ongoing custody dispute."); see also *id.* at \*3–16, \*24–27 (discussing issues of standing and domestic relations). The Solicitor General specifically invoked *Ankenbrandt* and domestic relations exception at oral argument. *Id.* at \*14–15.

90. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 8 (2004).

91. The Ninth Circuit issued three separate opinions in *Newdow*. The first appellate decision unanimously held that Newdow had standing to challenge a practice interfering with his right to direct his daughter's religious upbringing, *Newdow v. U.S. Congress*, 292 F.3d 597, 602 (9th Cir. 2002) [hereinafter *Newdow I*], and sustained Newdow's challenge to both the 1954 Act and the school district policy. *Newdow I*, 292 F.3d at 612. However, Newdow's complaint originally alleged standing to sue to vindicate both his own interests, and his daughter's as her "next friend." *Newdow*, 542 U.S. at 8. After the Ninth Circuit issued its first opinion, the child's mother filed a motion for leave to intervene or dismiss the complaint. The mother, Sandra Banning, asserted that although she and Newdow shared physical custody of the child, a state court order gave her "exclusive legal custody," including the right to make all decisions about her daughter's education. *Id.* at 9. Banning further explained that her daughter was a Christian who believed in God and had no objection to the Pledge, nor to its reference to God. *Id.* Accordingly, Banning argued that it was not in her daughter's best interest to be a



The Supreme Court granted certiorari to consider whether Newdow had standing to sue and, if so, whether the school district policy violated the First Amendment.<sup>92</sup>

Newdow's status as a family member was critical to the Court's analysis. As in the earliest cases, the Court used expansive rhetoric to describe the relationship between family law and the federal courts, noting that domestic relations has been one of the principal areas in which the Court customarily declines to intervene.<sup>93</sup> The opinion concluded its account of domestic relations in federal court in startlingly broad terms: "[W]hile rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts."<sup>94</sup>

Against this backdrop, the Court considered the "standing problem raised by the domestic relations issues" in the case, and Newdow's rights as a noncustodial parent under California law.<sup>95</sup> Newdow's standing depended on his relationship with his daughter, but by California court order, he could not

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party to the lawsuit. *Id.* at 9–10. The California Superior Court subsequently entered an order enjoining Newdow from including his daughter as an unnamed party or bringing the lawsuit as her next friend. *Newdow v. U.S. Congress*, 313 F.3d 500, 502 (9th Cir. 2002) [hereinafter *Newdow II*]. In its second appellate decision, the Ninth Circuit reexamined Newdow's Article III standing in light of Banning's motion, and found that notwithstanding the state-court order, Newdow retained standing to challenge unconstitutional government action allegedly affecting his own parental interests. *Newdow II*, 313 F.3d at 505. A third Ninth Circuit opinion amended the first, and denied rehearing en banc. *Newdow v. U.S. Congress*, 328 F.3d 466, 468–69 (9th Cir. 2003) [hereinafter *Newdow III*]. The amended opinion omitted the discussion of and ruling on the 1954 Act, but left the ruling on the school district's policy in place. *Newdow III*, 328 F.3d at 472, 490. The panel may have omitted reference to the 1954 Act in an effort to avoid Supreme Court review. *See id.* at 472 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("Perhaps in an effort to avoid ultimate Supreme Court review, *Newdow II*, which replaces [*Newdow I*], avoids expressly reaching the technical question of the constitutionality of the 1954 Act.").

92. *Newdow*, 542 U.S. at 10.

93. *Id.* at 12–13.

94. *Id.* (internal citation omitted).

95. *Id.* at 13. The Court's analysis bore an uncanny resemblance to the sort of "family law" determinations federal courts typically eschew. Justice Stevens explained that Newdow's rights, "as in many cases touching upon family relations," could not be evaluated in isolation, because the case also involved the mother's tiebreaking rights and, "most important . . . the interests of a young child who finds herself at the center of a highly public debate over her custody, the propriety of a widespread national ritual, and the meaning of our Constitution." *Id.* at 15. Justice Stevens engaged in a similar type of analysis in his dissent in *Troxell v. Granville*, 530 U.S. 57, 80 (2000); *see also infra* note 228.

sue as her next friend.<sup>96</sup> Consequently, the Court concluded that Newdow had no right to control whether others endorsed religion to his daughter.<sup>97</sup> Because "disputed family law rights [were] entwined inextricably"<sup>98</sup> with Newdow's standing, the Court concluded he lacked prudential standing to sue and dismissed the case,<sup>99</sup> stressing:

In our view, it is improper for the federal courts to entertain a claim by a plaintiff whose standing to sue is founded on family law rights that are in dispute when prosecution of the lawsuit may have an adverse effect on the person who is the source of the plaintiff's claimed standing. When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law.<sup>100</sup>

But there were no disputed family law rights, nor was there any reason to revisit the legal status of Newdow and the child's mother.<sup>101</sup> *Newdow* went to

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96. *Newdow*, 542 U.S. at 10.

97. *Id.* at 17.

98. *Id.* at 13 n.5.

99. Undeterred, Newdow, joined by other parents, again sued the United States, Congress, a congressional officer, the State and governor of California, California's education secretary, and four local school districts and their superintendents challenging the constitutionality of the federal Pledge statute and the practices of the four school districts. *Newdow v. Congress of the United States*, 383 F. Supp. 2d 1229, 1231–32 (E.D. Cal. 2005). Though Newdow himself again lacked standing to sue, *id.* at 1237–38, the other plaintiffs had standing to sue because there were no family rights in dispute with regard to their children. *Id.* at 1239–40. District Judge Karlton went on to hold that the Ninth Circuit's opinion in *Newdow III* regarding recitation of the Pledge in the classroom was binding precedent, notwithstanding the Supreme Court's dismissal on standing grounds. *Id.* at 1241–42. Ultimately, most of the other claims were either withdrawn or dismissed because the children in question no longer attended the Elk Grove elementary school where the Pledge was recited every day. See *Newdow v. Congress of the United States*, No. Civ. SO517LKKDAD, 2005 WL 3144086, at \*1 (E.D. Cal. Nov. 18, 2005) ("Because plaintiff DoeChild is no longer in elementary school, the Doe plaintiffs are unable to establish an injury-in-fact that provides them standing . . ."). The district court enjoined the remaining defendant school district from requiring recitation of the Pledge and enjoined its employees from leading students in the Pledge, but stayed the permanent injunction pending any appeals. *Id.* at \*1–2. No appeals were taken.

100. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17 (2004).

101. At the time Newdow filed the Complaint in March 2000, the parents shared full, joint, legal custody. *Newdow II*, 313 F.3d at 502. A subsequent February 6, 2002 order of the California Superior Court ruled that Banning had sole legal custody as to the rights and responsibilities in making decisions about their daughter's health, education, and welfare. *Newdow*, 542 U.S. at 14. The order directed both parents to consult on substantial decisions relating to their daughter's psychological and education needs but authorized Banning to exercise legal control if she and Newdow could not reach agreement. *Id.* After the Ninth Circuit's opinion in *Newdow II*, the Superior Court again held a conference regarding custody, ruling on September 11, 2003 that the parents were to share joint legal custody, but still preserving Banning's prerogative to make final decisions if the parents disagreed. *Id.* Although

Herculean efforts to avoid ruling on the Pledge issue—a question of "wide public significance"<sup>102</sup>—and used domestic relations as the means by which it averted a politically-loaded decision.<sup>103</sup> But the Court's language about federal courts and domestic relations was a significant departure.

Although the opinion managed to punt the constitutional issue, it quickly raised eyebrows among academics, who described the opinion as "obscure,"<sup>104</sup> "convoluted,"<sup>105</sup> "opaque,"<sup>106</sup> and "contradictory."<sup>107</sup> *Newdow's* loose language adds to the volatility surrounding federal court consideration of federal family law issues. The opinion seems to apply the domestic relations exception to

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Banning initially disputed *Newdow's* right to bring suit as his daughter's next friend, these claims were removed, and at no point in the litigation did he seek anything remotely resembling a divorce, alimony, or child custody decree. The lawsuit perhaps involved "disputed family law rights" to the extent that Petitioners and some amici argued that *Newdow*, as noncustodial parent, did not have Article III standing to challenge the policy, a question on which the highest court of California had not ruled. See, e.g., *The Supreme Court, 2003 Term—Leading Cases, Federal Jurisdiction & Procedure: Standing*, 118 HARV. L. REV. 426, 427 (2004) [hereinafter *Supreme Court, 2003 Term*]. As noted above, the Ninth Circuit's interpretation was based on two intermediate appellate court opinions. See *Newdow II*, 313 F.3d at 504–05 (relying on *In re Mentry*, 190 Cal. Rptr. 843 (Cal. Ct. App. 1983); *Murga v. Petersen*, 163 Cal. Rptr. 79 (Cal. Ct. App. 1980)). Thus, at most, the "disputed family law rights" entailed a disputed issue of California law regarding the standing of noncustodial parents to sue, a question that the Ninth Circuit had already answered, see *id.* at 504–05 (affirming *Newdow's* standing), and an issue the Court might have addressed by looking to abstention doctrines. See *Supreme Court, 2003 Term, supra*, at 433 ("[T]he unsettled state and significant consequences of the state law at issue brought the case fairly within the Court's abstention doctrines."). Perhaps the closest thing to "disputed family law rights" was that a dispute existed, between *Newdow* on the one hand and Banning and her daughter on the other, as to whether the Pledge and the school district policy were problematic and unconstitutional. But while this may have been a dispute as to preferences or opinions about the Pledge, it did not implicate the *status* or *rights* of any of the parties, which had already been delineated by the California family court. And certainly, Banning and her daughter would have been free to recite the Pledge at home or at a private school. *Newdow's* challenge involved the particular injury involved in his daughter saying the Pledge in public school. There was no ongoing dispute as to what each of the parties had a *legal right* to do vis-à-vis the child's education.

102. *Newdow*, 542 U.S. at 12.

103. See CHEMERINSKY, *supra* note 43, at 89 ("Perhaps the Court dismissed *Newdow* on standing grounds to avoid a highly controversial political issue.").

104. See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3531.9 (2d ed. & Supp. 2008) (characterizing the *Newdow* decision as offering obscure guidance on prudential standing limits).

105. See *Supreme Court, 2003 Term, supra* note 101, at 426–27 (describing Court's reasoning "unnecessarily convoluted").

106. See *id.* (criticizing effect on standing jurisprudence).

107. See *id.* at 432 ("In its effort to deny the relationship of this rule to the abstention doctrines, however, the Court engaged in opaque and sometimes contradictory reasoning."); see also CHEMERINSKY, *supra* note 43, at 89 ("It is difficult to fit the Court's decision in *Newdow* in the framework of traditional standing analysis.").

federal questions and create a new default rule deferring to state courts on all domestic relations issues.<sup>108</sup> Relying on *Newdow*, litigants can now "argue that federal question jurisdiction is inappropriate in cases that involve 'elements of the domestic relationship,' even on constitutional claims."<sup>109</sup> For example, the Court's language in *Newdow* has the potential to be especially powerful—and perhaps dispositive—in marriage equality cases.<sup>110</sup>

### *C. The Drift Toward a Domestic Relations Exception for Federal Questions*

Since *Newdow*, the status of the domestic relations exception remains in disarray. A number of courts continue to apply the exception to federal

108. *Supreme Court, 2003 Term, supra* note 101, at 434–35.

109. LINDA J. SILBERMAN ET AL., CIVIL PROCEDURE: THEORY & PRACTICE 328 (2d ed. 2006); see Margaret F. Brinig, *Does Parental Autonomy Require Equal Custody at Divorce?*, 65 LA. L. REV. 1345, 1355 (2005) (concluding general substantive law of custody is "delicate issue" for state courts, unless explicitly implicating race or gender); Lori Catalano, Comment, *Totalitarianism in Public Schools: Enforcing a Religious and Political Orthodoxy*, 34 CAP. U. L. REV. 601, 635 (2006) (stating *Newdow* majority extended exception to include all cases involving "delicate issues of domestic relations"). Chief Justice Rehnquist recognized the potential mischief in the Court's opinion, stating that "[t]he domestic relations exception is not a prudential limitation on our federal jurisdiction," and characterized *Newdow*'s holding narrowly: "[L]ike the proverbial excursion ticket—good for this day only." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 20, 25 (2004) (Rehnquist, J., concurring).

110. Mary Anne Case observed that the *Newdow* decision suggested that the Supreme Court was reluctant to decide constitutional questions of who may marry, and noted that the decision came down in the midst of congressional consideration of both a constitutional amendment and jurisdiction-stripping statute designed to insulate the issue from court review. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1791 (2005) ("There is every indication that the current Supreme Court [is reluctant] to decide the constitutional question of who may marry."). Cass Sunstein cited *Newdow* as "fresh support" for the idea that the Supreme Court should avoid resolving the marriage equality issue at this juncture. Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2113–14 (2004) (extolling *Newdow*'s emphasis on the need for judicial caution in domain of family law, and objecting to premature federal court intervention on issue of marriage equality based on courts' "properly limited role in the constitutional structure"). And Dale Carpenter observed that certain language in the opinion "seems tailor-made for a future case involving a gay marriage claim." Dale Carpenter, *Federal Marriage Amendment: Yes or No? Four Arguments Against a Marriage Amendment that Even an Opponent of Gay Marriage Should Accept*, 2 U. ST. THOMAS L.J. 71, 84 n.58 (2004); see also Nathan M. Brandenburg, Note, *Preachers, Politicians, and Same-Sex Couples: Challenging Same-Sex Civil Unions & Implications on Interstate Recognition*, 91 IOWA L. REV. 319, 345 (2005) (stating that it is unclear whether the Supreme Court would consider same-sex unions as part of domestic relations).

questions, without reference to *Newdow*.<sup>111</sup> For example, a district court in Colorado dismissed a father's claim that the defendants had heard his paternity claim under the wrong statute because of, among other things, the domestic relations exception.<sup>112</sup>

Some courts have explicitly advocated extension of the domestic relations exception to federal questions.<sup>113</sup> Other courts have limited the domestic relations exception to diversity jurisdiction.<sup>114</sup> And still others

111. See, e.g., *Birla v. Birla*, No. 07-1774 (MLC), 2007 WL 3227185, at \*2 (D.N.J. Oct. 30, 2007) (invoking domestic relations exception where plaintiff claimed divorce proceeding violated civil rights); *Andrews v. Jefferson Cty. Col. Dept. of Human Servs.*, No. C07-02918 HRL, 2007 WL 3035447, at \*2 (N.D. Cal. Oct. 16, 2007) ("At their core, plaintiff's claims present a child custody dispute. They are, therefore, barred by the domestic relations exception to federal subject matter jurisdiction."); *Fisher v. California*, No. 1:06-cv-00363-AWI-DLB-P, 2007 WL 1430091, at \*1 (E.D. Cal. May 15, 2007) ("[F]ederal courts lack jurisdiction to adjudicate claims arising from custody disputes because 'the domestic relations exception . . . divests the federal courts of power to issue . . . child custody decrees.'" (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992))); *Wideman v. Colorado*, No. 06-cv-001423-WDM-CBS, 2007 WL 757639, at \*7 (D. Colo. Mar. 8, 2007) (finding no subject matter jurisdiction over alleged constitutional violation in paternity proceeding); *Resendes v. Brown*, No. CA 06 286 ML, 2007 WL 293955, at \*4 (D.R.I. Jan. 25, 2007) (applying domestic exception in case involving custody dispute); *Dixon v. Kuhn*, No. 06-4224 (MLC), 2007 WL 128894, at \*2 (D.N.J. Jan. 12, 2007) ("This Court lacks jurisdiction over a domestic relations matter involving child support."); *Banks v. Washington State CPS*, No. CV-06-0335-JLQ, 2007 WL 128351 at \*2 (E.D. Wash. Jan. 11, 2007) ("Like *Coats*, this action appears to be a challenge to a state court child custody decision. Therefore, just as in *Coats*, it appears this court must decline to exercise jurisdiction.").

112. *Wideman*, 2007 WL 757639, at \*7 (dismissing for lack of subject matter jurisdiction based on domestic relations exception and on *Rooker-Feldman* doctrine).

113. Judge Posner wrote in *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006):

There is no good reason to strain to give a different meaning to the identical language in the diversity and federal-question statutes. The best contemporary reasons for keeping federal courts out of the business of . . . granting divorces and annulments, . . . approving child adoptions, and the like . . . are as persuasive when a suit is filed in federal court on the basis of federal law as when it is based on state law.

*Id.*

114. See, e.g., *Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 947 (9th Cir. 2008) ("We therefore join the Fourth and Fifth Circuits in holding that the domestic relations exception applies only to the diversity jurisdiction statute."); *Richardson v. Richardson*, No. 08-1671, 2008 WL 2355050, at \*3 n.2 (E.D. La. June 5, 2008) ("Although not asserted by Plaintiff, the Court notes that diversity jurisdiction is lacking in the present case, as the parties are not diverse. As such, the Court need not address the 'domestic relations' exception to diversity jurisdiction." (citing *Ankenbrandt v. Richards*, 504 U.S. 689 (1992))); *Colassi v. Looper*, No. 08-cv-115-JL, 2008 WL 2115160, at \*2 n.2 (D.N.H. May 20, 2008) ("While, at first blush, the domestic relations exception might seem to apply, the majority view is that the exception divests federal courts of jurisdiction over cases premised on diversity of citizenship only, in line with the reasoning of *Ankenbrandt*." (citing *Mandel v. Town of Orleans*, 326 F.3d 267, 271 & n.3 (1st Cir. 2003))); *Briggman v. Va. Dep't of Soc. Servs., Div. of Child Support Enforcement*,

have noted that it is unsettled whether the exception applies to federal questions.<sup>115</sup>

Perhaps surprisingly, *Newdow* itself has had considerable traction in the lower federal courts. A number of courts have relied on *Newdow* to apply the exception to federal questions.<sup>116</sup> For example, the Eighth Circuit relied in part

526 F. Supp. 2d 590, 598 (W.D. Va. 2007) (concluding that the "[domestic relations] exception applies only to limit diversity jurisdiction and 'has no generally recognized application as a limitation on federal question jurisdiction'" (quoting *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997))); *Smith v. Smith*, No. 7:07CV00117, 2007 WL 3025097, at \*3 n.2 (W.D. Va. Oct. 12, 2007) ("[T]he court concludes that neither the domestic relations exception nor the *Rooper-Feldman* doctrine serves as a complete bar to the court's exercise of subject matter jurisdiction over the plaintiff's claims." (citing *Johnson*, 114 F.3d at 481)); *Sheppard v. Welch*, No. 1:05CV0467DFHTAB, 2005 WL 1656873, at \*2 (S.D. Ind. July 5, 2005) (distinguishing *Newdow* and stating that "[b]ecause this is not a diversity jurisdiction case, the domestic relations exception does not apply" and "[t]here is no domestic relations exception to the Due Process Clause"); *Schottenstein v. Schottenstein*, No. 04 Civ. 5851 (SAS), 2004 WL 2534155, at \*8 n.91 (S.D.N.Y. Nov. 8, 2004) ("To the extent that this Court's jurisdiction is not based on the diversity statute, the domestic relations exception does not operate as a limitation on the Court's authority to adjudicate this dispute.").

115. *Tomas v. Gillespie*, 385 F. Supp. 2d 240, 243 n.2 (S.D.N.Y. 2005).

116. *See, e.g., Campbell v. Ligan*, 109 F. App'x 894, 895 (9th Cir. 2004) ("The district court also properly abstained from hearing this case on the ground that it essentially sought review of a domestic relations case."); *Edland v. Edland*, No. C08-5222RBL, 2008 WL 2001813, at \*1 (W.D. Wash. May 7, 2008) ("This Court should decline jurisdiction in matters such as these which are 'on the verge' of the [domestic relations] exception, when there is no obstacle to a full and fair determination in the state courts . . ." (brackets in *Edland*) (quoting *Bossom v. Bossom*, 551 F.2d 474, 475 (2d Cir. 1976))); *Arroyo ex rel. Arroyo-Garcia v. County of Fresno*, No. CV F 07-1443 AWI SMS, 2008 WL 540653, at \*4 (E.D. Cal. Feb. 25, 2008) (extending exception to both federal question and diversity cases pursuant to language of *Newdow*); *Whiteside v. Neb. State Health & Human Servs.*, No. 4:07CV3030, 2007 WL 2123754, at \*2 (D. Neb. July 19, 2007) (dismissing plaintiff's 42 U.S.C. § 1983 claims pursuant to domestic relations exception because, reasoning with *Newdow*, "the totality of the Plaintiff's claims involve a dispute over the collection of child support payments"); *Harden v. Harden*, No. 8:07CV68, 2007 WL 700982, at \*2 (D. Neb. Feb. 28, 2007) ("[E]ven if the plaintiff had stated a civil rights claim against his family members, . . . he is precluded . . . by the 'domestic relations doctrine' . . ."); *Puletti v. Patel*, No. 05 CV 2293(SJ), 2006 WL 2010809, at \*4 (E.D.N.Y. July 14, 2006) (dismissing plaintiff's "unconstitutional deprivation of parenting time" claim pursuant to domestic relations exception partly because "[p]laintiff's constitutional claims are 'directly related' to the custody proceeding"); *A.N. & D.N. v. Williams*, No. 8:05-CV-1929-T-27MSS, 2005 WL 3003730, at \*2 (M.D. Fla. Nov. 9, 2005) (dismissing § 1983 claim because "[e]ven if she [the plaintiff] has arguable standing, *Elk Grove* requires this Court to 'stay its hand' in order to leave these family law issues to the state courts"); *Gates v. County of Lake*, No. CIV. S-05-1374 DFL PAN PS, 2005 U.S. Dist. LEXIS 32182, at \*1-2 (E.D. Cal. Dec. 12, 2005) (dismissing plaintiff's "application to proceed in forma pauperis" because "[r]esolution of child custody and related family law issues lies only with the laws of the states, as interpreted by the state courts" (citing *Newdow*, 542 U.S. at 12); *Smith v. Huckabee*, 154 F. App'x 552, 554-55 (8th Cir. 2005) (affirming dismissal of Smith's § 1983 claim because "to the extent that Smith's complaint relates to defendants' actions in his custody dispute, we generally decline to intervene in state domestic-relations matters"); *Rousay v. Mieseler*, No. CIV. S-05-1261 LKK PAN PS,

on *Newdow* to affirm dismissal of a father's civil rights case alleging that state officials had improperly addressed allegations that his ex-wife's current husband was abusing his daughter.<sup>117</sup>

Like academics, courts have noted that *Newdow* suggests the domestic relations exception applies to both diversity and federal question cases and observe that "it is unsettled whether the 'domestic relations' exception applies to cases that raise a federal question."<sup>118</sup> Some courts have relied on *Newdow* specifically in the context of prudential standing or non-custodial parents' rights.<sup>119</sup> And, as was the case before *Newdow*, some courts expand the

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2005 U.S. Dist. LEXIS 27431, at \*3 (E.D. Cal. Nov. 9, 2005) ("Dismissal is also warranted to the extent this case involves child custody issues; such matters lie only with the laws of the states as interpreted by the state courts."); *Chase v. Czajka*, No. 04 Civ. 8228 (LAK) (AJP), 2005 U.S. Dist. LEXIS 8743, at \*19–23 (S.D.N.Y. May 12, 2005) (dismissing plaintiff's federal civil rights claims and promoting abstention when federal claims "are matrimonial in nature or on the verge of being matrimonial in nature"); *Fellows v. Kansas*, No. 04-4131-JAR, 2005 WL 752129, at \*4 (D. Kan. Mar. 31, 2005) (declining to review whether Kansas court erroneously determined that plaintiff was a noncustodial parent pursuant to domestic relations exception); *Pettit v. New Mexico*, 375 F. Supp. 2d 1140, 1148–49, 1151 (D.N.M. 2004) (concluding that, because "[Pettit's] claims would require the Court to make determinations about divorce, alimony and child custody decrees," "the domestic relations exception precludes the Court from exerting jurisdiction over some, if not all, of Pettit's claims"); *Smith v. Oakland County Cir. Ct.*, 344 F. Supp. 2d 1030, 1064–66 (E.D. Mich. 2004) (concluding that domestic relations exception precludes court from awarding prospective injunctive relief); *Rago v. Samaroo*, 344 F. Supp. 2d 309, 312, 314 (D. Mass. 2004) (concluding that, whether or not "the Full Faith and Credit Clause, in either its constitutional or statutory incarnations," provides plaintiff with "an implied federal cause of action," domestic relations exception warrants dismissal of plaintiff's claim for custody order); *Lopez-Rodriguez v. City of Levelland*, No. Civ.A. 5:02-CV-073-C, 2004 WL 1836729, at \*1–2 (N.D. Tex. Aug. 16, 2004) (staying, pursuant to domestic relations exception, plaintiffs' federal civil rights claims until appropriate state court determined marital status of plaintiffs).

117. See *Smith v. Huckabee*, 154 F. App'x 552, 555 (8th Cir. 2005) (citing *Newdow* in part to dismiss).

118. *Tomas v. Gillespie*, 385 F. Supp. 2d 240, 243 n.2 (S.D.N.Y. 2005); see also *Glaude v. Glaude*, No. 07-cv-137-PB, 2007 WL 4353707, at \*2–3 (D.N.H. Dec. 10, 2007) (reasoning that *Newdow* expanded domestic relations exception).

119. See, e.g., *Crowley v. McKinney*, 400 F.3d 965, 970–71 (7th Cir. 2005) (recognizing that noncustodial parents' constitutional rights to participate in children's education may be circumscribed); *A.N. & D.N. v. Williams*, No. 8:05-CV-1929-T-27MSS, 2005 WL 3003730, at \*2–4 (M.D. Fla. Nov. 9, 2005) (concluding that mother did not have prudential standing to pursue action seeking injunctive relief to prevent state court-ordered immunizations, because the parents were granted joint parental responsibility, and state law precluded mother from initiating litigation on behalf of children without father's participation); *Pettit v. New Mexico*, 375 F. Supp. 2d 1140, 1148–49, 1151 (D.N.M. 2004) (characterizing exception as one of prudential standing limitations and finding that, to extent claims would require determinations about divorce, alimony, or child custody decrees, exception precluded jurisdiction); *Lopez-Rodriguez v. City of Levelland*, No. Civ.A. 5:02-CV-073-C, 2004 WL 1836729, at \*1–2 (N.D. Tex. Aug. 16, 2004) (dismissing, in part, because "disputed family law rights are entwined inextricably

domestic relations exception to federal questions as a matter of subject matter jurisdiction,<sup>120</sup> while others rely on abstention.<sup>121</sup> Courts often cite some combination of the domestic relations exception, *Newdow*, *Rooker-Feldman*, and the abstention doctrines in tandem, taking a gestalt approach to bar federal court review.<sup>122</sup>

As a purely intellectual matter, *Newdow* is fairly easy to distinguish from federal civil rights cases relating to family law. After all, the family law issue in *Newdow* was antecedent to—not entwined with—the federal question, and one can easily imagine that, had the federal question been less controversial, the family law issue might not have been dispositive of the case.

But given the history of the domestic relations exception, there is little reason to be sanguine. As discussed earlier, the origins of the exception lie in Supreme Court dicta in cases where the Court sustained jurisdiction.

with the threshold standing inquiry").

120. See, e.g., *Arroyo ex rel. Arroyo-Garcia v. County of Fresno*, No. CV F 07-1443 AWI SMS, 2008 WL 540653, at \*4 (E.D. Cal. Feb. 25, 2008) (determining that court lacks subject matter jurisdiction because "[p]laintiff's attempt to cast this action as an effort to redress violations of her civil rights is belied by" plaintiff's underlying attempt to "vacate all custody and child support decrees and judgments" of the non-federal courts); *Puletti v. Patel*, No. 05 CV 2293(SJ), 2006 WL 2010809, at \*1 (E.D.N.Y. July 14, 2006) ("[T]he Court finds Plaintiff's Complaint is, in essence, an attempt to have this Court improperly review the state court decision regarding the custody arrangement for Plaintiff's son. As such, this Court lacks subject matter jurisdiction."); *Gates v. County of Lake*, No. S-05-1374 DFL PAN PS, 2005 U.S. Dist. LEXIS 32182, at \*2 (E.D. Cal. Dec. 12, 2005) ("Resolution of child custody and related family law issues lies only with the laws of the states, as interpreted by the state courts . . . . This court is without subject matter jurisdiction to consider plaintiff's complaint.") (citations omitted).

121. See, e.g., *Edland v. Edland*, No. C08-5222RBL, 2008 WL 2001813, at \*1 (W.D. Wash. May 7, 2008) (finding abstention appropriate because plaintiffs "seek[] to embroil this Court in the child custody battle between Ms. Edland and her ex-husband"); *Puletti*, 2006 WL 2010809, at \*4 (promoting abstention "even if subject matter jurisdiction exists over a particular matrimonial action"); *Campbell v. Ligan*, 109 F. App'x 894, 895 (9th Cir. 2004) ("The district court also properly abstained from hearing this case on the ground that it essentially sought review of a domestic relations case.") (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 524 U.S. 1, 124 S. Ct. 2301, 2309 (2004)).

122. See, e.g., *A.N. & D.N.*, 2005 WL 3003730, at \*4–5 (dismissing based on *Newdow*'s prudential standing ruling, *Newdow*'s general language regarding domestic relations exception, official immunity, absence of state action, and *Rooker-Feldman*); *Fellows v. Kansas*, No. 04-4131-JAR, 2005 WL 752129, at \*2–4 (D. Kan. Mar. 31, 2005) (dismissing based on Eleventh Amendment immunity, *Rooker-Feldman*, Article III standing, and exception in *Newdow*); *Pettit*, 375 F. Supp. 2d at 1150–52 (dismissing based on Eleventh Amendment, Article III standing, *Rooker-Feldman*, as well as prudential standing/domestic relations exception); *Rago v. Samaroo*, 344 F. Supp. 2d 309, 312–14 (D. Mass. 2004) (finding complaint subject to dismissal pursuant to absolute judicial immunity, Eleventh Amendment, *Rooker-Feldman*, and domestic relations exception); *City of Levelland*, 2004 WL 1836729, at \*1–2 (citing *Newdow* for deference to state courts, but also relying on *Newdow*'s standing principles, as well as *Burford* abstention principles).



*Ankenbrandt*'s language clarifying the parameters of the doctrine is at least arguably dicta, though almost always treated as authoritative. And historically, some lower courts have always tended to view the doctrine broadly. Viewed in this context, it is hardly surprising that some courts have seized on *Newdow* as the latest means of avoiding federal domestic relations questions. The question is not *whether* courts will rely on *Newdow* (they are) but rather, how far the rhetoric in *Newdow* will reach.

Thus far, federal court reliance on *Newdow* arises in the context of dismissing claims related to earlier, state-court domestic relations proceedings rather than more general constitutional cases raising claims about rights of the family. This alone is problematic, especially because in many of these cases, invocation of the domestic relations exception is simply unnecessary. The other avoidance doctrines described in Parts II.A.2 and II.A.3 provide ample justifications for dismissal.<sup>123</sup> But while *Newdow*'s impact could perhaps remain limited, it will not necessarily be. Its expansive wording has the potential to radically expand the scope of the domestic relations exception. Although a broad expansion of the exception to federal question cases is not yet a foregone conclusion, it cannot be ruled out, particularly when *Newdow* is considered in conjunction with domestic relations "abstention" and court decisions that already construe the exception as extending to federal questions.

In 2006, the Supreme Court again spoke in dicta about the domestic relations exception in *Marshall v. Marshall*,<sup>124</sup> a case in which the Court considered the probate exception to federal jurisdiction. Though the Court did not address whether the domestic relations exception extends to federal questions, Justice Ginsburg's opinion stressed that the doctrine "covers only a narrow range of domestic relations issues."<sup>125</sup> Thus, the reach of the exception remains unclear at this point, at least insofar as the Supreme Court is concerned.

What is clear, however, is that the lower federal courts are drifting toward an expansion of the domestic relations exception to include federal questions. They are using a variety of methods to avoid deciding federal question cases

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123. See *supra* note 122 and accompanying text (describing cases relying on multiple doctrines for dismissal).

124. See *Marshall v. Marshall*, 547 U.S. 293, 314 (2006) (holding that probate exception to federal jurisdiction does not extend to jurisdiction over tortious interference counterclaim).

125. *Id.* at 307 (quotations omitted) (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 701 (1992)). Courts have used *Marshall* both to expand and narrowly limit exceptions to federal jurisdiction. Compare *Mannix v. Machnik*, 244 F. App'x 37, 38 (7th Cir. 2007) (noting that *Marshall* declined to extend the probate exception to bankruptcy jurisdiction), with *Jones v. Brennan*, 465 F.3d 304, 306–09 (7th Cir. 2006) (extending probate exception to federal question cases).

relating to the family: *Newdow*, subject matter jurisdiction, abstention, or a combination of other federal courts avoidance doctrines. Part III considers whether an expanded exception fits within established federal courts jurisprudence, and then considers what ends might justify expansion.

### III. Assessing Doctrinal and Policy Justifications

Federal questions are characterized as the "core of modern federal court jurisdiction" and "the most important component of the federal courts' workload."<sup>126</sup> If an exception to domestic relations cases raising federal questions can be said to exist, where do we locate the basis for such an exception? What is its scope? What would be the rationales for this exception, and what public policy ends would it serve?

In *Ankenbrandt*, the Court answered these questions for the diversity exception.<sup>127</sup> Tracing the evolution of the diversity statute, the Court concluded that the exception exists as a matter of statutory construction, based on Congressional acceptance of federal courts' longstanding construction of diversity jurisdiction.<sup>128</sup> "[S]ound policy considerations,"—including problems relating to continuing federal court jurisdiction, the promotion of judicial economy, and the state courts' "special proficiency" in addressing these issues—supported this conclusion.<sup>129</sup> Nowhere in the opinion did the Court

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126. CHEMERINSKY, *supra* note 43, at 271.

127. *Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992).

128. *See id.* at 697–701. Specifically, the Court stated:

When Congress amended the diversity statute in 1948 to replace the law/equity distinction with the phrase "all civil actions," we presume Congress did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes, which had construed the statutory diversity jurisdiction to contain an exception for certain domestic relations matters.

*Id.* at 700.

129. *Id.* at 703–04. Because the plaintiff's suit did not seek a divorce, alimony, or child custody decree, the trial court had subject matter jurisdiction and should not have dismissed the case. *Id.* at 704. The Court also held that *Younger* abstention was inappropriate, *id.* at 705, although granting in dicta that in certain circumstances *Burford* abstention might be "relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody" if the case presented "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar." *Id.* at 705–06 (quotations omitted) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)). This might be the case if a federal suit arose before the effectuation of a divorce, alimony, or child custody decree if the suit depended on a determination of the parties' status. *Id.* at 706.

indicate that the exception extends to federal question cases.<sup>130</sup> Instead, the Court narrowly circumscribed the category of diversity cases to which the exception applies.<sup>131</sup>

Using *Ankenbrandt* as my starting point, below I analyze the potential doctrinal bases, scope, and policy goals of an expanded exception.

### A. Locating a Doctrinal Basis for Expansion

As described above, the doctrinal foundation for an expanded domestic relations exception for federal questions is a moving target. Many courts have viewed the exception in terms of subject matter jurisdiction, consistent with the narrow iteration in *Ankenbrandt*. Others have relied on the exception as an abstention doctrine. Since *Newdow*, still other courts have discussed the doctrine in terms of justiciability doctrines.

#### 1. Subject Matter Jurisdiction

There are two potential bases for an exception based on subject matter jurisdiction: Article III of the Constitution and the federal question statute.<sup>132</sup> Both would effect a mandatory exception to federal question jurisdiction.

Though the majority opinion in *Ankenbrandt* made no mention of the exception in the federal question context, Justice Blackmun did so in his concurrence.<sup>133</sup> He noted that, like the diversity statute, Article III's federal question grant extends judicial power in federal question cases to "Cases, in Law and Equity."<sup>134</sup> Justice Blackmun concluded that if the limitation applied

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130. *But see id.* at 715 n.8 (Blackmun, J., concurring) (arguing that majority decision "casts grave doubts upon Congress' ability to confer federal-question jurisdiction . . . on the federal courts in any matters involving divorces, alimony, and child custody").

131. *See id.* at 692 n.2 (noting that some lower courts had extended exception to include tort suits stemming from domestic relations disputes).

132. *See* U.S. CONST. art. III, § 2, cl. 1 (extending federal judicial power to "all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority"). The current iteration of the federal question statute, little changed from its predecessors, provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331 (2000). Federal courts may adjudicate cases *only* when they have both constitutional and statutory jurisdiction. CHEMERINSKY, *supra* note 43, at 266–67.

133. *See Ankenbrandt v. Richards*, 504 U.S. 689, 715 n.8 (1992) (Blackmun, J., concurring) (expressing concerns over domestic relations exception in federal question context).

134. *Id.* (Blackmun, J. concurring). Certainly, this is a weak point in *Ankenbrandt's*

in the Constitutional context, the Court's decision would "cast[] grave doubts upon Congress' ability to confer federal-question jurisdiction (as under 28 U.S.C. § 1331) on the federal courts in any matters involving divorces, alimony, and child custody."<sup>135</sup>

But the Constitution is an unlikely foundation for the exception. There is no express language in the text establishing the exclusion of domestic relations.<sup>136</sup> And the *Ankenbrandt* Court explicitly stated that the basis for the diversity exception was a limiting construction of the diversity statute, not Article III.<sup>137</sup> None of the foundational cases relied on the Constitution as the basis for the exception.<sup>138</sup> It is difficult to imagine that the current Court would locate an even more expansive exception with no historical precedent in Article III. Justice Blackmun's language—"any matters involving divorces, alimony, and child custody"—casts a much broader net than either he or the majority did in characterizing the existing exception.<sup>139</sup> Although he clearly was concerned about the potential scope of the exception, his extension of *Ankenbrandt*'s reasoning is not inevitable, nor have subsequent Supreme Court cases adopted his theory.<sup>140</sup>

Judge Posner in the Seventh Circuit has suggested a similar approach to the federal question statute.<sup>141</sup> When Congress created diversity jurisdiction extending to "all suits of a civil nature at law or equity," probate and domestic relations cases already were being excluded because they were thought not to

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reasoning. It is difficult to understand why, if the "Cases, in Law and Equity" language in the Constitution is identical to the earliest diversity statutes, the foundation of the exception should exist in statutory construction rather than in the Constitution itself. On the other hand, in the context of federal question jurisdiction, the Supreme Court has interpreted identical Constitutional and statutory language quite differently. See CHEMERINSKY, *supra* note 43, at 266–67 (noting that Court interprets constitutional federal question provision expansively, but takes more narrow view of same language in federal question statute).

135. *Ankenbrandt*, 504 U.S. at 715 n.8 (Blackmun, J., concurring).

136. *See id.* at 697 (acknowledging that "Article III, § 2, does not [explicitly] mandate the exclusion of domestic relations cases from federal-court jurisdiction").

137. *Id.* at 698–701.

138. *See id.* at 696–97 (examining post-*Barber* cases and "concluding that when the *Barber* Court 'disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce,' . . . it was not basing its statement on the Constitution") (brackets in *Ankenbrandt*) (quoting *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858)).

139. *Ankenbrandt v. Richards*, 504 U.S. 689, 715 n.8 (1992) (Blackmun, J., concurring) (emphasis added).

140. *See supra* Part II.C (examining more recent applications of the domestic relations exception).

141. *See Jones v. Brennan*, 465 F.3d 304, 306–07 (7th Cir. 2006) (comparing probate and domestic relations exception origins).

be part of common law or equity.<sup>142</sup> Because Congress used the same language—"all suits of a civil nature at law or equity"—in the federal question statute, Judge Posner urges that the probate and domestic relations exceptions should apply with equal force to federal question jurisdiction.<sup>143</sup>

Although the *Ankenbrandt* Court was careful to avoid expressly ruling on the historical basis for the exception,<sup>144</sup> its discussion of the issue suggests that Posner's formulation reaches too far. The generally accepted historical basis for the exception derives from English chancery court jurisdiction, on which United States courts' equity jurisdiction was based.<sup>145</sup> English chancery jurisdiction did not extend to cases of divorce or alimony; those cases remained within the exclusive sphere of the English ecclesiastical courts.<sup>146</sup> Because suits seeking divorce or alimony generally will only arise in the federal courts via diversity jurisdiction,<sup>147</sup> this narrow historical justification for the diversity exception does little to implicate a broader exception for federal question cases.

Moreover, unlike the diversity exception, this construction of the federal question statute lacks the weight of *stare decisis*, at least at the Supreme Court level. A broader federal question exception could hardly be said to be "an understood rule that has been recognized for nearly a century and a half."<sup>148</sup> As mentioned, *supra*, several of the initial cases commenting on the exception were in fact federal question cases, in which the Court found that federal jurisdiction was appropriate.<sup>149</sup>

142. *Id.* at 307 (quoting the Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78).

143. *See id.* ("[E]xceptions were probably intended to apply to federal-question cases too. And there is no indication that the current formula in both jurisdictional states—'all civil actions,' 28 U.S.C. §§ 1331, 1332(a)—was intended to repeal the exceptions.")

144. *See Ankenbrandt*, 504 U.S. at 698–701 (refraining from "join[ing] the historical debate over whether the English court of chancery had jurisdiction to handle certain domestic relations matters" but nevertheless examining the opposing viewpoints).

145. *See id.* at 698–99 (noting argument, promoted by *Barber* dissent, "that the federal courts had no power over certain domestic relations actions because the [English] court of chancery lacked authority to issue divorce and alimony decrees"); *see also* *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) ("We have long held that '[t]he "jurisdiction" thus conferred . . . is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries.'" (brackets in *Grupo Mexicano*) (quoting *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 568 (1939))).

146. *Ankenbrandt v. Richards*, 504 U.S. 689, 699–700 (1992).

147. *But see* *Lynk v. LaPorte* Super. Ct. No. 2, 789 F.2d 554, 557 (7th Cir. 1986) (considering prisoner's federal question claim that in effect included request for divorce).

148. *Ankenbrandt*, 504 U.S. at 694–95.

149. *Supra* note 46 and accompanying text.

Importantly, the position that an expanded exception might find its basis in Article III or federal statute is also in tension with the Court's own forays into federal questions involving family law, including those directly challenging state statutes regulating divorce and child custody or support, as well as state court custody decisions.<sup>150</sup> A conclusion that federal courts lack subject matter jurisdiction to entertain such cases would involve a significant rewriting of jurisprudential history, and undermine the considerable body of federal family law.

Finally, the language of *Newdow* itself—perhaps the closest thing to an explicit Supreme Court statement on jurisdiction over federal question domestic relations matters—suggests that any such exception necessarily would be discretionary rather than mandatory. Subject matter jurisdiction is a mandatory restriction on federal jurisdiction.<sup>151</sup> The Court's comment that there will, at least, be "rare instances . . . in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue"<sup>152</sup> necessarily implies that federal courts have subject matter jurisdiction to entertain these cases. I now turn to consider whether discretionary abstention or justiciability doctrines would be a better doctrinal fit for the expansion now underway in the lower courts.

## 2. Abstention

The domestic relations exception has been likened to abstention because it recognizes state-court proficiency in domestic relations matters and specially tailored procedures to address them—functions that, it is urged, federal courts are poorly equipped to perform.<sup>153</sup>

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150. See *supra* notes 13–25 and accompanying text (discussing various constitutional questions relating to family decided by Supreme Court).

151. CHEMERINSKY, *supra* note 43, at 266–67.

152. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 13 (2004).

153. See *Struck v. Cook County Pub. Guardian*, 508 F.3d 858, 860 (7th Cir. 2007) ("State courts . . . are assumed to have developed a proficiency in core probate and domestic-relations matters and to have evolved procedures tailored to them, and some even employ specialized staff not found in federal courts . . . . So the 'exception' is akin to a doctrine of abstention."). Because he found no coherent jurisdictional basis for the exception, in *Ankenbrandt* Justice Blackmun would have grounded the diversity exception in abstention doctrines. *Ankenbrandt v. Richards*, 504 U.S. 689, 714 (1992). Justice Blackmun emphasized that the early cases were concerned with "the virtually exclusive primacy at that time of the States in the regulation of domestic relations." *Id.* He found no need to "affix a label" to his proposed abstention principles. *Id.* at 716 n.9. And in the context of the exception to diversity jurisdiction, scholars have noted that existing abstention doctrines could address a large number of the concerns implicated in those cases. See *Atwood*, *supra* note 30, at 603–25 (examining abstention

Without doubt, the abstention doctrines play a role in the adjudication of domestic relations cases, as with all other cases in federal court. *Burford* abstention's concern with "complex issues of state law, resolution of which would be 'disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern'"<sup>154</sup> will sometimes implicate family law cases.<sup>155</sup> But it does not uniformly implicate all domestic relations matters.<sup>156</sup> Similarly, *Pullman* abstention will sometimes operate to preclude federal court review if decision on a state-law question would obviate the need for a federal, constitutional decision.<sup>157</sup> The Court has not used *Pullman* to articulate a wholesale exclusion of domestic relations matters from the federal courts, however. *Younger* abstention precludes federal court action when

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doctrines and discussing when federal jurisdiction is appropriate for domestic relations cases in the diversity context); Rush, *supra* note 30, at 26–27. Another commentator has advocated at least a form of "*Ankenbrandt*" abstention to further the policy aims of the exception to diversity jurisdiction. See Stein, *supra* note 30, at 671 (proposing "a new form of abstention whose application would exclude from federal review all core cases as well as suits raising difficult issues of unresolved state law").

154. *Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

155. It might be relevant in cases involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody decrees, if for example, "a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties." *Ankenbrandt*, 504 U.S. at 706. *Newdow* cited *Ankenbrandt* for this proposition, but without noting that *Ankenbrandt* made the statement in the context of discussing *Burford* abstention. See *Newdow*, 542 U.S. at 13. But conversely, a federal court will exercise federal question jurisdiction over a state-law claim if it appears that the right to relief depends on a construction or application of federal law. *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 313 (2005).

156. For example, in *Zablocki*, a case challenging a Wisconsin statute conditioning receipt of marriage licenses upon parents being current on child support payments, the Supreme Court rejected abstention and distinguished *Burford*, finding that *Zablocki* did not involve complex state law issues for which federal court intervention would be disruptive. *Zablocki*, 434 U.S. at 374.

157. *Pullman* abstention might have been an appropriate—though not necessarily dispositive—means of avoiding constitutional decision in *Newdow*. The California Supreme Court had never considered the extent of a non-custodial parent's standing to challenge unconstitutional state action affecting his or her child against the wishes of the custodial parent. See *Supreme Court, 2003 Term, supra* note 101, at 432–33. The Supreme Court thus might have abstained because a California Supreme Court answer in the negative would have mooted *Newdow*'s constitutional claim. *Id.* Of course, had the California Supreme Court sustained *Newdow*'s standing, the Court eventually would have had to consider the merits of *Newdow*'s claim. *Id.* Under *Pullman* abstention, the federal court retains jurisdiction but stays the case during the pendency of state court review, and the parties can return to federal court if the state ruling does not settle the matter. CHEMERINSKY, *supra* note 43, at 786. Note that the Court would have been abstaining, however, *not* on consideration of the domestic relations issue, but rather on the First Amendment issue.

family law litigants seek injunctive or declaratory relief related to pending state court proceedings,<sup>158</sup> but the Supreme Court has declined to apply it as a wholesale abstention doctrine for domestic relations cases.<sup>159</sup> Finally, to the extent virtually identical domestic relations lawsuits are proceeding concurrently in both state and federal court, in "exceptional circumstances" *Colorado River* abstention may preclude federal court review.<sup>160</sup>

Grounding the exception in abstention doctrine could present a uniform policy of deferring to state courts in all family law cases.<sup>161</sup> And abstention certainly would address concerns along the federalism axis<sup>162</sup> that seem to animate some federal family law cases and the state exclusivity theme that doggedly persists in contemporary cases. But the suitability of abstention doctrine to this task also depends on the goals of abstaining. For example, if

158. In *Sims*, the Court applied *Younger* abstention to dismiss a federal suit challenging the constitutionality of Texas child abuse statutes and procedures. *Moore v. Sims*, 442 U.S. 415, 435 (1979). Though it observed in passing that "[f]amily relations are a traditional area of state concern," *id.*, the *Sims* Court invoked *Younger* abstention because state court proceedings were pending, the State was a party, and the issues raised were closely related to criminal statutes. *Id.* at 423. As explained above, *Younger* is frequently invoked in federal question cases relating to domestic relations. See *supra* note 76 (providing examples).

159. *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992). The Court noted that it had "never applied the notions of comity so critical to *Younger*'s 'Our Federalism' when no state proceeding was pending nor any assertion of important state interests made." *Id.*

160. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976).

161. Some federal question claims involving federal statutes or regulations would likely remain in federal court.

162. The ultimate purpose of federalism is far from immutable; it is, in fact, highly contested. Federalism might be described as "concurrent governance; that is, federalism is maximized by increasing the occasions for the federal government and the state governments to share authority." Erwin Chemerinsky, *Federal Courts, State Courts, and the Constitution: A Rejoinder to Professor Redish*, 36 UCLA L. REV. 369, 378 (1988). Federalism might also have harmony as its goal. *Id.* at 379. Or federalism might be understood as "the national interest in the independent functioning of the states." Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1508 (1987). Still others have observed that:

[T]he constitutional structure presupposes that federalism will help realize some of the goods typically associated with this institutional configuration: more direct participation in government; more experiment[ation] and innovation; the diversity of choices a federal structure permits; the efficiencies of decentralization; and a reduced risk of tyrannical government when political power is divided across two government[s] . . . .

Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1558 (2000). "Historically, of course, federalism also has served some of the most offensive values in American history, such as those associated with slavery." *Id.* at 1558 n.155.



the goal is to foreclose a constitutional ruling altogether, abstention will only in some instances succeed.<sup>163</sup>

Blanket abstention in the context of federal question cases is especially problematic. Federal courts have a "strict,"<sup>164</sup> "virtually unflagging"<sup>165</sup> duty to exercise the jurisdiction conferred by Congress. Abstention remains the exception, not the rule.<sup>166</sup> Moreover, the existence of a federal question should make federal courts more circumspect about abstention rather than less: "[T]he presence of federal-law issues must always be a major consideration weighing *against* surrender [of jurisdiction]."<sup>167</sup> Thus, in certain contexts the Supreme Court has deemed abstention inappropriate because of the important constitutional claims alleged.<sup>168</sup>

In contrast to some lower federal courts, the Supreme Court has never fashioned a doctrine of wholesale abstention for domestic relations.<sup>169</sup> In the

163. For *Pullman* abstention, courts typically retain jurisdiction, meaning that if the state court ruling does not moot the federal question, the federal courts eventually will have to take it up. See generally *England v. Louisiana State Bd. of Med. Exam'rs*, 375 U.S. 411 (1964). This would not necessarily be the case with *Burford* or *Younger* abstention, where abstention usually results in dismissal. See *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726–27 (1996) (discussing parameters for dismissal in context of abstention). In general, in cases seeking equitable, discretionary relief, the federal courts may stay or dismiss/remand the case based on abstention principles. *Id.* at 721. In the context of damages actions, however, abstention may be exercised only to stay the action, not dismiss or remand it. *Id.* at 721, 730–31; see also *Ankenbrandt*, 504 U.S. at 706 n.8 ("[S]hould *Burford* abstention be relevant in other circumstances, it may be appropriate for the court to retain jurisdiction to ensure prompt and just disposition of the matter upon the determination by the state court of the relevant issue.") (citing *Kaiser Steel Corp. v. W. S. Ranch Co.*, 391 U.S. 593, 594 (1968)). And regardless of whether a court dismisses or stays under *Colorado River*, the practical effect will almost always be to permanently withdraw the issue from federal-court review, because of preclusion doctrine. See *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 28 (1983) ("[A] stay is as much a refusal to exercise federal jurisdiction as a dismissal . . . . [T]he decision to invoke *Colorado River* necessarily contemplates that the federal court will have nothing further to do in resolving any substantive part of the case, whether it stays or dismisses.").

164. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996).

165. *Colo. River*, 424 U.S. at 817.

166. *Id.* at 813.

167. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 26 (emphasis added); *Ankenbrandt v. Richards*, 504 U.S. 689, 717 (1992) (Blackmun, J., concurring) (arguing that, had plaintiff's claims raised federal questions, abstention would have been counter-indicated); see also *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 815 n.21 (1976) ("[T]he presence of a federal basis for jurisdiction may raise the level of justification needed for abstention.").

168. See CHEMERINSKY, *supra* note 43, at 795–96 ("[A]s the Supreme Court has indicated, if there are sensitive constitutional rights, such as voting and freedom of speech, which will be harmed by delay, abstention should be avoided.").

169. See *Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978) ("And there is, of course, no doctrine requiring abstention merely because resolution of a federal question may result in the

context of diversity, the *Ankenbrandt* Court was not persuaded that the exception should be grounded in abstention doctrines, noting that the doctrine predated the advent of abstention jurisprudence by more than eighty years, and questioning why abstention would be preferable to a construction of the diversity statute.<sup>170</sup> The existing abstention doctrines apply to domestic relations cases, *not* because domestic relations are involved, but because the cases implicate the underlying concerns of abstention doctrines, just as other federal cases do.<sup>171</sup> Crafting a new abstention doctrine based on the subject matter of the suit would be a departure from existing jurisprudence: The isolation of domestic relations for different treatment would be unprecedented and, for reasons discussed below, troubling.

### 3. Justiciability

As with other federal court doctrines, the justiciability doctrines—the prohibition on advisory opinions, standing, ripeness, mootness, and the political question doctrine—will sometimes operate to preclude review of domestic relations questions. Although the Supreme Court has never based a broad domestic-relations exception on justiciability doctrines, *Newdow*'s prudential standing ruling arguably comes close.

Justiciability doctrines perform a gatekeeping function in determining which cases are appropriate for federal court review.<sup>172</sup> A primary concern of the justiciability doctrines is the separation of powers.<sup>173</sup> These doctrines "define the judicial role; they determine when it is appropriate for the federal courts to review a matter and when it is necessary to defer to the other branches of government."<sup>174</sup> As with abstention, however, whether separation of powers issues are implicated would depend on the motivation for an expanded domestic relations exception.

Considered in the context of the existing exception for diversity cases, separation of powers concerns initially seem less relevant than federalism concerns. After all, one of the primary justifications for the diversity exception

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overturning of state policy.").

170. *Ankenbrandt*, 504 U.S. at 706 n.8.

171. *Cf. Spindel v. Spindel*, 283 F. Supp. 797, 811 (E.D.N.Y. 1968) ("There appears to be no ground for application of a generalized doctrine of abstention in matrimonial cases.").

172. *See* CHEMERINSKY, *supra* note 43, at 44 (discussing policies underlying justiciability doctrines).

173. *Id.* at 45.

174. *Id.*

is that cases seeking divorce, alimony, or child custody—questions necessarily determined by state rather than federal law—historically have been decided by state courts. This arguably raises federalism-based questions about the relationship between the states and federal courts, but does not raise similar concerns about the relationship between the judiciary and the other branches. And to the extent the justiciability doctrines are concerned with ensuring actual, concrete disputes between adverse parties, carving out domestic relations exceptions as a category is unwarranted. These concerns are no more or less salient in domestic relations cases than in other federal suits.

If, however, the goal of an expanded exception is to avoid constitutional questions and defer to legislative actors on "delicate issues of domestic relations,"<sup>175</sup> justiciability doctrines could certainly vindicate those interests.<sup>176</sup> Prudential standing, ripeness, and the political question doctrine are potential bases for expanding the domestic relations exception.

"[S]tanding is crucial in defining the scope of judicial protection of constitutional rights."<sup>177</sup> Prudential standing was the basis for the Court's decision in *Newdow*.<sup>178</sup> But the Court's prudential standing analysis was roundly criticized as a dramatic departure from existing standing jurisprudence.<sup>179</sup> The Court's reasoning did not square with prudential

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175. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004); cf. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION & FAMILY VALUES 6–7* (1997) (discussing judicial and academic positions that family law is area reserved for state legislative action).

176. The Court's concerns about separation of powers were manifest in *Newdow*: Justice Stevens took pains to highlight the "constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary" and the need for courts to avoid deciding "abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions." *Newdow*, 542 U.S. at 12. Justice Stevens observed: "The command to guard jealously and exercise rarely our power to make constitutional pronouncements requires strictest adherence when matters of great national significance are at stake." *Id.* at 11. And, he stressed repeatedly that domestic relations are the province of the states rather than the federal courts. *Id.* at 12–13.

177. CHEMERINSKY, *supra* note 43, at 61.

178. When would a plaintiff's "standing to sue [be] founded on family law rights that are in dispute?" This might be a categorization problem akin to the one that arose in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989): The answer depends on how the alleged right is categorized, as injury based on the general right to marry, or a right to same-sex marriage. That is, if the right to same-sex marriage is "in dispute," could a court then dismiss the case for lack of standing because there is no injury in fact? (This of course is precisely the sort of problem that critics of the standing doctrine often raise—the justiciability question collapses into a question about the merits.)

179. See *Supreme Court, 2003 Term*, *supra* note 101, at 430; see also *Newdow*, 542 U.S. at 20 (Rehnquist, J., concurring) ("The domestic relations exception is not a prudential limitation on our federal jurisdiction."); *supra* notes 104–10 and accompanying text.

prohibitions against third party standing, generalized grievances, and challenges outside a party's zone of interests.<sup>180</sup>

Ripeness doctrine might also serve these goals. Judge Wood in the Seventh Circuit recently suggested: "Given the primary responsibility that states have for the field of family law, perhaps the Supreme Court might hold some day that [a domestic relations claim] is not ripe until state remedies have been exhausted."<sup>181</sup> But such a holding would require § 1983 litigants to exhaust state remedies before filing suit in federal court.<sup>182</sup> There is no such requirement,<sup>183</sup> and because collateral estoppel applies to plaintiffs,<sup>184</sup> such an exhaustion requirement essentially would bar them from reaching the federal forum.<sup>185</sup> Creating an exception for family law cases would also treat those litigants differently from virtually all other § 1983 litigants.<sup>186</sup>

Finally, the political question doctrine—with its focus on subject matter the Court deems inappropriate for judicial review<sup>187</sup>—could expand to include constitutional domestic relations cases. But the traditional areas in which the doctrine has been invoked do not include domestic relations.<sup>188</sup> Further,

180. See generally CHEMERINSKY, *supra* note 43, at 57–62, 84–105 (introducing standing doctrine and describing prudential standing limitations).

181. *Crowley v. McKinney*, 400 F.3d 965, 977 (7th Cir. 2005) (Wood, J., dissenting in part, concurring in part) (citation omitted).

182. *Id.* at 973 (Wood, J., dissenting in part, concurring in part).

183. *Patsy v. Bd. of Fed. Regents*, 457 U.S. 496, 507 (1982).

184. *Allen v. McCurry*, 449 U.S. 90, 103–05 (1980).

185. See Michael Wells, *The Role of Comity in the Law of Federal Courts*, 60 N.C. L. REV. 59, 80 (1981) (arguing that Court has continued to make distinction between exhaustion in habeas and § 1983 claims in order to prevent creating a situation in which § 1983 plaintiffs essentially are denied federal forum on basis of exhaustion).

186. The Supreme Court has imposed an analogous exhaustion requirement in the context of as-applied regulatory takings claims. In *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), the Supreme Court announced a two-factor test for determining whether a federal takings claim is ripe: (1) there must be administrative exhaustion, and (2) the plaintiffs must first litigate their claims in state court. *Id.* at 186–88, 194–95 (1985). See generally Scott A. Keller, Note, *Judicial Jurisdiction Stripping Masquerading as Ripeness: Eliminating the Williamson County State Litigation Requirement for Regulatory Takings Claims*, 85 TEX. L. REV. 199 (2006) (characterizing ripeness doctrine as judicially developed jurisdiction stripping rule that should be abandoned). When combined with preclusion doctrine, these ripeness requirements practically close the federal forum to takings plaintiffs. *Id.* at 200.

187. CHEMERINSKY, *supra* note 43, at 147.

188. Traditional areas include: foreign affairs; the impeachment process; the republican form of government clause and the electoral process; Congress's ability to regulate its internal processes; the process for ratifying constitutional amendments; and instances where the federal court cannot shape equitable relief. See generally CHEMERINSKY, *supra* note 43, at 147–49 (describing political question doctrine).

although current doctrine defers to the President and Congress in these matters,<sup>189</sup> given the Court's recent opinions regarding congressional regulation of domestic relations, it seems likely that an expanded domestic relations exception under the rubric of the political question doctrine would defer to *state* legislators rather than Congress.

Reliance on justiciability doctrines would function to remove domestic relations cases from judicial review in favor of other, more politically accountable bodies. But as with abstention, singling out a particular type of litigation for exceptional treatment by the justiciability doctrines would be virtually unprecedented.<sup>190</sup>

In conclusion, although a variety of federal court doctrines act to preclude federal review of some domestic relations cases in some circumstances, none of them provides a basis for the wholesale exclusion of federal questions related to domestic relations. Basing an expanded exception on one of the current doctrines would challenge the integrity of existing federal courts jurisprudence.<sup>191</sup> I now consider the potential scope of a domestic relations exception that would include federal question cases.

### B. Measuring the Scope of Expansion

Whatever the shortcomings of the domestic relations exception to diversity jurisdiction, the Supreme Court's clarifications have made it relatively straightforward to determine when the exception applies. An expanded exception in the area of federal questions promises no such clarity.

Parsing the language of the *Newdow* opinion illustrates the difficulties in answering these questions.<sup>192</sup> Broadly, *Newdow* might be cited for the

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189. *Id.*

190. *But see supra* note 186.

191. Of course, many judicial avoidance doctrines have been the subject of harsh criticism. *See generally* CHEMERINSKY, *supra* note 43, at 45–48.

192. In particular, two aspects of the *Newdow* opinion seem to open up the possibility of an expansive exception: First, Justice Stevens uses broad language to describe the federal judiciary's relationship with domestic relations cases. *See Newdow*, 542 U.S. at 13 (acknowledging that federal courts might decline to hear case involving elements of domestic relationship apart from divorce, alimony, or child custody). Second, the majority relies heavily on the federal system's relationship with domestic relations cases to justify dismissal, even though there were no core domestic relations disputes at issue and no outstanding questions regarding the status of the parties, as discussed above. *Supra* notes 92–97 and accompanying text. Of course, it is possible to construe the holding of *Newdow* narrowly, and that is certainly what Justice Rehnquist hoped would happen. *Supra* note 109. Most narrowly, it might stand merely for the proposition that a plaintiff does not have prudential standing to sue when that standing "is founded on family law rights that are in dispute when the prosecution of the lawsuit

proposition that "[w]hen *hard questions of domestic relations are sure to affect the outcome*, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law."<sup>193</sup> Or, courts might rely on *Newdow's* quotation of *Ankenbrandt* (taken out of context):

[I]t might be appropriate for the federal courts to decline to hear a case involving '*elements of the domestic relationship*,' even when divorce, alimony, or child custody is not strictly at issue: This would be so when a case presents *difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar*.<sup>194</sup>

Or, even more broadly: "[W]hile *rare instances* arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts."<sup>195</sup> *Newdow's* rhetoric takes a very different approach than *Ankenbrandt's* contained holding that the exception applies *only* to diversity and *only* to actions for divorce, alimony, and child custody.

The question then becomes: What counts as a domestic relations case? How close a relationship to domestic relations matters must a federal question suit have in order to implicate the exception? Would all federal question suits raising any issues even tangentially touching on domestic relations fall within the exception?<sup>196</sup>

The broadest construction would implicate all of the categories described above: "Hard questions of domestic relations" affecting case outcomes might arise in *any* case challenging state proceedings, policies, statutes, or regulations

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may have an adverse effect on the person who is the source of the plaintiff's claimed standing." *Newdow*, 542 U.S. at 19. Or, perhaps a noncustodial parent does not have prudential standing to sue to vindicate his or her own constitutional rights vis-à-vis the child's education when the noncustodial parent lacks the right to sue as the child's next friend. *See id.* at 15 (noting conflict between interests of custodial and noncustodial parent in such a case). Or, a noncustodial parent does not have prudential standing to sue when his preferences regarding the parental right at issue are in conflict with those of the custodial parent or the child. *See id.* at 17 (noting custodial parent exercises sort of veto power over noncustodial parent's wishes for child's education).

193. *Id.* at 17 (emphasis added).

194. *Id.* at 13 (quoting *Ankenbrandt v. Richards*, 504 U.S. 687, 705–06 (1992)) (emphasis added).

195. *Id.* (emphasis added) (internal citations omitted).

196. In this section, I am concerned principally with how the exception might apply to federal constitutional claims brought pursuant to § 1983.

and, indeed, any federal question case in which some of the parties have or had a domestic relationship of some kind.<sup>197</sup> This construction would implicate virtually all of the existing and future constitutional family law jurisprudence. Similarly, a variety of federal question cases would involve "elements of a domestic relationship," and could present "difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case a bar."<sup>198</sup>

The scope of the exception might depend on the particular type of domestic relationship at issue. Relying on a literal reading of the existing exception's language, an expanded exception might be limited to federal question challenges relating to divorce, child custody, and support proceedings.<sup>199</sup> It is also possible that the Court could carve out *marriage* regulation—as opposed to other domestic relations—as peculiarly within the domain of the states. The context in which *Newdow* came down is telling: The *Newdow* decision was announced during congressional debate over the Federal Marriage Amendment, and the example of a "rare case" justifying federal review was *Palmore v. Sidoti*—a race case—rather than any of the Court's sex discrimination cases involving state marriage laws.<sup>200</sup> In *Lawrence v. Texas*,<sup>201</sup> Justice O'Connor indicated that she might make a distinction between the criminalization of sexual conduct and state regulation of marriage, stating that preserving the traditional institution of marriage is a "legitimate state interest" and that "other reasons exist to promote the institution of marriage beyond mere moral disapproval of an excluded group."<sup>202</sup> And there is precedent for the proposition that challenges to a state statute prohibiting same-sex marriage do not raise a federal question.<sup>203</sup>

Another variation could base the exception on the category of constitutional claim raised. For example, the exception might preclude review

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197. Cf. *Wand*, *supra* note 30, at 326 ("At one end of the spectrum are courts that define 'domestic relations' expansively and avoid the difficult line-drawing process. Under this approach, any litigation involving parent and child or husband and wife is labeled as a domestic relations case and thus within the exception.")

198. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004) (quoting *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 814 (1976)).

199. As I explained in Part II, the majority of cases currently relying on an expanded exception have come to federal court challenging earlier, state-court proceedings. Many of these cases would also be barred by preclusion doctrine or *Rooker-Feldman*.

200. Case, *supra* note 110, at 1791–92.

201. *Lawrence v. Texas*, 539 U.S. 558, 564 (2003).

202. *Id.* at 585 (O'Connor, J. concurring).

203. E.g., *Baker v. Nelson*, 409 U.S. 810 (1972); see also *supra* note 16 (citing cases so finding).

of cases raising substantive due process claims concerning fundamental family rights, such as the right to marry or the right of family privacy. This variation might construe these claims as involving "elements of a domestic relationship . . . present[ing] difficult questions of state law bearing on policy problems of substantial public import."<sup>204</sup> So, perhaps federal courts increasingly would defer to states in terms of what constitutes fundamental rights of the family, but nevertheless review state court procedures and proceedings in status determinations for procedural infirmities.

Or, it might mean that federal courts would decline to hear both procedural and substantive due process claims about fundamental rights of the family, but would continue to review equal protection or due process challenges impacting a particular subclass of citizens.<sup>205</sup> Such a case might constitute a "rare instance" in which a federal question exists that "transcends or exists apart from the family law issue."<sup>206</sup> But if the Court really means what it says, perhaps Chief Justice Rehnquist was right to emphasize that in *Palmore v. Sidoti* the federal constitutional issue was intimately related to the custody issue.<sup>207</sup>

Yet another variant would consider what work the court is being asked to do when determining whether to provide federal court review.<sup>208</sup> *Ankenbrandt* focuses on the power of federal courts to *issue* divorce, alimony, and child custody decrees.<sup>209</sup> So, another alternative might be to ask what relief the plaintiff seeks. If the claimant seeks a status determination or modification of a court order of support or alimony, the exception applies;<sup>210</sup> if the claimant seeks

204. *Newdow*, 542 U.S. at 13 (internal quotations omitted).

205. *See, e.g.*, *Magaziner v. Montemuro*, 468 F.2d 782, 787 (3d Cir. 1972) (refusing to consider federal question in absence of equal protection concerns).

206. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004).

207. *Id.* at 22 (Rehnquist, J., concurring).

208. For example, some courts considering whether to apply the doctrine to federal question cases have refused to become involved in cases that would require them to become "enmeshed in the facts" of underlying domestic relations disputes. *See, e.g.*, *Hernstadt v. Hernstadt*, 373 F.2d 316, 317–18 (2d Cir. 1967) (affirming dismissal for lack of subject matter jurisdiction because relief sought would cause district court to become enmeshed in facts); *McArthur v. Bell*, 788 F. Supp. 706, 708–09 (E.D.N.Y. 1992) ("[T]o decide the instant case, this Court would be forced to re-examine and re-interpret all the evidence brought before the state court in the domestic relations proceedings."); *Neustein v. Orbach*, 732 F. Supp. 333, 339 (E.D.N.Y. 1990) ("If . . . in resolving the issues presented, the federal court becomes embroiled in factual disputes concerning custody and visitation matters, the action must be dismissed.").

209. *Ankenbrandt v. Richards*, 504 U.S. 689, 703–04 (1992); *see also* *Catz v. Chalker*, 142 F.3d 279, 292 & n.14 (6th Cir. 1998) (relying on *Ankenbrandt* to support finding that domestic relations exception should be read narrowly to proscribe federal courts from issuing divorce, child custody, and alimony decrees).

210. *See, e.g.*, *Partridge v. Ohio*, 79 F. App'x 844, 845 (6th Cir. 2003) (dismissing claims



money damages, an examination of the *process* by which the court order was determined, or other equitable relief, federal court review is available.<sup>211</sup>

Ultimately, the blurry boundaries of this exception would make consistency challenging, but its amorphousness would be a useful means of avoiding challenging or controversial constitutional questions.<sup>212</sup> So, while it is clear that a more expansive exception would be discretionary rather than mandatory in nature, when and how it would be triggered is anyone's guess. As exercised now, there is no predictability for litigants, nor a principled explanation for why some domestic relations cases should remain in federal court while others should not.

### C. Justifying Expansion and Exclusion

The current exception to diversity jurisdiction has no apparent relationship to congressional intent despite the *Ankenbrandt* Court's intimations to the contrary.<sup>213</sup> In *Ankenbrandt*, however, the Court articulated "sound policy considerations" supporting the narrow exception it announced: judicial economy and judicial expertise.<sup>214</sup> A more general rationale to which federal

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because plaintiff sought relief in form of shared custody of his children); *Hughes v. Hamann*, 23 F. App'x 337, 337 (6th Cir. 2001) (dismissing claims because plaintiff asked court to make decision on merits of custody issue of children's best interests); *Smith v. Oakland County Circuit Court*, 344 F. Supp. 2d 1030, 1064–65 (E.D. Mich. 2004) (finding relief in form of affirmative child custody orders barred by domestic relations exception); *Elmasri v. England*, 111 F. Supp. 2d 212, 220–21 (E.D.N.Y. 2000) (dismissing claims because plaintiff sought to overturn, at least in part, decision of state court regarding the custody). *But see* *Lynk v. LaPorte Super. Ct. No. 2*, 789 F.2d 554, 558 (7th Cir. 1986).

211. *See* *King v. Comm'r*, 60 F. App'x 873, 875 (2d Cir. 2003) (finding domestic relations exception inapplicable in suits for monetary damages); *Johnson v. Rodrigues*, 226 F.3d 1103, 1111–12 (10th Cir. 2000) (rejecting domestic relations exception because federal court could reach federal question and remand custody issue back to state court for determination); *Smith v. Oakland County Circuit Court*, 344 F. Supp. 2d 1030, 1065 (E.D. Mich. 2004) (permitting facial challenge to state statute and due process challenge to state proceedings); *Catz*, 142 F.3d at 293 (overruling dismissal of due process claims because it did not implicate merits of divorce decree); *Thomas v. New York City*, 814 F. Supp. 1139, 1146–47 (E.D.N.Y. 1993) (alleging substantive due process violations that do not implicate domestic relations exceptions and not seeking custody award). Other courts note that most typical adversary proceedings regarding probate or domestic relations are in rem and therefore focus on whether the civil actions in federal court seek to remove a *res* over which a state court is exercising control. *E.g.*, *Struck v. Cook County Pub. Guardian*, 508 F.3d 858, 859–60 (7th Cir. 2007).

212. *See* *Wells*, *supra* note 185, at 86.

213. Barry Friedman, *A Different Dialogue: The Supreme Court, Congress, and Federal Jurisdiction*, 85 NW. U. L. REV. 1, 26 (1990).

214. *Ankenbrandt v. Richards*, 504 U.S. 689, 703–04 (1992). The *Ankenbrandt* opinion (and other federal decisions) also are animated, at least in part, by stare decisis concerns. *Id.* at

judges adhere with insistence echoes the family law exceptionalism narrative: Federal courts do not "do" family law (and never have).<sup>215</sup>

### *I. Judicial Economy/Court Congestion*

The judicial economy rationale for the exception emphasizes that "core" domestic relations cases<sup>216</sup> often involve continuing jurisdiction, and that state courts are more "eminently suited" to this work because of their close association with state and local agencies addressing issues arising out of divorce, alimony, and child custody.<sup>217</sup> The exception to diversity jurisdiction might also be justified in part because it restricts an area of federal jurisdiction that has been singled out for elimination altogether.<sup>218</sup> Diversity jurisdiction has long been the target of those who advocate a reduction in federal court caseloads.<sup>219</sup>

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700. The Court explains that "the unbroken and unchallenged practice of the federal courts since before the War Between the States of declining to hear certain domestic relations cases provides the very rare justification for continuing to do so." *Id.* at 715; *see also, e.g.*, *Ruffalo v. Civiletti*, 702 F.2d 710, 717 (8th Cir. 1983) ("Although the historical interpretation of the origin of the domestic-relations exception is probably incorrect, federal courts have consistently refused to entertain diversity suits involving domestic relations for a number of reasons . . .") (internal citations omitted).

215. *Ruffalo*, 702 F.2d at 717. In his *Ankenbrandt* concurrence, Justice Blackmun, in advancing his case for an abstentional rather than jurisdictional basis for the exception, maintains that the common concern expressed in the cases on this issue is based on "the virtually exclusive primacy at that time of the States in the regulation of domestic relations," but questioned whether state interest remains a sufficient justification for the exception. *Ankenbrandt*, 504 U.S. at 714–15 (Blackmun, J., concurring). Some courts have also raised the specter of incompatible federal and state court decrees in cases of continuing jurisdiction. *See Ruffalo*, 702 F.2d at 718 (noting that state court's child custody decree could not compel federal actors to disclose whereabouts of subject under federal witness protection). As discussed above, however, preclusion doctrine would prevent federal courts from issuing judgment on status at odds with state court orders, and abstention doctrines would require federal court dismissal in the event of concurrent lawsuits. *Supra* notes 76–79 and accompanying text.

216. Core cases involve status declarations such as marriage, annulment, divorce, custody, and paternity. "Semicore" cases are those declaring the rights or obligations that arise from status, e.g., alimony, child support, and property division. *Ankenbrandt*, 504 U.S. at 716 (Blackmun, J., concurring).

217. *Id.* at 704.

218. The carving out of a special exception for domestic relations cases, as I will discuss, *infra*, is nevertheless fraught.

219. *See* Friedman, *supra* note 213, at 27–28 (recognizing that Supreme Court has little use for diversity jurisdiction and urges curtailment where possible); CHEMERINSKY, *supra* note 43, at 298–99 (summarizing arguments for abolishing diversity jurisdiction).

But diversity cases are distinct from federal question cases involving rights of the family. Diversity cases, after all, deal with application of state law, and it may make some intuitive sense—at least facially—to defer to the states on this front.<sup>220</sup> Not so with federal question cases, which are at the crux of modern federal court jurisdiction.<sup>221</sup> No one is agitating for the wholesale elimination of federal question jurisdiction, although Congress routinely attempts to narrow jurisdiction over particular types of cases.<sup>222</sup> And judicial economy becomes even less tenable as a justification once we acknowledge the variety of other contexts in which federal courts must retain jurisdiction for lengthy periods, such as in cases of systemic discrimination in the public education system,<sup>223</sup> widespread civil rights violations in state penitentiaries,<sup>224</sup> and even continuing jurisdiction in federal abstention cases.<sup>225</sup> The judicial economy rationale has little force in the context of federal question jurisdiction.

## 2. Judicial Expertise

Notions of judicial economy bleed into concerns about judicial expertise. In the context of core proceedings, federal judges have noted that because of historical practices, states have developed specialized courts and procedures for administering family law matters, while Congress and the federal court system generally have not.<sup>226</sup> By contrast, federal judges may be relatively inexpert in state law matters relating to family law and less versed in the complex regulatory regime in place to oversee these relationships.<sup>227</sup>

But in the context of federal question jurisdiction, this need not be the case and likely would not be. Federal question jurisdiction should not typically

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220. CHEMERINSKY, *supra* note 43, at 312. This rationale would apply equally to all other state law claims. *But c.f.* Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 312 (2005) (noting that federal courts have federal question jurisdiction to hear state-law claims implicating important federal issues).

221. *Id.* at 271.

222. *See supra* note 27 and accompanying text (citing examples of Congress's attempts to pass legislation to prevent federal judicial review in family law related matters).

223. *See, e.g.*, Brown v. Bd. of Educ., 349 U.S. 294, 301 (1955) (maintaining continuing jurisdiction over cases involving the integration of American public schools).

224. *See, e.g.*, Ruiz v. Johnson, 37 F. Supp. 2d 855, 862–64 (S.D. Tex. 1999) (retaining federal jurisdiction over Texas prison system for several decades).

225. *See supra* note 163 (discussing which abstention doctrines contemplate continuing jurisdiction).

226. Ankenbrandt v. Richards, 504 U.S. 689, 715 (1992) (Blackmun, J., concurring).

227. Of course, federal courts could observe the same about state contract or tort law, as well.

involve the federal courts in making core status determinations.<sup>228</sup> Instead, federal courts would be reviewing state statutes, regulations, policies, and proceedings for constitutional or federal statutory infirmities.<sup>229</sup> Federal courts have at least as much—if not more—expertise in deciding these federal statutory and constitutional questions.<sup>230</sup> As with the judicial economy justification, judicial expertise holds considerably less sway in the context of federal questions.

### 3. *State Exclusivity*

The state exclusivity theory holds that family law is the exclusive province of the states. In *Ankenbrandt*, however, Justice Blackmun, observed that "whether the interest of States remains a sufficient justification today . . . is uncertain in view of the expansion in recent years of federal law in the domestic relations area."<sup>231</sup> Contemporarily, numerous scholars have contested the notion of state exclusivity in the realm of domestic relations.<sup>232</sup>

Recent scholarship challenges the commonly invoked aphorism that the states have always had virtually exclusive control over domestic relations. For example, during the pre-Civil War period, the federal government was involved in domestic relations in a variety of ways: Congress passed legislation providing a war pension system for widows and orphans; federal courts considered issues of married women's citizenship even when such a determination limited state power; Congress passed citizenship statutes regulating family rights and responsibilities; and federal courts regularly

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228. Certainly, the idea that federal courts are incapable or inexpert at reviewing core domestic relations decrees cannot be the case. The Supreme Court itself reviewed the merits of several divorce decrees in some detail as early as the turn of the century, *see De La Rama v. De La Rama*, 201 U.S. 303, 310–19 (1906) (reexamining facts underlying direct appeal from divorce decree), and has continued to engage in family law type analysis in many of its contemporary decisions. *See, e.g., Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 15 (2004) (noting that case implicates "the interests of a young child"); *Troxel v. Granville*, 530 U.S. 57, 86 (1999) (engaging in best interests analysis to decide appropriateness of hearing family law issues before federal court).

229. To the extent a federal court invalidated a particular status determination, as long as adjudication is available in state court, the better practice would be to send the issue back to be revisited by the family court judge. This practice is consistent with a focus on the relief litigants seek rather than the subject matter of the lawsuit. *Supra* notes 210–11 and accompanying text.

230. *But see* William Rubenstein, *The Myth of Superiority*, 16 CONST. COMMENT. 599, 612–19 (1999) (urging that state court judges may be more technically and psychologically competent to consider some civil rights claims).

231. *Ankenbrandt*, 504 U.S. at 715 (Blackmun, J., concurring).

232. Hasday, *supra* note 30, at 1298.

adjudicated cases involving domestic relations while applying federal practices and procedures.<sup>233</sup> During the nineteenth century, Congress regulated the family via prohibitions against polygamy and regulations of sexual activity.<sup>234</sup>

In the modern era, the federal system is involved in a complex array of laws regulating the family. Some statutes are specific to families, such as the Sexual Abuse Act of 1986,<sup>235</sup> the Parental Kidnapping Prevention Act of 1980,<sup>236</sup> and the federal Defense of Marriage Act.<sup>237</sup> Federal law also shapes domestic relations both directly and indirectly through laws governing taxation, pensions, bankruptcy, social welfare programs, military families, Native Americans, and immigrants.<sup>238</sup> As Judith Resnik summarizes:

[O]ne finds a pattern of interaction between the national government and individuals, some but by no means all of whom reside in federal territories, about discrete issues relating to family life, marriage, sexuality, and economic relations. When this history of sporadic federal intervention is coupled with the many contemporary federal laws that affect and regulate family life, the idea that family law belongs to the states becomes problematic.<sup>239</sup>

Beyond these contested historical claims, even were the state exclusivity assumption true, that observation alone should not lead to a conclusion that the states *should* have exclusive control over domestic relations.<sup>240</sup> The final work of this Article is to consider this normative issue.

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233. Collins, *supra* note 30, at 1842–43.

234. See Resnik, *Naturally*, *supra* note 30, at 1743 n.319 (citing acts of Congress in 1800s outlawing bigamy, polygamy, and adultery).

235. Pub. L. No. 99-646, 100 Stat. 3620 (codified as amended at 18 U.S.C. § 2241 (2000)).

236. Pub. L. No. 96-611, 94 Stat. 3566 (codified as amended at 28 U.S.C. § 1738A (2006)).

237. Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C. § 7 (2005) and 28 U.S.C. § 1738C (2006)).

238. Resnik, *Naturally*, *supra* note 30, at 1722; see also *id.* at 1722–29 (discussing impact of federal law on domestic relations in tax, pension, bankruptcy, welfare, military, Native American, and immigration contexts).

239. *Id.* at 1746–47.

240. Cf. Martin Redish, *Judicial Parity, Litigant Choice, and Democratic Theory: A Comment on Federal Jurisdiction & Constitutional Rights*, 36 UCLA L. REV. 329, 350 (1988) (“[I]n discussing our national traditions, it is both dangerous and fallacious to infer an ‘ought’ from an ‘is.’”).

#### IV. *The Effects of Expansion*

Having now considered the potential doctrinal bases and policy justifications for an expanded exception, this Part turns to the critical issue my analysis raises: *Should* federal courts defer to the states when faced with federal questions affecting the family?<sup>241</sup> This question implicates the instrumental and normative value in preserving federal jurisdiction for this category of cases, as well as the causal, expressive, and cultural harms that flow from an expanded exception. Ultimately, this Part concludes these values and concerns far outweigh any justification for expanding the domestic relations exception.

##### A. *The Values of the Federal Forum*

Regardless of whether a federal forum is available, plaintiffs raising federal claims relating to the family will nevertheless be able to pursue their federal claims in state court. Unless there exists a specific federal statute carving out exclusive federal jurisdiction, "state courts have concurrent jurisdiction with federal courts over all matters within federal jurisdiction."<sup>242</sup> There is also the possibility, albeit unlikely, of Supreme Court review.<sup>243</sup> So, one might argue, contracting federal jurisdiction over this subset of cases raising federal questions will not foreclose litigation of these federal claims.<sup>244</sup> Despite the availability of state court review, below I explore the values of preserving a federal forum.

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241. Should the exception be extended to sweep up "prospective relief under the civil-rights laws even if a state should adopt an unconstitutional substantive or procedural norm"? *Mannix v. Machnik*, 244 F. App'x 37, 38 (7th Cir. 2007).

242. *CHEMERINSKY*, *supra* note 43, at 268; *see also* *Yellow Freight Sys. Inc. v. Donnelly*, 494 U.S. 820, 826 (1990) ("[T]he presumption of concurrent jurisdiction . . . lies at the core of our federal system.").

243. *See* 28 U.S.C. § 1257 (2006) (granting Supreme Court jurisdiction over appeals from highest state courts when constitutionality of treaty, federal statute, or state statute is in question, or when any right or privilege created by Constitution or federal statute or treaty is implicated).

244. Moreover, state constitutionalism is resurgent and may provide additional opportunities for family-law litigants. *See* Burt Neuborne, *Parity Revisited: The Uses of a Judicial Forum of Excellence*, 44 DEPAUL L. REV. 797, 797, 799 (1994) (noting modest renascence in state constitutional jurisprudence).

### 1. *The Instrumental Values of Federal Question Jurisdiction*

The availability of federal courts to hear federal claims serves a variety of the instrumental purposes<sup>245</sup> of federal question jurisdiction. First, federal judges generally will have greater experience in interpreting questions of federal law, which should lead to accurate and well-reasoned rulings on federal questions.<sup>246</sup> Second, in part by virtue of their greater experience and the relatively small number of federal judges, the availability of federal judges to decide federal questions should lead to greater uniformity in the interpretation of federal law.<sup>247</sup> Third, the availability of federal courts to decide federal questions protects the federal system's interest in expounding on issues of federal law where that law intersects with the realm of family law.<sup>248</sup> Without exercising jurisdiction over this subset of cases, federal courts will have few opportunities to shape this area of the law.<sup>249</sup> In the absence of this availability, state courts would be closer to the sole interpreters of federal law concerning domestic relations, potentially disrupting the uniform interpretation of federal law.<sup>250</sup>

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245. By "instrumental," I mean purposes that exist and have value regardless of whether there is parity between state and federal courts.

246. Redish, *supra* note 240, at 333; see John F. Preis, *Reassessing the Purposes of Federal Question Jurisdiction*, 42 WAKE FOREST L. REV. 247, 272–86 (2007) (offering empirical analysis of state and federal cases involving federal law and concluding that federal judges have more experience interpreting federal law); see also *Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005) (referencing "experience, solicitude, and hope of uniformity that a federal forum offers on federal issues"); American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 164–65 (1969) ("The federal courts have acquired a considerable expertness in the interpretation and application of federal law which would be lost if federal question cases were given to the state courts.").

247. See American Law Institute, *Study of the Division of Jurisdiction Between State and Federal Courts* 165–68 (1969) ("[L]ack of uniformity in the application of federal law stemming from misunderstandings as to that law, and the body of decisions construing it, would be less in the federal courts than in the state courts."). *But see* CHEMERINSKY, *supra* note 43, at 272 ("It is not clear that ninety-four federal judicial districts will produce more uniformity than fifty state judiciaries . . . . Even if all fifty state judiciaries consider the issue, there are still likely to be just two or three different positions taken on a given legal question.").

248. See Preis, *supra* note 246, at 292 ("[J]udicial interpretation of federal law—whether by state or federal courts—has the effect of law. The federal government, therefore, has a strong interest in having the opportunity to adjudicate questions of federal law.").

249. Because Supreme Court jurisdiction by writ of certiorari is discretionary and infrequent, it would be insufficient. See Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between State and Federal Courts*, 104 COLUM. L. REV. 1211, 1219 (2004) (noting the "Supreme Court's limited capacity to superintend the fifty state court systems").

250. While certainly the state courts should be—and are—the final word on state law matters, surely the federal courts should have the parallel function vis-à-vis federal law. See *id.*

Fourth, maintaining the federal forum promotes litigants' autonomy by allowing them to select a forum in which to pursue federal constitutional claims.<sup>251</sup> This autonomy has special significance in the family law context because "it is desirable to permit individuals to make choices that are likely to be determinative of important aspects of their lives."<sup>252</sup>

Finally, having both state and federal courts concurrently consider and rule on federal questions concerning the family provides opportunities for cross-pollination and a state-federal dialogue about norm creation in the constitutional context. "One of the main advantages of an organic, interactive federal system is that the different political units within that system may benefit from cross-pollination derived from each other's wisdom and experience. Such benefits would largely be sacrificed by a rigid subject-matter separation of federal and state court jurisdictions."<sup>253</sup>

## 2. *The Normative Values of the Federal Forum: The Federal Role and Constitutional Tradition*

Beyond the federal forum's instrumental value, there is an extensive and spirited scholarly debate over whether the federal courts are superior arbiters of federal questions, which implicates questions about jurisdictional line-drawing between state and federal courts. Some scholars maintain that the federal judiciary is institutionally and normatively superior to the state courts,<sup>254</sup> while

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at 1243 ("The federal government, like the state governments, has an interest in having its own laws enforced in its own courts.").

251. Erwin Chemerinsky, *Parity Reconsidered: Defining a Role for the Federal Judiciary*, 36 UCLA L. REV. 233, 306 (1988).

252. *Id.* at 306. There is something paternalistic in the federal courts' decision to relegate constitutional family law cases to state courts that echoes an earlier era when it was routine, for example, for husbands to make decisions on behalf of their wives. See Cahn, *supra* note 30, at 1105 ("The rhetoric confining family law to the states is reminiscent of earlier language that confined women to the private sphere.").

253. Redish, *supra* note 240, at 332; see also Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 1006 (2000) ("A binary assumption, that an issue is either 'state' or 'federal,' misses the rich complexity of governance, in which shared and overlapping work is commonplace."); cf. Friedman, *supra* note 213, at 49 ("[U]ncertainty is resolved on a case-by-case basis between the [federal] branches. At times the dialogue is cooperative, with one branch or the other seeking assistance . . . . At other times the dialogue is educative, with one branch teaching the other . . . .").

254. See, e.g., Akhil Reed Amar, *Parity as a Constitutional Question*, 71 B.U. L. REV. 645, 645 (1991) (arguing that issue of parity should be considered "in the larger context—state court jurisdiction versus the federal judicial power of the United States as a whole"); Martin Guggenheim, *State Intervention in the Family: Making a Federal Case Out of It*, 45 OHIO ST. L.J. 399, 399, 427 (1984); Redish, *supra* note 240, at 336. In an important and influential



others argue just as strongly that there is "parity"<sup>255</sup> between state and federal courts.<sup>256</sup>

Those maintaining federal court superiority argue that they are the better forum because of their technical competence,<sup>257</sup> predisposition toward

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article, Burt Neuborne set out the general theory of why federal courts are the preferable fora for the litigation of federal, constitutional rights. *See generally* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1976). He argued that, historically, decisions by both litigants and judges regarding forum selection were based on assumptions about federal court superiority to state courts, and parties put forward federalism arguments based on what effect a particular forum would have on substantive rights. *Id.* at 1106. Depending on which side of an issue one was on, one might prefer the state or federal forum. *Id.* Neuborne's initial thesis prompted a flurry of scholarly discussion, which has had remarkable longevity. He continues to advance a "weak" version of disparity. *See* Neuborne, *supra* note 244, at 799 (arguing that relative institutional advantage for plaintiffs still exists because of "political insulation, tradition, better resources and superior professional competence").

255. The meaning of "parity," is, predictably, disputed. Some seem to view parity as relating to how frequently a court will rule in favor of those asserting constitutional claims. Chemerinsky, *supra* note 251, at 233 n.1. Others reject the notion that hospitality to constitutional claims should be preferable. *Id.* at 234 n.5 (citing Paul Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963)). Professor Redish observes:

The key issue . . . is not so much whether the court will find in favor of the constitutional right, but whether, whatever decision the court reaches, we can be assured that that decision was reached on the basis of a fair and neutral assessment of law, policy, and facts.

Redish, *supra* note 240, at 337–38; *see also* Preis, *supra* note 246, at 287 ("[I]n some instances, there are reasons to believe that federal courts *do* care more about federal claims. In other instances, however, such reasons are absent."). For Redish, the question is not whether state courts are competent to decide these issues, but whether they are equivalent to federal courts in so doing. Redish, *supra* note 240, at 336.

256. *See, e.g.*, Paul M. Bator, *The State Courts & Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 623–37 (1981) (arguing that "state courts are and should be seen as a valuable and enriching resource when they participate in the great task of federal constitutional lawmaking"); Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretations of Nollan v. California Coastal Commission*, 23 HARV. J.L. & PUB. POL'Y 233, 290 (1999) (presenting "strong empirical evidence of parity between state and federal courts in the takings area"); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State Courts: An Empirical Analysis of Judicial Parity*, 10 HASTINGS CONST. L.Q. 213, 214 (1983) ("Our study indicates that state courts are no more 'hostile' to the vindication of federal rights than are their federal counterparts . . ."); Michael E. Solimine & James L. Walker, *State Court Protection of Federal Constitutional Rights*, 12 HARV. J.L. & PUB. POL'Y 127, 128 n.8 (1989) ("We acknowledge the superiority of federal courts in some ways over state courts, but suggest that the distance between them is not so great as to vitiate parity.").

257. Federal court advocates argue that federal judges' technical competence will often make them better arbiters of federal constitutional rights because of their selection process and the resources available to them. Neuborne, *supra* note 254, at 1121–24.

enforcing constitutional rights,<sup>258</sup> and independence.<sup>259</sup> By contrast, those who maintain parity between the state and federal courts assert that state courts are just as competent to decide federal questions, and that courts' hospitality to federal constitutional claims is not the appropriate measure for parity.<sup>260</sup> This debate has been at an impasse for years, and the Supreme Court has offered support for both positions.<sup>261</sup>

In the area of domestic relations, the federal bench has functioned as a buffer between state prerogatives and individual rights, often weighing in on the side of the individual against the state.<sup>262</sup> In recent years, the family paradigm has shifted dramatically.<sup>263</sup> The current status of the family locally and nationally therefore gives special relevance to the role of federal courts in

258. Some scholars argue that federal judges will be more psychologically predisposed to enforce constitutional rights because of the longstanding tradition of federal courts as constitutional enforcers, their receptivity to Supreme Court precedent, and their distance from the day-to-day realities of state court practices that have the potential to leave state court judges cynical and skeptical of constitutional rights in practice. *Id.* at 1124–27. Given the constantly evolving demographic make-up of the federal judiciary, however, this argument only goes so far. See Chemerinsky, *supra* note 251, at 274–75 (discussing impact of changing presidential administrations on makeup of federal judiciary).

259. Those preferring federal courts argue that they will be more independent, and therefore protect against local bias. Neuborne, *supra* note 254, at 1127–28. Because federal judges receive lifetime appointments to the federal bench and are not easily removed from office, they are more insulated from the popular will than state court judges, particularly those who are elected and therefore risk being beholden to state voters. *Id.* This makes them "as insulated from majoritarian pressures as is functionally possible, precisely to insure their ability to enforce the Constitution without fear of reprisal." *Id.* at 1127; see also Redish, *supra* note 240, at 333–34 (questioning independence of state judges compared to the federal judiciary). This independence is compelling particularly in the context of deciding constitutional claims, because one function of the federal courts is to protect individual rights against majoritarian oppression. *Id.* at 335. For this reason, many arguments supporting federal question jurisdiction are based on distrust of the state courts. CHEMERINSKY, *supra* note 43, at 271; see also Friedman, *supra* note 213, at 38 n.200 ("[F]rom the start federal courts were viewed as necessary to protect federal rights.").

260. See, e.g., Bator, *supra* note 256, at 630 (doubting superior competence of federal courts to state supreme courts); Solimine & Walker, *supra* note 256, at 135–48 (analyzing empirical studies to support claim of parity); see generally MICHAEL SOLIMINE & JAMES WALKER, *RESPECTING STATE COURTS: THE INEVITABILITY OF JUDICIAL FEDERALISM* (1999).

261. See Chemerinsky, *Parity Reconsidered*, *supra* note 251, at 244 ("What is most striking about the Supreme Court's statements is their inconsistency. There are as many declarations that state courts are equal to federal courts as there are statements that federal courts are superior to state courts in protecting federal rights."); Chemerinsky, *Rejoinder*, *supra* note 162, at 370 (calling the debate on parity "futile" and pointing out inconsistency of Supreme Court on issue).

262. See *supra* notes 13–25 and accompanying text (discussing cases in which the Supreme Court has upheld individual rights against states).

263. *Supra* note 32.

federal question cases. Judicial autonomy remains critical in cases hearing federal challenges to state action because of the potential predilections of state judges and the pressures they face.<sup>264</sup> Again, the Supreme Court's discretionary review of state court decisions does not always ensure such a forum.<sup>265</sup>

There is increasing pressure, and indeed consensus among many, to maximize individual autonomy and agency in making decisions about the family, with the state injecting itself into these decisions as little as possible.<sup>266</sup> Paradoxically, then, in order to maximize individual autonomy, the continued engagement of the federal judiciary is necessary. And this is not remarkable, as the federal bench serves the same function in a variety of other contexts, such as speech, religious beliefs, and criminal law.<sup>267</sup>

Beyond the necessary mediation of the federal judiciary between the individual and the states is the question of continued constitutional tradition.<sup>268</sup>

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264. State judges may unfairly prioritize state interests and will be subject to political pressure if they invalidate popular state statutes. Neuborne, *supra* note 254, at 1127; see Neuborne, *supra* note 244, at 799 ("I continue to believe that a relative institutional advantage for the plaintiff exists in federal court; an advantage resulting . . . from political insulation . . ."); Wells, *supra* note 185, at 68 ("[Judicial] independence is especially important in deciding constitutional claims, as the function of the court is to protect the individual's rights against majoritarian goals.").

265. CHEMERINSKY, *supra* note 43, at 272 ("Supreme Court review of state court decisions is insufficient to adequately insure such a forum.").

266. In fact, as a descriptive matter, scholars have observed that this already is the case in American family law. See LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS & THE LAW 8–9 (2004) (describing trend in American family law toward the right to make personal choices "freely, without society, or the state, interfering"). But see DAVIS, *supra* note 175, at 8 (describing trend among feminist scholars to embrace communitarian values and deemphasize rights-centered jurisprudence).

267. At bottom, there is something incongruous about precluding a federal forum for the vindication of these federal, constitutional rights, particularly when the Supreme Court has recognized that a variety of rights related to the family are protected by the United States Constitution. See *Flood v. Braaten*, 727 F.2d 303, 307–08 n.17 (3d Cir. 1984) ("Given that . . . in the 1970s the Supreme Court increasingly recognized that federal constitutional rights permeate state family law, it would be difficult to maintain that the domestic relations exception extends to all sources of federal jurisdiction.") (citations omitted).

268. "[T]he power to control jurisdiction undeniably encompasses the potential to control substantive rights." Friedman, *supra* note 213, at 60. Certainly, the Supreme Court has in the past invoked federalism and comity principles in ways that effectively curtailed or rejected substantive, constitutional rights. See, e.g., Wells, *supra* note 185, at 84 (discussing *Rizzo v. Goode*, 423 U.S. 362 (1976), in which the Supreme Court invoked principles of comity and federalism to avoid granting injunctive relief to remedy allegedly abusive police practices routinely committed by state executive officials); see also *id.* at 85 ("Advocates of substantive comity value the state interest in autonomy so much that they would deny the individual not only the federal forum but any federal right at all.").

The jurisprudence of substantive due process, for example, has been central to the development of constitutional family law norms.<sup>269</sup> But substantive due process rights have long been controversial, and courts are reluctant to expand them in the domestic relations context for fear they will further embroil the federal judiciary in the untidy business of family law.<sup>270</sup> For those eager to see the evolution of substantive due process stall or decline, an expanded exception would provide an alternative to explicitly overturning of a significant body of precedent. Through consistent and increasing deference to the states on fundamental rights of the family, substantive due process could gradually fade from the federal constitutional landscape. And while it is unlikely that certain significant decisions—particularly those implicating equal protection concerns—would be overturned, substantive due process rights could come to be underenforced at the federal level, amounting to de facto reversal, or, at the very least, ossifying doctrine.<sup>271</sup>

If federal courts avoid deciding new and novel questions of family liberty (and even they are reluctant to expand on them), it may be less likely that state courts will do so.<sup>272</sup> The result would be a jurisprudence in desuetude, with the protections of substantive due process being invoked and applied less frequently. Thus, "jurisdictional" decisions become a screen for substantive results, "which weaken disfavored federal constitutional rights by remitting their enforcement to less receptive state forums."<sup>273</sup> Even more, federal judicial

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269. *Supra* notes 11–25 and accompanying text.

270. *See, e.g.*, *Brittain v. Hansen*, 451 F.3d 982, 990–91 (9th Cir. 2006) (declining to recognize substantive due process violation for alleged deprivation of one-week visitation because, *inter alia*, the Supreme Court has urged particular caution in area of domestic relations). The *Brittain* court feared that finding a violation could "dramatically interject federal courts and federal law into domestic relations disputes involving children" and could cause federal courts to "rapidly become de facto family courts." *Id.* at 995; *see also* DAVIS, *supra* note 175, at 6–7 (tracing history of Supreme Court jurisprudence involving family liberty).

271. *Cf.* Lawrence H. Tribe, *Jurisdictional Gerrymandering: Zoning Disfavored Rights Out of the Federal Courts*, 16 HARV. C.R. - C.L. L. REV. 129, 129–30 (1981) (discussing several bills designed to achieve de facto reversal of controversial Supreme Court rulings through stripping federal courts of jurisdiction); Sager, *supra* note 43, at 41 (pointing out that stripping jurisdiction "could have effect of freezing existing Supreme Court doctrine" which state courts would still be bound to follow).

272. Professor Neuborne's most pessimistic suspicions raise the possibility that some constitutional decisionmaking is "funneled" to state courts precisely because they will be less likely to uphold constitutional claims challenging state action. Neuborne, *supra* note 254, at 1105–06.

273. *Id.* at 1106; *see also* Chemerinsky, *supra* note 251, at 270 ("[B]lanket jurisdictional rules based on aggregate conclusions about parity would assign constitutional claims in some instances to the less sympathetic court.").

avoidance could indirectly invite state courts to disregard constitutional norms in certain family law contexts.<sup>274</sup>

Fixing constitutional family law doctrine where it currently stands presents particular problems. Most fundamental rights for traditional, nuclear families have been firmly laid down on the constitutional landscape.<sup>275</sup> But issues of family formation remain fraught. Members of post-nuclear families may be particularly susceptible to local bias. Arresting the development of the family liberty jurisprudence could inhibit the extension of these norms to recognize and protect post-nuclear families and alternative family forms. Historically, our social progress as a country has required the presence of the federal judiciary to articulate and preserve fundamental rights, and help moderate the national discussion.<sup>276</sup> Because the boundaries of the family are blurring and key definitions are in flux, the federal court system is a necessary and important participant in this ongoing conversation.

Of course, assuming federal court superiority does not ensure that federal courts will take a more expansive view of particular rights; federal court review is not a panacea in terms of advancing progressive social change. Some have argued persuasively that state courts are preferable to federal courts for the vindication of particular civil rights.<sup>277</sup> For example, marriage-equality

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274. See Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. City of Mesquite*, 85 CORNELL L. REV. 1309, 1310 (2000) (defining "under-ruling" as court permitting the undermining of constitutional protections and inviting destruction of doctrine); cf. Sager, *supra* note 43, at 69 (removing federal jurisdiction over particular issues effectively "paint[s] a target on constitutionally protected rights").

275. See, e.g., *supra* notes 13–22 and accompanying text (discussing use of substantive due process to challenge statutes and regulations affecting marriage, divorce, and child custody).

276. See, e.g., *Roe v. Wade*, 410 U.S. 113, 122 (1973); *Loving v. Virginia*, 388 U.S. 1, 12 (1967); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

277. For example, William Rubenstein documents his experience as a gay rights litigator, in which he observed more favorable results in gay rights cases in state, rather than federal, courts. Rubenstein, *supra* note 230, at 606–11. Rubenstein posits that state courts have been more sympathetic to gay rights claims for several reasons. First, because the primary way in which gay litigants interact with the legal system is in family court, state courts may have greater experience in addressing issues particular to gay litigants. *Id.* at 612–14. Second, state court judges have more familiarity, generally, with gay litigants, making bias against them less likely than it might be in federal courts. *Id.* at 615–17. Moreover, federal litigation raises dual hurdles of separation of powers and federalism concerns, whereas state court litigation raises only the former. *Id.* at 618. And, the number of state court judges suggests that opportunities for exceptional positions are greater. *Id.* Rubenstein also questions Neuberger's thesis about majoritarian pressures, noting that because of their insulation, federal judges may lag behind societal norms in important ways that might be expressed in unreflective biases that would not be present in state courts. *Id.* at 619–21. Of course, not all state courts have been hospitable to gay rights claims. See Knauer, *supra* note 32, at 423 (finding that LGBT advocates have had more success at the state level, but state gains are partial, not portable, and fragile).

advocates generally have had more success at the state court level.<sup>278</sup> And as a consequence of the federal Defense of Marriage Act, there is certainly nothing progressive about the federal system's official position on marriage.<sup>279</sup> Further, limiting the domestic relations exception may in some instances foreclose an avenue of avoiding decision in cases in which an unjust result seems pre-ordained.<sup>280</sup> So, there may often be very good strategic reasons to prefer a state forum over a federal one.<sup>281</sup>

But it is important to distinguish between litigant *selection* of forum on the one hand, and court *allocation* of jurisdiction on the other.<sup>282</sup> Continuing with the marriage-equality example, there is nothing inherently progressive about state efforts to address social issues.<sup>283</sup> Forty-five states prohibit same-sex marriage by statute, constitutional amendment, or both.<sup>284</sup> Only ten states and

278. *Id.* at 434.

279. The DOMA amended the Federal Dictionary Act to define marriage as a legal union between one man and one woman for all federal purposes. 1 U.S.C. § 7 (2005). It also authorizes states to refuse to recognize same-sex relationships recognized in other states. 28 U.S.C. § 1738C (2006).

280. *Cf.* Jack B. Weinstein, *Every Day is a Good Day for a Judge to Lay Down His Professional Life for Justice*, 32 FORDHAM URB. L.J. 131, 136–39 (2004) (noting how senior district court judges sometimes refuse to take cases in which law requires them to render judgment they deem unjust). One such possibility is a federal constitutional challenge to same-sex marriage recognition because it threatens "traditional marriage." *See, e.g.*, Lynn D. Wardle, *The Attack on Marriage as the Union of a Man and a Woman*, 83 N.D. L. REV. 1365, 1369–79 (2007) (arguing that same-sex marriage threatens institution of marriage, children, families, and society).

281. Because of the reasons discussed herein, I argue that federal courts must be available for the litigation of federal questions regarding the family. But litigants certainly may elect to pursue federal constitutional claims in state courts that they perceive to be more friendly than federal courts. *See, e.g.*, DANIEL R. PINELLO, *GAY RIGHTS & AMERICAN LAW* 105–17 (2003) (noting that state courts were "by far the more responsive arena for protecting sexual minorities"); Chemerinsky, *supra* note 251, at 259 ("Some state courts are more disposed toward upholding individual liberties than are some federal courts.") (citation omitted); Rubenstein, *supra* note 230, at 599 ("[G]ay litigants seeking to establish and vindicate civil rights have generally fared better in state courts than they have in federal courts.").

282. *See* Rubenstein, *supra* note 230, at 599 (describing forum selection as debate over how litigators should evaluate the relative merits of state and federal courts, compared to forum allocation as process by which courts determine proper jurisdictional boundaries). But litigants certainly may elect to pursue federal constitutional claims in state courts that they perceive to be more friendly than federal courts. *Supra* note 281.

283. *See* Knauer, *supra* note 32, at 432–33 (noting that much state legislation relating to same-sex marriage prohibits legal recognition of same-sex couples).

284. *Id.* Although Knauer notes only forty-four such states, California joined these ranks with its passage of Proposition 8 in November 2008. *See* Ashby Jones, *Gay-Marriage Ban Sets up Host of Battles—California's Proposition 8 Is Challenged in State Court; What Happens to Previously Wed Couples?*, WALL ST. J., Nov. 8, 2008, at A12B. California's Constitution now states that "[o]nly marriage between a man and a woman is valid or recognized." CAL. CONST.

the District of Columbia provide some sort of recognition for same-sex marriage.<sup>285</sup> Success at the state level has been fragile and partial, and the rights secured in some states are not portable to others.<sup>286</sup> In a number of states, experimentation at the state constitutional level has been foreclosed by constitutional amendment.<sup>287</sup> Federal recognition of these rights would remedy these problems and have great symbolic value. This recognition may be slow in coming: It took time for *Bowers* to give way to *Lawrence*.<sup>288</sup> But the alternative considered in this Article—expanding the domestic relations exception to include federal questions—could potentially foreclose progress at the federal constitutional level altogether.

It may be, as several scholars have persuasively argued, that the parity question is unknowable in the aggregate.<sup>289</sup> Nevertheless, for the reasons explained above, it will be the case that at least in some instances, federal courts will be better suited to decide questions of constitutional dimension and to enforce constitutional liberties in the face of state encroachment. Our federal system allows for experimentation in the states as laboratories, healthy both for diversity and evolution of the law and social policy.<sup>290</sup> But alongside this model, the federal system has an important role to play in protecting citizens

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art. I, § 7.5.

285. Knauer, *supra* note 32, at 425–26.

286. *Id.* at 434, 436–37.

287. *See id.* at 433 & nn.101–02 (describing how twenty-six states have amended their constitutions to define marriage so as to prevent state courts from declaring state Defense of Marriage Acts unconstitutional); *supra* note 284 (describing California's recent constitutional amendment).

288. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (finding no constitutional right to consensual sex between same-sex partners), *overruled by* *Lawrence v. Texas*, 539 U.S. 186 (2003).

289. *Compare* Neuborne, *supra* note 254, at 1117 (challenging position that federal courts are no better at protecting federal constitutional rights than state courts), *and* Redish, *supra* note 240, at 330–31 (arguing that application of well-established institutional factors supports conclusion that there is no parity between state and federal courts with regard to litigating federal constitutional questions), *with* Chemerinsky, *supra* note 251, at 237 ("Federal courts exist under this perspective not because they are better than state courts, but rather because they are potentially different."), *and* Preis, *supra* note 246, at 287 (arguing that resolution of parity issue is unlikely due to difficulty in aggregating and weighing evidence on both sides of the argument). Professor Chemerinsky presents a middle path. Recognizing that the parity debate likely is at a permanent impasse, and that individual choices espousing one side or the other necessarily reflect a normative view of what the adjective "better" signifies, Professor Chemerinsky instead proposes a principle that takes as its normative goal maximizing opportunities for vindicating constitutional rights, while also maximizing litigant autonomy and federalism. Chemerinsky, *supra* note 251, at 237.

290. *See* *New State Ice Co. v. Liebman*, 285 U.S. 262, 310–11 (1932) (Brandeis, J., dissenting) (arguing that experimentation among states is not only permitted but encouraged).

against local bias and as a backstop against discrimination and unconstitutional state action.<sup>291</sup>

### B. *The Consequences of an Expanded Exception*

Moving beyond the values of the federal forum, expanding the domestic relations exception to include federal questions would have important consequences transcending the parity debate. These effects include the exclusion and subordination of family law issues and litigants, expressive harms regarding their status in the national system, and—potentially—cultural manifestations of these expressive harms. The negative consequences are of sufficient potential significance that they counsel against expanding the domestic relations exception, regardless of how federal courts rule on the merits of family law claims.

#### 1. *Exclusion and Subordination*

Singling out family law cases for different treatment in the federal question context raises particularly sharp concerns. Scholars, especially feminist critics, have long attributed the domestic relations exception's longevity and tenacity to the federal judiciary's distaste for domestic relations and the sense that family law is not sufficiently important or national in interest to justify federal jurisdiction.<sup>292</sup> Both early and contemporary cases evince an aversion to domestic relations cases by the federal bench.<sup>293</sup> Domestic relations as a category is an easy mark because of the combination of a supposed veneration of localism and an aversion to the messiness of family disputes.<sup>294</sup>

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291. See Sager, *supra* note 43, at 43 (outlining basic premise that Constitution contemplates federal judicial supervision of state conduct to ensure state compliance with federal constitutional norms).

292. Resnik, *Naturally*, *supra* note 30, at 1754 (describing that one argument against federal jurisdiction in this area is that issues presented by family law are unappealing or trivial).

293. This antipathy has survived well beyond the *Ankenbrandt* decision. See, e.g., *Servetnick v. Tulsy*, No. Civ. JFM-04-5061, 2005 WL 2177110, at \*1 n.1 (D. Md. Sept. 7, 2005) (lamenting that although, per *Ankenbrandt*, the exception does not apply, "it should"); see also Atwood, *supra* note 30, at 572 (noting "federal courts' entrenched antipathy to domestic relations litigation").

294. See Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L. J. 619, 621 (2001) (arguing that "categorical federalism" draws artificial national and local boundaries while minimizing the impact of family law issues).



Jurisdiction historically has been used as a means of patriarchal dominance.<sup>295</sup> Early cases specifically impacted *women's* access to the federal system. The plaintiffs in some of the earliest cases were women, and some of these cases operated to bar women's access to the federal courts.<sup>296</sup> More generally, federal courts historically have assumed that women and families are outside the domain of the federal system—separate from the weighty national issues with which the federal judiciary is preoccupied. Our federal courts jurisprudence has developed in such a way as to marginalize the "domestic" sphere and, consequently, women.<sup>297</sup> Indeed, *Newdow's* reference to the "delicate issues of domestic relations" recalls the days when women's "delicate" status was used to justify denial of legal personhood and full citizenship.<sup>298</sup> An extension of the exception to federal questions—particularly in the face of constitutional family law that has in some respects worked to eradicate gender bias and promote equality—would exacerbate this bias.

Beyond the exclusion of women and the marginalization of the "women's sphere," the exception operates to subordinate family law litigants based on their domestic relations status.<sup>299</sup> Certainly, the Supreme Court has fashioned common law rules limiting the scope of federal question jurisdiction, some of which separate federal question litigants into discrete categories.<sup>300</sup> Importantly, however, virtually no other federal court doctrine limits federal

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295. *See id.* at 625 (describing how patriarchal dominance was initially reflected by argument that family unit was beyond jurisdiction and control of state).

296. *See* Resnik, *Naturally*, *supra* note 30, at 1744–45 (describing how exception to federal jurisdiction blocked woman's access to federal court even though adverse party was considered "public minister" and thus under exclusive federal jurisdiction).

297. *See id.* at 1750 ("Given the construction of domestic relations as out of the jurisdiction and concerns of the national courts, it is not surprising that women, so often identified in their roles in families, were similarly understood to be only obliquely related to the federal courts.").

298. *See, e.g.*, *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

299. *See* Cahn, *supra* note 30, at 1098 ("[T]he Court recognizes the importance of domestic relations, but relegates it to a different set of courts, those of the state.").

300. *See, e.g.*, Friedman, *supra* note 213, at 22 (describing well-pleaded complaint rule as the most prominent common law restriction on federal question jurisdiction). A variety of federal court doctrines and statutory constructions combine to favor state criminal defendants' access to the federal system over that of state civil litigants. Friedman, *supra* note 249, at 1264. When construing the federal question statute, the Court focuses on the "sensitive judgments about congressional intent, judicial power, and the federal system," the "nature of the federal issue," and judicial economy. Friedman, *supra* note 213, at 22–23 (quoting *Merrell Dow Pharmaceuticals v. Thompson*, 487 U.S. 804, 810, 814 n.12 (1986)).

question jurisdiction in a way that so purposely categorizes cases because of their content.<sup>301</sup>

The domestic relations exception treats family law litigants differently. Yet domestic relations matters "are no more linked to core aspects of state sovereignty than are many other types of suits that federal courts may adjudicate."<sup>302</sup> Even to the extent one subscribes to the passive virtues,<sup>303</sup> there is no more justification for the wholesale exercise of judicial avoidance in the context of federal domestic relations questions than in any other substantive area. A judicial forum, if provided for some, must be available consistently; it "cannot be granted to some litigants and capriciously or arbitrarily denied to others."<sup>304</sup> When particular rights are singled out for exclusion—particularly if some subset of those rights is controversial—harm to constitutionally protected interests results.<sup>305</sup> Isolating particular rights for exclusion from federal jurisdiction violates equal protection and due process norms.<sup>306</sup>

To the extent federal courts expand the domestic relations exception beyond diversity cases to federal question jurisdiction, it comes close to a wholesale exclusion of family law litigants from the federal courts. Almost nowhere else in federal courts jurisprudence is a discrete category of litigants excluded from federal jurisdiction entirely based simply on the content or category of cases being pursued.<sup>307</sup> An expanded exception therefore raises serious challenges to fundamental equality and anti-subordination norms. Family law litigants should have the same opportunities to litigate federal constitutional rights as all other federal question litigants.

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301. See Keller, *supra* note 186, at 208–25 (arguing that ripeness doctrine as applied to federal takings cases acts to strip federal jurisdiction but without creating an explicit categorical "exception" as with domestic relations).

302. CHEMERINSKY, *supra* note 43, at 314.

303. See generally Alexander Bickel, *The Supreme Court 1960 Term Foreword: The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

304. Tribe, *supra* note 271, at 143 (internal quotations and citations omitted). For example, neither Congress nor the federal courts would be able to restrict jurisdiction to plaintiffs of a particular race, religion, or political affiliation. Sager, *supra* note 43, at 26.

305. Sager, *supra* note 43, at 75.

306. *Cf. id.* at 78–80 (outlining general equal protection and due process arguments against federal jurisdiction stripping in case of highly controversial claims).

307. The domestic relations and probate exceptions exclude these categories of cases from federal *diversity* jurisdiction. And, as discussed above, the Supreme Court's ripeness jurisprudence in federal takings claims, when combined with preclusion doctrines, practically achieves the same result. *Supra* notes 178, 301 and accompanying text.

## 2. Expressive Harms and Cultural Consequences

The federal imprimatur has symbolic meaning. Particularly in terms of constitutional decision making, there is a pecking order, which begins with the state courts, moves to the lower federal courts, and reaches its apex at the Supreme Court.<sup>308</sup> This hierarchy renders the federal courts most powerful, and the supremacy clause validates and enforces that power.<sup>309</sup> Further, "the federal courts claim to be and are understood as the place in which the national agenda is debated and enforced."<sup>310</sup> Thus, access to the federal forum has a legitimating function. There is value in this access, regardless of whether state courts are equally competent, and regardless of how they decide the merits. Federal court access serves a symbolic function, not just because of its visibility, but also because federal law is supreme and represents the constitutional values of the nation as a whole.<sup>311</sup>

Viewing an expanded exception in the context of the legitimating function of the federal forum, it becomes clear that—quite apart from the practical effects—an expanded exception would also serve a significant *expressive* function; that is, it would both embody and manifest a particular attitude about family law litigants and federal jurisdiction.<sup>312</sup> Applying expressive norms to federal jurisdiction, decisionmakers are "morally required to express the right attitudes toward people."<sup>313</sup> To be consistent with expressive norms, jurisdictional line drawing should "express the appropriate attitudes toward persons . . . . It must also express a collective understanding of all *citizens* as equal members of the State, all equally part of 'us.'"<sup>314</sup> This line drawing violates expressive norms when it conveys inappropriate valuations, regardless of its practical or cultural consequences.<sup>315</sup> A person suffers an expressive

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308. See Cass Sunstein, *Incommensurability & Valuation in Law*, 92 MICH. L. REV. 779, 824 (1994) ("When the Court makes a decision, it is often taken to be speaking on behalf of the nation's basic principles and commitments."); *c.f.* Friedman, *supra* note 213, at 42 (describing how the Supreme Court plays "unique function" in constitutional system: "A federal court may be . . . more attentive to federal claims of right than a state court, but it is hard to envision a lower court compelling the *same respect* as the Supreme Court . . . .") (emphasis added).

309. See Resnik, *Naturally*, *supra* note 30, at 1756.

310. *Id.* at 1699.

311. And clearly, a victory in federal court on federal, constitutional grounds has wider effects. Rubenstein, *supra* note 230, at 618.

312. See Anderson & Pildes, *supra* note 162, at 1506–07 (describing expression as embodiment and external manifestation of state of mind).

313. *Id.* at 1514.

314. *Id.* at 1520.

315. *Id.* at 1531.

harm when a jurisdictional decision of some sort treats her or him in such a way that expresses negative or inappropriate attitudes toward her or him.<sup>316</sup>

Expanding the domestic relations exception would violate these norms and cause family law litigants expressive harm. An expansion manifests an attitude of federal disregard—or lesser regard—for family law litigants pursuing federal claims than that for other federal question litigants, *because of* the content of their claims.<sup>317</sup> But federal courts possess Article III and statutory subject matter jurisdiction over these cases, and they should therefore receive equal recognition in the federal system. If federal question jurisdiction is otherwise proper, use of the category "family"—whether explicitly or implicitly—to bar access to the federal system not only unfairly frustrates litigants, practically, but also symbolically sends the message that issues surrounding the family are less important, less worthy of federal, judicial attention.<sup>318</sup> An expansion would cause this expressive harm regardless of whether federal judges actually adopt such an attitude,<sup>319</sup> intend to communicate this attitude,<sup>320</sup> and regardless of

316. *Id.* at 1527.

317. *See id.* at 1550 (describing how state action can endorse expressive message even without state actor intent). Put another way, an expanded exception's failure to include family law cases as properly within the domain of federal courts constitutes a denial or withdrawal of acknowledgment that family law cases raising federal questions are just as legitimate as other federal questions. *Cf. id.* ("The legislators [in the case of an ordinance exclusively allowing the display of Christian symbols] fail to acknowledge the insider status of non-Christians in a context that demands such acknowledgment, and thereby withdraw from non-Christians the social status of fully-included citizens."). An expanded exception would express an inappropriate valuation or attitude about the family's place in civic life vis-à-vis the federal courts, relative to other types of federal question litigation. *See* Sunstein, *supra* note 308, at 820 (describing how expression of incorrect valuation in law might improperly influence wider social norms).

318. The fairly recent emergence of standing doctrine as a potential doctrinal justification for the domestic relations exception is an especially vivid example of the expressive function: Because to lack standing most basically means one has no right to be heard in federal court, the standing doctrine has the potential to both reinforce the categorization of family law matters as "lesser," symbolically, and also reinforce the subordination of this class of litigants. Noncustodial parents quickly picked up on this message after the *Newdow* decision was announced. More generally, *Newdow* may have expressive significance because of its lengthy invocation of domestic relations rhetoric despite the fact that the decision ultimately did not rest on the doctrine. *Cf.* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2043 (1996) (using civil rights litigation as example of how expressive function of law can have wider societal impact).

319. *See* Anderson & Pildes, *supra* note 162, at 1508 (noting that one need not adopt mindset in order to express it). Indeed, even as historical justifications for the exception have come to be seen as more tenuous, judges have continued to invoke the exception, oftentimes in a reflexive rather than reflective way.

320. *See id.* at 1508, 1513 (describing additional element of intent present in communication but absent in expression).

whether family law litigants actually recognize or experience this attitude.<sup>321</sup> Expressive meanings and harms are socially constructed, and the manifestation of the attitude by virtue of an expanded exception *itself* constitutes a harm.<sup>322</sup>

Thus, we can draw a distinction between an expanded domestic relations exception on the one hand, and other avoidance doctrines like abstention or *Rooker-Feldman* on the other: These doctrines may have the same *practical* function, but they have entirely different *expressive* functions. Because these other doctrines do not treat family law cases differently than any other federal questions cases (at least not facially),<sup>323</sup> they are content-neutral and do not reflect a particular attitude about the relative importance of the family in the federal system. And if anything, the existence and applicability of these other doctrines to federal family law cases renders the expressive function of an expanded domestic relations exception even more stark. Because in the great majority of current federal question cases these other doctrines are sufficient for dismissal,<sup>324</sup> the expanded domestic relations exception does little *other* than serve an expressive function.

The fact that an expressive harm occurs simply by virtue of the existence of an expanded domestic relations exception, however, does not mean that the expansion would not have further consequences. Expressive injuries can have significant cultural consequences beyond the immediate harm they inflict.<sup>325</sup> "[T]he kinds of valuations reflected in law will affect social valuations in general."<sup>326</sup> An expanded exception could lower the status of family law litigants by treating them as inferior to other federal question litigants.<sup>327</sup> This

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321. *See id.* at 1524–25 (describing harmful expression that goes beyond definition agreed upon by targets of expression).

322. *Id.* at 1525.

323. Given the trends I discussed in Part I, this obviously raises another concern: To what extent will the federal judiciary simply use the abstention and *Rooker-Feldman* doctrines to make an end-run around what they could not achieve through the domestic relations exception? In both contexts, the judiciary has sometimes taken liberties and molded these doctrines so as to accommodate and cover domestic relations cases over which they wanted to avoid exercising jurisdiction. So, concurrently with a frank acknowledgment that the exception does not apply to federal question cases, existing federal courts doctrines must be construed narrowly and precisely in order to preserve the integrity of federal judicial consideration of family rights and related constitutional issues.

324. *Supra* notes 50, 126–30, 199 and accompanying text.

325. *See* Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy*, 89 MICH. L. REV. 936, 937 (1991) (describing general impact the law has on culture). That is, the law is not just a reflection of what *is*; instead it is an active agent that affects norms, roles, and the ways in which we see the world. *See id.* (outlining constitutive and reconstitutive role for the law).

326. Sunstein, *supra* note 308, at 822.

327. *See* Anderson & Pildes, *supra* note 162, at 1544 ("[L]egal communications of status

lesser status would then contribute to a feedback loop, reifying family law exceptionalism and the lesser status of family law litigants vis-à-vis the federal courts: Courts would continue to observe that, as a descriptive matter, family law is exceptional in federal question jurisdiction, and this valuation, both as a practical and expressive matter, would continue to ensure that family law remains exceptional. By contrast, the availability of a federal forum increases visibility for family law litigants and issues in the federal system.<sup>328</sup>

Federal review of family law cases promotes the instrumental values of federal question jurisdiction and furthers normative values by acting as a safeguard against state intrusion and continuing constitutional tradition. Given the current state of the family, these values are especially important. Even more important, denying federal court review has negative consequences. Not only does refusing jurisdiction subordinate family law litigants, but the domestic relations exception itself causes expressive harm and ultimately will perpetuate the family law exceptionalism myth. The federal courts should refuse to expand the domestic relations exception to federal question cases. Instead, courts should entertain these cases just as they do all other federal question cases that come before them.<sup>329</sup>

### V. Conclusion

The larger implications of this analysis concern the relationship between the federal and state systems, and the implications of the family law exceptionalism narrative.

The work of the Supreme Court in this area has been, at least in part, about striking a balance between the states' interest in deciding issues locally, and the individual's interest in a federal forum. Several federalism scholars advocate a cooperative approach to these issues, in which it is openly acknowledged that issues of the family—and even individual cases—may implicate and invoke

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inferiority constitute their targets as second-class citizens.").

328. Cf. Resnik, *Naturally*, *supra* note 30, at 1750 (asserting that lack of access to federal courts contributes to marginalization of family law issues); Neuborne, *supra* note 244, at 809 (noting that it is not surprising that litigants seek to route contemporary issues of great importance to federal trial courts).

329. Although beyond the scope of this project, much of the critique in this discussion applies equally to the domestic relations exception to diversity jurisdiction. Indeed, virtually all of the contemporary justifications for the exception can be addressed, except, perhaps, *stare decisis*. But *stare decisis* alone cannot justify an incorrect or untenable decision.

both state and federal law, and suggest a collaborative role between the two systems.<sup>330</sup>

This position begins with a frank acknowledgment that both systems interact in important ways with family law, recognizing that the states take on much of the work of domestic relations, including decisions relating to core status determinations, but also recognizing that the federal system shapes family roles and structures, though perhaps sometimes less directly. Weighing both state and individual interests in the balance, perhaps the best approach would be that, at the federal level, federal actors defer to the states in the *prescription* of the substance of core family law relationships, but take the job (shared with state courts) of *proscribing* constitutional violations and other unwarranted state intrusions on personal autonomy. The states would retain primary authority to decide how status determinations like marriage, divorce, and child custody are made.<sup>331</sup> This arrangement should assuage, at least in part, concerns about both separation of powers and federalism.

This relationship would also facilitate diverse approaches to family law issues, subject to judicial checks on state power. As in many other contexts, judicial review is necessary as a constitutional guard against state incursions on federal, constitutional rights.<sup>332</sup> Even state regulation of traditionally state matters cannot run afoul of federal, constitutional limits, and this will at least sometimes require the presence of a federal forum to make such determinations. Thus, regardless of the extent of Congress's role in regulating and shaping American families, the federal judicial role in protecting them must remain intact.

Beyond the practical and normative reasons for rejecting a domestic relations exception for federal questions, procedural decisions that treat family

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330. See Sylvia Law, *Families & Federalism*, 4 WASH. U. J.L. & POL'Y 175, 194 (2000) (describing tension between limited or expansive role for federal judiciary in monitoring mandates of cooperative state-federal programs); Resnik, *Categorical Federalism*, *supra* note 294, at 623 ("Multi-faceted federalism presumes that governance cannot accurately be described as residing at a single site."); Wells, *supra* note 185, at 74 (addressing similar balancing act between state and federal courts as reflected in doctrine of comity).

331. This might mean that a statute like the Defense of Marriage Act would be inappropriate to the extent it prescribes definitions of marriage, which generally should be left to the state legislatures and courts, but the civil rights remedy created in the VAWA would be permissible (although some federalism advocates would still have problems with VAWA's civil rights remedy). This might also mean that a proposed Constitutional amendment like the Federal Marriage Amendment would be wrong as a matter of policy, because it would usurp traditional state authority to define and regulate marriage.

332. See, e.g., Anne C. Dailey, *Federalism and Families*, 143 U. PA. L. REV. 1787, 1881 (1995) ("The fundamental rights of equality, privacy and parental authority set federal constitutional limits on state authority over family law.").

law litigants and issues differently as a category cause harm. Reflexive embrace of family law exceptionalism has the power to reinforce stereotypes and status hierarchy that in the past have frustrated full equality for all families and all family members. More broadly, this Article demonstrates that procedure rules can have an expressive function that deserves careful scrutiny.

With the diverse and complicated web of family relationships represented in contemporary society, taking a monolithic view of the family as an exclusively local subject is both misguided and unworkable. Guarding personal autonomy against unwarranted intrusion by the state demands a federal forum to ensure that fundamental rights of the family remain secure. Supporting, empowering, and protecting contemporary families and family members is the joint work of local, state, and federal systems.