

## **LET'S NOT THROW OUT THE BABY WITH THE BATHWATER: A UNIFORM APPROACH TO THE DOMESTIC RELATIONS EXCEPTION**

### **ABSTRACT**

*From questions of marriage equality to marriage dissolution, federal courts are deeply divided as to when to engage claims concerning family law. The divide is most evident in the courts' treatment of the longstanding judicial doctrine called the "domestic relations exception." The domestic relations exception divests federal courts of subject matter jurisdiction over family law matters, but which specifically? The answer to this question depends on the circuit where a litigant files. Some federal courts determine that the exception only divests them of hearing actions for divorce, alimony, or child custody. Others conclude that the exception prevents not only those actions, but also related matters such as child support, guardianship, or a breach of a visitation agreement.*

*Other than the precise nature of the family law claim, more inconsistencies abound. Some courts apply the exception only to diversity jurisdiction, while others apply the exception to both diversity and federal question jurisdiction. One would expect this variation to be the product of a traditional circuit split, but alas, the inconsistencies persist even when an individual circuit is examined in isolation.*

*The diverse inter- and intra-circuit treatment of the domestic relations exception stems from the different weight courts place on the exception's underlying values: stare decisis, federalism, and access to courts. Some federal courts only apply the exception because it has long been a part of precedent; otherwise, they would overrule it. Other courts apply the exception rigorously, concluding that family law matters are properly left to state courts, elevating federalism ideas. Even still, there are courts that recognize and apply the exception, but believe federalism should always take a back seat to a litigant's right to access a federal forum. This elevation of one value, often to the downgrading or omission of another, results in the deep divide and inconsistency that exists today.*

*The breadth of inconsistency matters: It matters to the father who feels that although his federal rights have been violated, he cannot invoke the federal court's jurisdiction to receive a remedy that is most dear to his heart—the custody of his children. It matters to the mother who brings a tort action,*

seeking damages as a remedy for the abuse her daughters suffered at the hands of their father. And it matters to the divorcée, whose ex-spouse refuses to uphold their alimony agreement, making day-to-day financial living extremely difficult.

*This Comment offers a new approach to the domestic relations exception. It proposes a three-step analysis that properly accounts for the exception's underlying values: federalism and access to courts, as well as the value that has kept the exception alive to this day—stare decisis. Should federal courts adopt this Comment's approach, a uniform application of the domestic relations exception emerges, and from there, a proper scope will develop. Although the exact contours of the exception's limits will always be difficult to delineate given the highly factual nature of family law inquiries, this Comment's proposed analysis offers a significant step toward establishing the consistency concerning the domestic relations exception.*

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## INTRODUCTION

The domestic relations exception is a judicially created doctrine that divests federal courts of jurisdiction over family law matters.<sup>1</sup> Its origins trace back to 1858,<sup>2</sup> and as of 2017, it lives on,<sup>3</sup> albeit in a state of haze. The Supreme Court has given unclear direction regarding its application, leading many lower federal courts to treat the exception inconsistently.<sup>4</sup> Yet despite its variance in application, the exception has made a permanent home among doctrines of federal court jurisdiction.<sup>5</sup> Although many scholars have discussed,<sup>6</sup> critiqued,<sup>7</sup> argued for limiting,<sup>8</sup> or offered alternative theories for its existence,<sup>9</sup> a three-step approach that accounts for all the values underlying the exception, and one that will lead to a closer consensus on its scope, has not been suggested.<sup>10</sup> This Comment offers that solution through a three-step analysis.

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<sup>1</sup> See *Chevalier v. Estate of Barnhart*, 803 F.3d 789, 794 (6th Cir. 2015).

<sup>2</sup> See *Ankenbrandt v. Richards*, 504 U.S. 689, 694 (1992) (describing that the statements that spawned the domestic relations exception originated in dicta from the case of *Barber v. Barber*, 62 U.S. (21 How.) 582, 599–600 (1858)).

<sup>3</sup> See, e.g., *Strickland v. Cty. Council of Beaufort Cty.*, No. 16–CV–1150 (JNE/LIB), 2017 WL 72398, at \*4 (D. Minn. Jan. 6, 2017) (discussing the domestic relations exception).

<sup>4</sup> See *infra* Part II.

<sup>5</sup> See *Ankenbrandt*, 504 U.S. at 694–95 (noting that the Supreme Court was “unwilling to cast aside an understood rule that has been recognized for nearly a century and a half”).

<sup>6</sup> See Mark Strasser, *Congress, Federal Courts, and Domestic Relations Exceptionalism*, 12 CONN. PUB. INT. L.J. 193, 230 (2012) (asserting that the Supreme Court “should articulate and apply a consistent approach with respect to the conditions under which federal intervention in family matters is permissible”); Thomas H. Dobbs, Note, *The Domestic Relations Exception Is Narrowed After Ankenbrandt v. Richards*, 28 WAKE FOREST L. REV. 1137, 1166 (1993) (discussing the potential effects of the *Ankenbrandt* decision); Maryellen Murphy, Comment, *Domestic Relations Exception to Diversity Jurisdiction: Ankenbrandt v. Richards*, 28 NEW ENG. L. REV. 577, 579 (1993) (discussing and critiquing the *Ankenbrandt* decision).

<sup>7</sup> See Steven G. Calabresi & Genna L. Sinel, *The Same-Sex Marriage Cases and Federal Jurisdiction: On Third-Party Standing and Why the Domestic Relations Exception to Federal Jurisdiction Should Be Overruled*, 70 U. MIAMI L. REV. 708, 754–55 (2016) (arguing that the domestic relations exception is “archaic, inequitable, and ought to be overruled”).

<sup>8</sup> See Bradley G. Silverman, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L.J. 1364, 1397 (2016) (arguing that “[t]he domestic-relations exception does not and cannot, as a matter of positive law, limit federal-question jurisdiction”); see also Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 198 (2009) (describing and critiquing federal courts’ willingness to expand the exception to include federal question cases).

<sup>9</sup> See Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1076 (1994) (concluding that domestic relations cases may appear in federal courts and that the exception is more fully explained due to underlying biases against both women and families); James E. Pfander & Emily K. Damrau, *A Non-Contentious Account of Article III’s Domestic Relations Exception*, 92 NOTRE DAME L. REV. 117, 149 (2016) (offering an explanation of the domestic relations exception that is grounded in Article III’s distinction between “cases” and “controversies”).

<sup>10</sup> In his 1995 article, Professor Michael Ashley Stein offers a new type of abstention, *Ankenbrandt* abstention, to account for when federal courts should exercise jurisdiction over domestic relations matters. See

One may question the continued vitality of the domestic relations exception given the vast amount of federal court involvement in family law matters. For example, in the recent landmark case *Obergefell v. Hodges*, the Supreme Court held that same-sex individuals have a fundamental right to marry.<sup>11</sup> Moreover, under its Commerce, Full Faith and Credit, and Spending Clause powers, Congress has passed many laws in the area of domestic relations.<sup>12</sup> Of course, being that it is the federal judiciary's "province and duty" to say what the law is,<sup>13</sup> federal courts routinely review these laws.<sup>14</sup> Yet despite the large quantity of family law activity in the federal sphere, the domestic relations exception survives, albeit inconsistently applied in federal courts across the country.

To demonstrate that inconsistency, consider the following factual scenario: A divorced mother and father are entrenched in a bitter legal dispute concerning their children's custody and visitation. The mother has filed claims in her state court and in the state court where the father is domiciled. Relying on diversity jurisdiction (because the mother seeks damages exceeding \$75,000 and she meets the complete diversity requirement),<sup>15</sup> she files a claim in her federal court for tortious interference with visitation rights.<sup>16</sup>

Under the current approaches used by the federal circuits, this suit would result in a variety of procedural outcomes. Some circuits would permit the case to go forward since the mother is not suing for divorce, alimony, or child custody.<sup>17</sup> Other circuits would apply the exception, noting that the suit is too closely involved with domestic relations matters.<sup>18</sup> The practical result is that in one circuit, the mother may receive true vindication of her wrongs, but in

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Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 703–05 (1995). While Stein's piece describes a uniform approach to the exception, it does not include a discussion of recently decided Supreme Court cases or the complex circuit split as it exists today. *See id.*

<sup>11</sup> 135 S. Ct. 2584, 2599 (2015).

<sup>12</sup> *E.g.*, Child Support Recovery Act of 1992, 18 U.S.C. § 228 (2012).

<sup>13</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

<sup>14</sup> *See, e.g.*, *Kansas v. United States*, 24 F. Supp. 2d 1192, 1196–97 (D. Kan. 1998) (noting that a federal law on child support collection was constitutional on its face as a valid exercise of power under the Spending Clause).

<sup>15</sup> To meet the requirements for federal diversity jurisdiction, the party invoking the federal court's jurisdiction must demonstrate that the parties are completely diverse from one another and must satisfy the amount in controversy requirement. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 267 (1806).

<sup>16</sup> This factual scenario is loosely based on the case *Ervin v. Estopare*, No. CV 08–122–M–DWM–JCL, 2009 WL 50169, at \*2 (D. Mont. Jan. 6, 2009).

<sup>17</sup> *E.g.*, *Estopare*, 2009 WL 50169, at \*4.

<sup>18</sup> *E.g.*, *Fischer v. Clark*, No. 08–CV–3807(JS)(ARL), 2009 WL 3063313, at \*3 (E.D.N.Y. Sept. 24, 2009).

another, she will never have her day in court, or more blatantly, may never receive custody of her children.

The conflicting treatment of the domestic relations exception stems from the different weight federal courts place on the exception's three underlying values: (1) stare decisis, (2) federalism, and (3) access to courts.

The first value, stare decisis, is the “obligation to follow precedent.”<sup>19</sup> While it is not an “inexorable command,” a previous ruling should only be overruled if, for example, the rule has been found unworkable or the premises of fact on which the rule was based have so far changed as to render the rule somehow irrelevant or unjustifiable.<sup>20</sup> Since it is debatable, at best, that the exception has met this standard to warrant overruling, courts reason that they will continue to follow the doctrine.<sup>21</sup>

The second underlying value of the domestic relations exception is federalism. In the context of federal courts, federalism could mean deference<sup>22</sup> or the belief and recognition that some areas of the law are traditionally left to the states to govern.<sup>23</sup> When the Supreme Court famously defined “Our Federalism,” it observed that the concept encompasses both of these ideas.<sup>24</sup> The Court noted that federalism represents “a system in which there is sensitivity to the legitimate interests of both [s]tate and [n]ational [g]overnments, and in which the [n]ational [g]overnment, anxious . . . to vindicate and protect federal rights . . . , always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the [s]tates.”<sup>25</sup> This model, in the realm of the domestic relations exception, means that the federal government should always uphold federal rights regarding the family. But, it should do so in a way that leaves the bulk of family law, an area traditionally regulated by the states, to the states.

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<sup>19</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992).

<sup>20</sup> *Id.* (internal quotation marks omitted) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405–11 (1932) (Brandeis, J., dissenting)).

<sup>21</sup> *See, e.g.*, *Norton v. McOsker*, 407 F.3d 501, 505 (1st Cir. 2005) (“The domestic relations exception ‘divests the federal courts of power to issue divorce, alimony, and child custody decrees.’” (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992))); *United States v. Bailey*, 115 F.3d 1222, 1231 (5th Cir. 1997) (“Federal courts have long divested themselves of jurisdiction over only the *issuance* of divorce, alimony, and child custody decrees . . .”).

<sup>22</sup> *See, e.g.*, *Johnson v. Williams*, 568 U.S. 289, 292–93 (2013) (applying deference to the state court’s opinion in a federal habeas corpus petition).

<sup>23</sup> *See, e.g.*, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (describing the “prominence of [s]tates in matters of public health and safety”).

<sup>24</sup> *Younger v. Harris*, 401 U.S. 37, 44 (1971).

<sup>25</sup> *Id.*

The final value that informs the domestic relations exception is access to courts, specifically access to a federal forum. The First Amendment guarantees the right to petition the government,<sup>26</sup> but to gain access to a federal forum, the litigant must demonstrate that the federal court has subject matter jurisdiction.<sup>27</sup> Together, Article III<sup>28</sup> and federal statutes provide two main types of jurisdiction: federal question jurisdiction<sup>29</sup> and diversity jurisdiction.<sup>30</sup> Federal question jurisdiction exists in “civil actions arising under the Constitution, laws, or treaties of the United States,”<sup>31</sup> while diversity jurisdiction exists in litigation between citizens of different states when the amount in controversy is satisfied.<sup>32</sup> Both methods of jurisdiction provide access to a federal forum, but the domestic relations exception strips federal courts of that jurisdiction.<sup>33</sup> To limit such a harsh result (i.e., meeting the requirements for either type of federal court jurisdiction, but having it taken away due to the doctrine), some federal courts seek to apply the exception as little as possible, holding on to the timeless charge that federal courts “have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.”<sup>34</sup>

Because these values are in direct tension with one another, courts tend to elevate one of them to the omission or downgrading of another. This results in the inconsistent application of the domestic relations exception. For example, the courts that value federalism will rigorously apply the exception, reasoning that family law matters should be left to the states.<sup>35</sup> On the other hand,

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<sup>26</sup> *Borough of Duryea v. Guarnieri*, 564 U.S. 379, 387 (2011).

<sup>27</sup> FED. R. CIV. P. 8.

<sup>28</sup> U.S. CONST. art. III, § 2 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

<sup>29</sup> 28 U.S.C. § 1331 (2012).

<sup>30</sup> *Id.* § 1332.

<sup>31</sup> *Id.* § 1331.

<sup>32</sup> *Id.* § 1332(a)(1). The traditional justification for diversity jurisdiction has been fear of bias against out-of-state litigants, although other explanations, such as the need to encourage interstate commerce and to make available “superior” federal courts, have also been suggested. See Adrienne J. Marsh, *Diversity Jurisdiction: Scapegoat of Overcrowded Federal Courts*, 48 BROOK. L. REV. 197, 199–200 (1982).

<sup>33</sup> *Chevalier v. Estate of Barnhart*, 803 F.3d 789, 794 (6th Cir. 2015).

<sup>34</sup> *Id.* at 795 (internal quotation marks omitted) (quoting *Marshall v. Marshall*, 547 U.S. 293, 289–99 (2006)).

<sup>35</sup> See, e.g., *Kahn v. Kahn*, 21 F.3d 859, 861 (8th Cir. 1994) (applying the domestic relations exception to bar a tort claim that was “inextricably intertwined” with a previous state court proceeding).

advocates of access to courts will argue the opposite—if litigants satisfy the federal question or diversity requirements, they should proceed in federal court, notwithstanding the domestic relations exception.<sup>36</sup> The result is a myriad of inconsistent applications of the domestic relations exception.

This lack of consistency matters: Not only is it important to ensure that similarly situated litigants receive similar jurisdictional outcomes, which avoids one litigant receiving a remedy while the other does not, it is also an important American principle to protect the nuclear family as well as a person's rights regarding that family. When the federal judiciary created this exception to its otherwise limited jurisdiction, then failed to properly determine its application, it left federal involvement in family law matters open to extreme variance. If federal courts are going to abdicate their responsibility to hear cases within their subject matter jurisdiction, the doctrine determining when that happens should be clear.

This Comment offers a solution: a new approach to the application of the domestic relations exception. This Comment's approach properly considers the three competing values of the exception—*stare decisis*, federalism, and access to courts—and accounts for them. It suggests a three-step analysis that will result in a more consistent application of the exception, which will provide significant progress in clearing the haze that currently surrounds the domestic relations exception.

This Comment proceeds in three parts. Part I examines Supreme Court precedent to trace the origin and development of the domestic relations exception. This Part examines every Supreme Court case that discusses the exception. Central to this Part is the most recent Supreme Court case on point, *Ankenbrandt v. Richards*.<sup>37</sup> The line of cases demonstrates the Court's ongoing attempts to adhere to the precedential nature of the exception, while also trying to balance the competing values of access to a federal forum and federalism. This Part highlights the Court's struggle with these three concepts, a struggle that presents itself as inconsistencies in the domestic relations exception's application.

Part II surveys and critiques the current methods used by the federal appellate courts to determine whether a matter falls within the purview of the

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<sup>36</sup> See, e.g., *Reale v. Wake Cty. Human Servs.*, 480 F. App'x 195, 197 (4th Cir. 2012) (per curiam) (“[T]he domestic relations exception [does not] undermine federal question jurisdiction where it otherwise exists.”).

<sup>37</sup> 504 U.S. 689 (1992).

domestic relations exception. The approaches naturally cluster into four groups. The first approach is what this Comment terms the “core-only” approach. Courts that follow this approach only apply the exception to the issuance or modification of divorce, alimony, and child custody decrees.<sup>38</sup> The second approach is the “core and penumbra” approach, in which the domestic relations exception blocks not only the core cases,<sup>39</sup> but also “cases ‘on the verge’ of being matrimonial in nature.”<sup>40</sup> The third approach is the “inextricably intertwined” approach, the inquiry being whether the federal court’s remedy or analysis will overlap with that of the state.<sup>41</sup> If so, the action is prohibited by the exception. The fourth and final approach is a factor-based method employed by the Eleventh Circuit, in which the court engages in a balancing test to determine whether the matter may go forward in federal court or instead is barred by the exception.<sup>42</sup>

Part III offers a three-step approach that accounts for the competing values that underlie the domestic relations exception: stare decisis, federalism, and access to courts. This Part identifies three inquiries to determine whether the domestic relations exception should be applied in a matter before the federal court. First, is the litigant affirmatively or functionally suing for divorce, alimony, or child custody? If so, due to adherence to precedent, the domestic relations exception prevents federal jurisdiction. If not, the court proceeds to the second inquiry: Are there any significant state interests that should prevent the matter from continuing in federal court? If the state’s interest is significant, the domestic relations exception applies due to notions of federalism, and the case would be dismissed. However, if there is not a significant state interest or, per the third inquiry, there is an overriding necessity to provide the litigant with access to a federal forum, the domestic relations exception is overcome, and the case may proceed in federal court.

Part III also discusses the implications of a universal adoption of the proposed test, which includes a respect for the underlying values of the domestic relations exception and a crucial first step in reducing the current judicial inconsistency. The Comment ends with a call for federal courts to adopt a uniform process to determine the application of the domestic relations exception, specifically the proposed three-step test.

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<sup>38</sup> *E.g.*, *Chevalier*, 803 F.3d at 797.

<sup>39</sup> The core cases are those that involve divorce, alimony, child custody, or all. *Id.*

<sup>40</sup> *Hamilton v. Hamilton-Grinols*, 363 F. App’x 767, 769 (2d Cir. 2010); *see also* *Friedlander v. Friedlander*, 149 F.3d 739, 740 (7th Cir. 1998).

<sup>41</sup> *E.g.*, *Kahn v. Kahn*, 21 F.3d 859, 861 (8th Cir. 1994).

<sup>42</sup> *E.g.*, *McCavey v. Barnett*, 629 F. App’x 865, 867 (11th Cir. 2015) (per curiam).

## I. HISTORY AND DEVELOPMENT OF THE DOMESTIC RELATIONS EXCEPTION

This Part traces the origins and development of the domestic relations exception by centering on a defining moment in the exception's history, the *Ankenbrandt v. Richards* decision.<sup>43</sup> The *Ankenbrandt* decision is the Supreme Court's most recent full analysis of the domestic relations exception,<sup>44</sup> in which the Court reaffirmed the existence of the domestic relations exception and endeavored to define its scope.<sup>45</sup>

This Part proceeds in four sections. Section A examines the genesis of the domestic relations exception, illuminating that even at its inception, Justices disagreed on its application.<sup>46</sup> Section B focuses on the case law tracing the exception's creation until the *Ankenbrandt* decision. Case law reveals how the scope of the exception confusingly evolves and constricts, setting the stage for the desperate need for a clarifying message from the Supreme Court. Section C discusses what should have been that clarifying message, the *Ankenbrandt* case, and how the Supreme Court fell short. Section D examines Supreme Court decisions since *Ankenbrandt*. It discusses how they too shed no light on a consistent approach to its application. This Part ends with a summary of the current state of the domestic relations exception and identifies matters still left open as a result of Supreme Court precedent.

### A. *Origins of the Exception*

The roots of the domestic relations exception trace back to an 1858 diversity lawsuit between ex-spouses.<sup>47</sup> *Barber v. Barber* involved a wife who sought to enforce an alimony decree against her husband.<sup>48</sup> When domiciled in different states, the wife sued in federal court, invoking diversity jurisdiction.<sup>49</sup>

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<sup>43</sup> 504 U.S. 689 (1992).

<sup>44</sup> See *infra* Section I.D.

<sup>45</sup> See *Ankenbrandt*, 504 U.S. at 692 (granting certiorari to determine whether “there [is] a domestic relations exception to federal jurisdiction,” and if so, whether “it permit[s] a district court to abstain from exercising diversity jurisdiction over a tort action for damages”).

<sup>46</sup> Compare *Barber v. Barber*, 62 U.S. (21 How.) 582, 599–600 (1858) (holding that federal jurisdiction was proper for the enforcement of an alimony decree), with *id.* at 602 (Daniel, J., dissenting) (“The Federal tribunals can have no power to control the duties or the habits of the different members of private families in their domestic intercourse[, because t]his power belongs exclusively to the particular communities.”).

<sup>47</sup> See *Ankenbrandt*, 504 U.S. at 694 (describing that “[t]he statements disclaiming jurisdiction over divorce and alimony decree suits” in *Barber* are “technically dicta,” but “formed the basis for excluding ‘domestic relations’ cases from the jurisdiction of the lower federal courts”). Although the exception was first overtly addressed in *Barber*, earlier Supreme Court cases suggest that domestic relations matters are within the power of the states. See, e.g., *Barry v. Mercein*, 46 U.S. (5 How.) 103, 108 (1847).

<sup>48</sup> 62 U.S. at 584.

<sup>49</sup> *Id.* at 583–84.

But whether the district court truly had jurisdiction turned out to be one of the key issues in the case.<sup>50</sup>

To address whether it had jurisdiction, the Court looked at the subject of the suit, the enforcement of an alimony decree.<sup>51</sup> Then, for the first time, the Court expressly “disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony.”<sup>52</sup> In other words, federal courts do not have jurisdiction to *issue* or *modify* a divorce or alimony decree, but did have jurisdiction to *enforce* an already-issued alimony decree, which was the situation in this case.<sup>53</sup> Yet from that one statement, the domestic relations exception was born.<sup>54</sup>

The first of many disagreements on the application of the domestic relations exception appears in the case’s dissent, authored by Justice Daniel.<sup>55</sup> Justice Daniel agreed that federal courts should not exercise jurisdiction over domestic matters, but proposed that even the matter currently before the Court should be barred.<sup>56</sup> Thus, in Justice Daniel’s view, federal courts should not issue, modify, or *enforce* an alimony decree.<sup>57</sup> In contrast, the majority construed the scope of the exception more narrowly, only applying it to cases in which an alimony decree was issued or modified.<sup>58</sup>

Although the majority opinion did not provide any explanation for the domestic relations exception, Justice Daniel’s dissent does. He explained that the exception had its historical foundation in the jurisdiction of the English Courts.<sup>59</sup> Justice Daniel reasoned the jurisdiction of the federal courts was the

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<sup>50</sup> *Id.* at 592.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 584. This quoted language formed the basis for the domestic relations exception. *Ankenbrandt*, 504 U.S. at 694. Scholars note that this language has “[taken] on a life of its own,” being frequently applied “as a general rule [to] the federal courts [that] consistently and repeatedly refused over the years to entertain actions involving matrimonial status.” See 13 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3609.1 (3d ed. 2009).

<sup>53</sup> *Barber*, 62 U.S. at 592. The Court made it clear that its enforcement was “to the extent of what is due.” *Id.* at 591. Accordingly, the Court would not order the husband to increase or decrease the amount of his alimony payments because that would be modifying an alimony decree. *Id.*

<sup>54</sup> *Id.* at 584 (“Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction.”).

<sup>55</sup> *Id.* at 600 (Daniel, J., dissenting).

<sup>56</sup> Compare *Barber*, 62 U.S. at 599–600 (holding that “the court below has not committed error in sustaining its jurisdiction over this cause”), with *id.* at 600 (Daniel, J., dissenting) (disagreeing with the majority on “the authority of the courts of the United States to adjudicate upon a controversy and between parties such as are presented by the record before us”).

<sup>57</sup> *Id.* at 600 (Daniel, J., dissenting).

<sup>58</sup> *Id.* at 599–600.

<sup>59</sup> *Id.* at 605 (Daniel, J., dissenting).

same as the chancery courts in England, which did not have jurisdiction over divorce or alimony.<sup>60</sup> Instead, those matters belonged to the ecclesiastical courts.<sup>61</sup> Since federal courts were the equivalent of chancery courts, Justice Daniels concluded that like the chancery courts, federal courts did not have jurisdiction over divorce or alimony.<sup>62</sup>

### B. *From Barber to Ankenbrandt*

From *Barber* in 1858 to *Ankenbrandt* in 1992, the Supreme Court observed the domestic relations exception in cases on a variety of matters. During this 134-year period, the Court heard suits on child custody,<sup>63</sup> divorces between individuals living in U.S. territories,<sup>64</sup> and a divorce between an American and non-American citizen.<sup>65</sup> This section discusses each of these cases.

The first claim implicating the domestic relations exception following *Barber* was *In re Burrus*.<sup>66</sup> At issue in *Burrus* was whether the district court had jurisdiction over a father's custody petition for his daughter.<sup>67</sup> The father had previously sent his daughter to live with her grandparents, who later claimed that they were the rightful custodians.<sup>68</sup> Although the father and grandfather were citizens of different states,<sup>69</sup> the case concerned federal question jurisdiction because the father had brought suit in a federal district court seeking a writ of habeas corpus to recover custody of his daughter.<sup>70</sup>

The Supreme Court held that the federal district court lacked jurisdiction to hear the case.<sup>71</sup> Even though the case invoked federal question jurisdiction, and

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* It should be noted that over time, there has been a “debate over the accuracy of this historic characterization [that] has cast doubt on the legitimacy of that rationale.” WRIGHT ET AL., *supra* note 52, § 3609 (citing *Marshall v. Marshall*, 547 U.S. 293, 299 (2006)).

<sup>63</sup> *E.g.*, *In re Burrus*, 136 U.S. 586, 587 (1890).

<sup>64</sup> *E.g.*, *De La Rama v. De La Rama*, 201 U.S. 303, 304 (1906); *Simms v. Simms*, 175 U.S. 162, 162–63 (1899).

<sup>65</sup> *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 382, 384 (1930).

<sup>66</sup> 136 U.S. at 593–94.

<sup>67</sup> *Id.* at 587, 593–94.

<sup>68</sup> *Id.* at 587–88.

<sup>69</sup> *Id.* at 587.

<sup>70</sup> *Id.* The father in this case attempted to use the federal habeas corpus statute to compel the grandfather to return custody of the child to him. *Id.* The Court observed that federal habeas jurisdiction extended only to cases in which a party was “held in custody for an act done by or under the authority of” federal law, or in which the imprisonment violated federal law. *Id.* at 591.

<sup>71</sup> *Id.* at 594 (“As to the right to the control and possession of this child, as it is contested by its father and its grandfather, it is one in regard to which neither the Congress of the United States nor any authority of the United States has any special jurisdiction.”).

not diversity jurisdiction as in *Barber*, the Court applied the domestic relations exception.<sup>72</sup> The Court firmly announced that “[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the [s]tates and not to the laws of the United States.”<sup>73</sup> Without citing any support for that proposition, the Court expanded the scope of the exception to include not only issuing or modifying a divorce or alimony decree, but also child custody decrees.<sup>74</sup>

After *Burrus*, the Supreme Court declined to apply the domestic relations exception in two cases involving U.S. territories. Both *Simms v. Simms* and *De La Rama v. De La Rama* involved divorces arising from Arizona and the Philippines, respectively,<sup>75</sup> thereby falling directly within the scope set out earlier by the Court in *Barber*.<sup>76</sup> However, in contradiction to its statement in *Barber*, wherein the Court expressly disclaimed jurisdiction on “the subject of divorce,”<sup>77</sup> the Court in *Simms* and *De La Rama* both found persuasive that Congress had enacted a statute that gave power to the federal courts over the federal territories involved.<sup>78</sup> That power “covers the domestic relations, the settlement of estates, and all other matters which, within the limits of a [s]tate, are regulated by the laws of the [s]tate only.”<sup>79</sup> In other words, Congress granted these federal territories general jurisdiction, including jurisdiction over matters typically left for the states, such as domestic relations issues.<sup>80</sup> Thus the Court distinguished the two cases from *Barber* because Congress had given federal courts jurisdiction over domestic relations matters in federal territories,<sup>81</sup> and these cases involved federal territories.<sup>82</sup>

The last case discussing the domestic relations exception before *Ankenbrandt* was *Ohio ex rel. Popovici v. Agler*.<sup>83</sup> In contrast to *Simms* and *De*

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<sup>72</sup> *Id.* at 593–94.

<sup>73</sup> *Id.* Although this assertion cited to no case precedent, it has become one of the most oft-cited Supreme Court quotes on the domestic relations exception. Hereinafter, this Comment refers to this language as the “*Burrus* holding.”

<sup>74</sup> *Id.*

<sup>75</sup> *De La Rama v. De La Rama*, 201 U.S. 303, 304 (1906); *Simms v. Simms*, 175 U.S. 162, 162–63 (1899).

<sup>76</sup> *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858).

<sup>77</sup> *Id.*

<sup>78</sup> *De La Rama*, 201 U.S. at 307–08; *Simms*, 175 U.S. at 168.

<sup>79</sup> *Simms*, 175 U.S. at 168.

<sup>80</sup> *Id.*

<sup>81</sup> *See De La Rama*, 201 U.S. at 307–08; *Simms*, 175 U.S. at 167–68.

<sup>82</sup> *De La Rama*, 201 U.S. at 308; *Simms*, 175 U.S. at 168 (explaining that when the law of a territory rather than a state is at issue, Congress has power to legislate).

<sup>83</sup> 280 U.S. 379, 379 (1930).

*La Rama*, the Supreme Court invoked the exception to decide that the federal court lacked jurisdiction to hear the matter.<sup>84</sup> After being sued by his wife for divorce and alimony in state court, Popovici, a foreign citizen stationed in the United States as a vice-consul, objected to the state court's jurisdiction.<sup>85</sup> Popovici argued that according to Article III of the Constitution,<sup>86</sup> only the Supreme Court had original jurisdiction over suits involving him, a vice-consul.<sup>87</sup>

The Court rejected Popovici's argument.<sup>88</sup> Despite the patent constitutional language that seemed to be in Popovici's favor, the Court determined that the words "ha[d] to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used."<sup>89</sup> At the time the Constitution was adopted, one of those "tacit assumptions" was that federal courts do not hear domestic relations matters; instead, these matters belong to the states.<sup>90</sup> Thus, in direct contradiction to *Simms* and *De La Rama*, in which a federal court exercised jurisdiction over divorces, in *Popovici* the Court announced that "the jurisdiction of the [c]ourts of the United States over divorces and alimony always has been denied."<sup>91</sup>

The decisions concerning the domestic relations exception thus far illustrate the Supreme Court's strong preference for federalism. In the previous three cases, *Burrus*, *Simms*, and *Popovici*, the Court made strong statements concerning the fact that domestic relations is an area of the law traditionally regulated by the states, and should be left to the states.<sup>92</sup> So strong was that assertion that the Court applied the exception with equal force to both diversity and federal question cases.<sup>93</sup> But that inherent tension—when litigants have

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<sup>84</sup> *Id.* at 383–84.

<sup>85</sup> *See id.* at 382.

<sup>86</sup> "The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . ." U.S. CONST. art. III, § 2, cl. 2.

<sup>87</sup> *See Popovici*, 280 U.S. at 382–83.

<sup>88</sup> *See id.* at 383.

<sup>89</sup> *Id.* at 383.

<sup>90</sup> *See id.* at 383–84 ("If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the [s]tates, there is no difficulty in construing the instrument accordingly . . .").

<sup>91</sup> *Id.* at 383.

<sup>92</sup> *See id.* at 383–84 (noting that federal courts do not hear domestic relations matters, instead they belong to the states); *Simms v. Simms*, 175 U.S. 162, 168 (1899) (asserting that domestic relations matters are "within the limits of a [s]tate, [and] are regulated by the laws of the [s]tate only"); *In re Burrus*, 136 U.S. 586, 593–94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the [s]tates and not to the laws of the United States.").

<sup>93</sup> *Compare Burrus*, 136 U.S. at 593–94 (federal question jurisdiction), with *Popovici*, 280 U.S. at 382–83 (diversity jurisdiction).

met the requirements for access to a federal court on one hand, while the exception stripped that access on the other—left many lower courts in a haze. The *Ankenbrandt* decision represents the Court's attempt at clarification.

### C. *The Ankenbrandt Decision*

At the time of the *Ankenbrandt* decision, the law on the domestic relations exception as set out by the Supreme Court was in a deep haze. Although many understood the *Burrus* holding<sup>94</sup> (which of course included the issuance and modification of decrees involving divorce, alimony, and, as a result of *Burrus*, child custody),<sup>95</sup> there was little consensus about related matters, such as adoption, guardianship, and child abuse.<sup>96</sup> Turning to the Court's proffered rationale for the exception proved futile since the Supreme Court had never provided a consistent justification for the exception.<sup>97</sup> The Supreme Court attempted to clear the haze with the 1992 decision of *Ankenbrandt v. Richards*.<sup>98</sup>

In *Ankenbrandt*, Carol Ankenbrandt, a Missouri citizen, sued her children's father and his "female companion," who were both citizens of Louisiana.<sup>99</sup> Relying on the court's diversity jurisdiction, Ms. Ankenbrandt sued in the U.S. District Court for the Eastern District of Louisiana.<sup>100</sup> Ms. Ankenbrandt "sought monetary damages for alleged sexual and physical abuse" of her children by the respondents.<sup>101</sup>

The district court granted the respondents' motion to dismiss the case for lack of jurisdiction,<sup>102</sup> citing the *Burrus* holding.<sup>103</sup> The Court of Appeals affirmed in an unpublished opinion.<sup>104</sup> From there, the Supreme Court granted certiorari to determine if the domestic relations exception to jurisdiction still

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<sup>94</sup> *Burrus*, 136 U.S. at 593–94.

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

<sup>96</sup> For a thorough breakdown of the circuit split that existed before the *Ankenbrandt* decision, see Stein, *supra* note 10, at 679–81.

<sup>97</sup> For a discussion of various rationales offered for the exception, see Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 584–92 (1984).

<sup>98</sup> 504 U.S. 689, 692–93 (1992).

<sup>99</sup> *Id.* at 691.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 691–92.

<sup>103</sup> *Id.* at 692. "The [district] court also invoked the abstention principles announced in *Younger v. Harris*" to justify its dismissal. *Id.*

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

existed, and if so, whether “it permit[ed] a district court to abstain from exercising diversity jurisdiction over a tort action for damages.”<sup>105</sup>

Answering the first question, the Supreme Court held that the domestic relations exception in fact existed.<sup>106</sup> The Supreme Court noted that the words in *Barber v. Barber*,<sup>107</sup> “though technically dicta,” formed the basis for the exception, even though the *Barber* Court “cited no authority” for its announcement.<sup>108</sup> The *Ankenbrandt* Court determined it would continue to acknowledge the exception on three grounds. First, the exception must be recognized as a matter of stare decisis.<sup>109</sup> Second, the exception could now be explained as a method of statutory construction—Congress has had ample opportunity to amend the diversity statute considering the rule, but had chosen not to do so.<sup>110</sup> Third, the exception served public policy—states are better equipped to monitor cases of this type since they have the judicial expertise from having handled these cases for so long.<sup>111</sup>

The second question gave the Court the opportunity to redefine when the exception should apply and delineate its scope. The Court answered that it should only apply in a narrow set of cases, those “involving the issuance of a divorce, alimony, or child custody decree.”<sup>112</sup> The Court expressed concern that “the lower federal courts have applied [the domestic relations exception] in a variety of circumstances . . . [that] go well beyond the circumscribed situations posed by *Barber* and its progeny.”<sup>113</sup> It concluded that “the domestic relations exception encompasses only cases involving the issuance of a

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<sup>105</sup> See *id.* (granting certiorari to determine: “(1) Is there a domestic relations exception to federal jurisdiction? (2) If so, does it permit a district court to abstain from exercising diversity jurisdiction over a tort action for damages?”). The Supreme Court also granted certiorari to a third question: “Did the District Court in this case err in abstaining from exercising jurisdiction under the doctrine of *Younger v. Harris*?” *Id.* at 692–93. However, this question is inconsequential to the subject of this Comment and will not be discussed.

<sup>106</sup> *Id.* at 694–95.

<sup>107</sup> “We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery or as an incident to divorce . . .” *Barber v. Barber*, 62 U.S. (21 How.) 582, 584 (1858).

<sup>108</sup> *Ankenbrandt*, 504 U.S. at 694.

<sup>109</sup> *Id.* at 694–95 (noting that the Court was “unwilling to cast aside an understood rule that has been recognized for nearly a century and a half”).

<sup>110</sup> *Id.* at 700 (“When Congress amended the diversity statute in 1948 . . . , 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.”).

<sup>111</sup> *Id.* at 703–04 (“Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. . . . [S]tate courts are more eminently suited to work of this type than are federal courts . . .”).

<sup>112</sup> *Id.* at 704.

<sup>113</sup> *Id.* at 701.

divorce, alimony, or child custody decree.”<sup>114</sup> Although the Court conceded that at the exception’s genesis it was only applied to suits for divorce and alimony,<sup>115</sup> the Court would continue to apply the exception to child custody cases as a result of *In re Burrus*.<sup>116</sup> This conclusion was facially unclear, since *In re Burrus* involved federal question jurisdiction, not diversity jurisdiction.<sup>117</sup> But the *Ankenbrandt* Court explained away this irregularity by stating that the *Burrus* holding “has been interpreted by the federal courts to apply with equal vigor in suits brought pursuant to diversity jurisdiction.”<sup>118</sup> Thus, the Court’s attempt to include child custody in the domestic relations exception, combined with its failure to specify whether the exception truly applied to federal question cases, left lower courts lost in the haze the Court attempted to clarify.<sup>119</sup>

With the *Ankenbrandt* decision, the Supreme Court attempted to balance the three values underlying the exception’s creation and duration. First, regarding stare decisis, the Court determined it would continue to recognize the exception even though when it was announced in *Barber*, the Court “cited no authority and did not discuss the foundation for its announcement.”<sup>120</sup> Second, concerning federalism, the Court noted that one of the reasons it would continue to apply the exception was that states were better equipped to monitor cases of this type since they have the judicial expertise from having handled these cases for so long.<sup>121</sup> Finally, regarding access to courts, the Court signaled a willingness to honor this value by narrowing the application of the exception.<sup>122</sup> While the opinion is laudable for its recognition and attempted balance of the exception’s three underlying values, it suffered from two key problems.

First, the Court offered little guidance on matters associated with the core domestic relations issues. All federal courts understood that the exception prohibits a federal court from issuing “a divorce, alimony, or child custody

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<sup>114</sup> *Id.* at 704.

<sup>115</sup> *Id.* at 701–02.

<sup>116</sup> 136 U.S. 586, 593–94 (1890).

<sup>117</sup> *Id.* at 586, 591.

<sup>118</sup> *Ankenbrandt*, 504 U.S. at 703. Scholars examining this reasoning have criticized it as “convoluted.”

See Cahn, *supra* note 9, at 1082.

<sup>119</sup> See *infra* Part II.

<sup>120</sup> *Ankenbrandt*, 504 U.S. at 694.

<sup>121</sup> *Id.* at 703–04.

<sup>122</sup> See *id.* at 701.

decree,”<sup>123</sup> but what about related matters such as child support, guardianship, adoption, neglect, and abuse?<sup>124</sup> The Court wrote nothing regarding how the domestic relations exception applies to these matters.

Because the Court omitted a discussion of related matters, some lower courts look to a different part of the opinion, the portion on abstention, for support. In the abstention portion, the Court noted that it may be appropriate for federal courts to abstain from exercising subject matter jurisdiction “in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody.”<sup>125</sup> It is unclear how this statement relates to the domestic relations exception given that it is separate from the Court’s discussion of the exception.<sup>126</sup> Because of this lack of clarity, many courts were left wondering whether the abstention portion applies to the exception.

Second, similar to the original domestic relations statement in *Barber*, the information in the *Ankenbrandt* opinion about the domestic relations exception is dicta. Because the exception did not apply in the matter before the Court, a “decision on the scope of the [e]xception was not necessary.”<sup>127</sup> Thus, some courts implicitly rejected the discussion of the exception in *Ankenbrandt*, and continued to rely on pre-*Ankenbrandt* cases as support.<sup>128</sup> These two problems have led to the circuit split on the scope of the exception that exists today.<sup>129</sup>

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<sup>123</sup> *Id.* at 690; *see also* Stein, *supra* note 10, at 679 (“With one notable exception, district courts agree[d] that their jurisdiction [did] not extend to core suits.”).

<sup>124</sup> *See* Stein, *supra* note 10, at 686 (asserting that “[t]he *Ankenbrandt* opinion is entirely silent about the viability of federal adjudication of core enforcement cases”).

<sup>125</sup> *Ankenbrandt*, 504 U.S. at 705.

<sup>126</sup> *Id.*

<sup>127</sup> Cahn, *supra* note 9, at 1084. One may find support for this proposition in Justice Stevens’s concurrence in which he stated, “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.” *Ankenbrandt*, 504 U.S. at 718 (Stevens, J., concurring).

<sup>128</sup> *See, e.g.,* Mitchell-Angel v. Cronin, No. 95-7937, 1996 WL 107300 (2d Cir. Mar. 8, 1996). In *Mitchell-Angel*, the court cited pre-*Ankenbrandt* cases and applied the exception to federal question jurisdiction cases, including the civil rights action in *Mitchell-Angel*. *Id.* at \*2–3.

<sup>129</sup> *See infra* Part III.

*D. From Ankenbrandt to the Present*

In the wake of the *Ankenbrandt* decision, two rules definitively emerged.<sup>130</sup> First, the domestic relations exception exists as a result of stare decisis, statutory construction, and public policy.<sup>131</sup> Second, it applies to issuances of divorce, alimony, and child custody decrees.<sup>132</sup> Beyond that, “the *Ankenbrandt* Court confused matters” by failing to offer an adequate explanation of when, beyond the three named situations, a court should invoke the exception.<sup>133</sup> In other words, the Court did not provide guidance on the “difficult cases at the margin.”<sup>134</sup> Does child support fall within the exception? It is not within the three situations named, but as Professor Naomi Cahn has observed, it is “comparable to alimony because it is a form of ongoing wealth transfer” and “closely related to child custody determinations because most state statutes require the noncustodial parent to pay.”<sup>135</sup> Because the Court has not provided consistent guidance, we meet the problem of similarly situated litigants having very different outcomes.<sup>136</sup>

After *Ankenbrandt*, the Supreme Court addressed the domestic relations exception on two occasions. The first was a 2004 case called *Elk Grove Unified School District v. Newdow*.<sup>137</sup> *Newdow* involved a father, an atheist, who challenged the use of the words “under God” in the Pledge of Allegiance, which his daughter recited daily at her public school.<sup>138</sup> The mother of the child, who also had exclusive legal custody, disputed having her daughter as a party to the lawsuit.<sup>139</sup> The mother believed “that her daughter would be harmed if the litigation were permitted to proceed, because others might incorrectly perceive the child as sharing her father’s atheist views.”<sup>140</sup>

Because the case’s true question involved a contentious constitutional issue—whether small children could be told they were “under God” in public schools every day—the Court evaded the difficult the question by relying on

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<sup>130</sup> Note that the use of the term “definitively” is subject to challenge. Some argue that the Supreme Court’s discussion of the domestic relations exception in *Ankenbrandt* is merely dicta. See Cahn, *supra* note 9, at 1083–84.

<sup>131</sup> See *supra* notes 109–11 and accompanying text.

<sup>132</sup> *Ankenbrandt*, 504 U.S. at 704.

<sup>133</sup> Strasser, *supra* note 6, at 200.

<sup>134</sup> *Dunn v. Cometa*, 238 F.3d 38, 41 n.1 (1st Cir. 2001).

<sup>135</sup> Cahn, *supra* note 9, at 1084.

<sup>136</sup> See *supra* INTRODUCTION.

<sup>137</sup> 542 U.S. 1 (2004).

<sup>138</sup> *Id.* at 5.

<sup>139</sup> *Id.* at 9.

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

standing<sup>141</sup> and the domestic relations exception.<sup>142</sup> Summing up the rules about the domestic relations exception and expanding its scope, the Court noted:

One of the principal areas in which this Court has customarily declined to intervene is the realm of domestic relations. . . . So strong is our deference to state law in this area that we have recognized a “domestic relations exception” that “divests the federal courts of power to issue divorce, alimony, and child custody decrees.” We have also acknowledged that it 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.<sup>143</sup>

Thus, with forceful language, the Court did two things. First, it incorporated the scope of the domestic relations exception as set by *Ankenbrandt*, divesting federal courts of the authority to issue divorce, alimony, and child custody decrees.<sup>144</sup> Second, in a puzzling maneuver, the Court cited to the abstention portion of *Ankenbrandt* to expand the scope of the exception to include matters involving “elements of the domestic relationship.”<sup>145</sup>

To add to that confusion, the Court’s writing on the domestic relations exception is dicta.<sup>146</sup> The Court explicitly wrote, in a footnote, that the holding does not rest on the domestic relations exception.<sup>147</sup> Instead, the Court noted that its “prudential standing analysis is informed by the variety of contexts,” one of which is the domestic relations exception.<sup>148</sup> Here, the father’s standing depended on his relationship with his daughter, but because “disputed family law rights [were] entwined inextricably” with his standing, the Court chose to reverse the appellate court’s decision and dismiss the case.<sup>149</sup> In these situations, the Court wrote that “it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts.”<sup>150</sup>

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

<sup>142</sup> *Id.* at 12–14.

<sup>143</sup> *Id.* at 12–13 (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 703, 705 (1992)).

<sup>144</sup> *Ankenbrandt*, 504 U.S. at 704.

<sup>145</sup> *Newdow*, 542 U.S. at 13 (quoting *Ankenbrandt*, 504 U.S. at 705–06).

<sup>146</sup> *See id.* at 13 n.5 (noting that the holding of the case does not rest on the domestic relations exception).

<sup>147</sup> *Id.*

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

<sup>149</sup> *Id.* at 10, 13 n.5, 17.

<sup>150</sup> *Id.* at 13.

The second occasion after *Ankenbrandt* in which the Supreme Court addressed the domestic relations exception was *Marshall v. Marshall*.<sup>151</sup> Although *Marshall* involved facts surrounding the probate exception to diversity jurisdiction,<sup>152</sup> the Court took the opportunity to discuss its cousin, the domestic relations exception.<sup>153</sup> The Court wrote that *Ankenbrandt* “reined in the ‘domestic relations exception,’”<sup>154</sup> noting that the “so-called” exception applies only to a “narrow range of domestic relations issues.”<sup>155</sup> But since the domestic relations exception was not necessary to the Court’s holding because the case was about the probate exception, the Court’s discussion of it is again dicta.<sup>156</sup>

Since *Marshall*, the Supreme Court has not again discussed the domestic relations exception at length. Thus, from the time the exception began in 1858 until now, the Supreme Court has taken several confusing steps concerning the exception. First, the Court has applied the domestic relations exception to matters that did not involve diversity jurisdiction.<sup>157</sup> Second, the Court confined the exception’s application in *Ankenbrandt*,<sup>158</sup> but then seemed to provide conflicting instruction in the dicta of the same case and in subsequent cases.<sup>159</sup> Third, the Court has consistently provided shifting, dubious rationales for the exception’s existence.<sup>160</sup>

Taken together, the Court’s measures to clear the haze have been unavailing—lower courts are still lost. Although some scholars predicted that “the Supreme Court’s clear statement of the narrow confines of the [domestic relations exception] may eliminate or at least sharply reduce [its] inconsistent application,”<sup>161</sup> this has not been the case. Instead, the domestic relations

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<sup>151</sup> 547 U.S. 293, 293 (2006).

<sup>152</sup> The probate exception to diversity jurisdiction denotes that federal courts have no subject matter jurisdiction over probate matters and thus cannot directly probate a will or undertake the administration of an estate. See WRIGHT ET AL., *supra* note 52, § 3610.

<sup>153</sup> See *Marshall*, 547 U.S. at 299 (noting that like the domestic relations exception, the probate exception is an exception to otherwise proper federal jurisdiction).

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

<sup>155</sup> *Id.* at 299, 307 (citing *Ankenbrandt v. Richards*, 504 U.S. 689, 701 (1992)).

<sup>156</sup> *Id.* at 314–15.

<sup>157</sup> See, e.g., *In re Burrus*, 136 U.S. 586, 593–94 (1890).

<sup>158</sup> *Ankenbrandt*, 504 U.S. at 701, 704.

<sup>159</sup> See *Marshall*, 547 U.S. at 307 (discussing the domestic relations exception even though the case concerned the probate exception); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12–13, 13 n.5 (2004) (noting that the holding does not rest on the domestic relations exception).

<sup>160</sup> See Atwood, *supra* note 97, at 584–92.

<sup>161</sup> WRIGHT ET AL., *supra* note 52, § 3609.

exception bars litigants in some circuits, while being inapplicable to the same similarly situated litigants in other circuits.

## II. CIRCUITS' VARYING APPROACHES TO THE DOMESTIC RELATIONS EXCEPTION

The background on the domestic relations exception in Part I highlights the problem with the doctrine—the Supreme Court has never offered a holding regarding the application of the exception or provided a definitive test.<sup>162</sup> Thus, lower courts apply *Ankenbrandt* inconsistently, leading to conflicting treatment of similarly situated litigants in different jurisdictions.<sup>163</sup> This Part examines the lower courts' various approaches.

The approaches used by the circuits to determine the application of the domestic relations exception can be divided into four general methods. Each section in this Part explores a different method. Section A describes the core-only approach. Circuits that follow this method determine that the exception only applies to the issuance or modification of divorce, alimony, and child custody decrees.<sup>164</sup> Section B explains the core and penumbra approach.<sup>165</sup> Circuits that rely on this approach believe the exception applies to cases that sound in family law or are “matrimonial in nature.”<sup>166</sup> Section C discusses the Eighth Circuit's inextricably intertwined approach.<sup>167</sup> With this method, the Eighth Circuit examines whether the federal court's remedy or inquiry will overlap with that of a state court.<sup>168</sup> Finally, Section D describes the Eleventh Circuit's factor-based approach, in which the court balances various identified factors to determine if the exception will apply.<sup>169</sup>

The approaches used by various circuits reflect their attempts to acknowledge and balance the competing values that underlie the domestic relations exception: stare decisis, federalism, and access to courts. But the problem that plagues these approaches is twofold. First, some circuits elevate one value to the omission or downgrading of the others. Second, the

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<sup>162</sup> For an example of the Supreme Court expressly holding on the scope of a topic, see *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013) (“We have not applied *Younger* outside these three ‘exceptional’ categories, and today hold, in accord with *NOPSI*, that they define *Younger*'s scope.”).

<sup>163</sup> See *supra* INTRODUCTION.

<sup>164</sup> E.g., *Chevalier v. Estate of Barnhart*, 803 F.3d 789, 797 (6th Cir. 2015).

<sup>165</sup> See, e.g., *Friedlander v. Friedlander*, 149 F.3d 739, 740 (7th Cir. 1998).

<sup>166</sup> *Hamilton v. Hamilton-Grinols*, 363 F. App'x 767, 769 (2d Cir. 2010).

<sup>167</sup> See, e.g., *Wallace v. Wallace*, 736 F.3d 764, 767 (8th Cir. 2013).

<sup>168</sup> See, e.g., *Kahn v. Kahn*, 21 F.3d 859, 861 (8th Cir. 1994).

<sup>169</sup> See, e.g., *McCavey v. Barnett*, 629 F. App'x 865, 867 (11th Cir. 2015) (per curiam).

approaches are not always inclusive. Some do not account for the current questions that make the exception's application so inconsistent, such as whether it applies to federal question jurisdiction. For these reasons, this Comment ultimately advocates a three-step approach that appropriately accounts for the competing values and provides a uniform method of determining the applicability of the domestic relations exception.

### A. The "Core-Only" Approach

The first method, and the method used by the First,<sup>170</sup> Third,<sup>171</sup> Fourth,<sup>172</sup> Fifth,<sup>173</sup> and Sixth<sup>174</sup> Circuits, is the core-only approach. In *Ankenbrandt*, the Supreme Court noted that "the domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree."<sup>175</sup> Although this language may be viewed as dicta since the Court did not need to discuss the exception on the case before it, beyond that, the exception did not apply; courts that follow the core-only approach disagree, and view the language as an explicit holding concerning the exception's scope.<sup>176</sup> The core-only approach is one that promotes access to federal courts by only omitting cases concerning those three claims. Since federal courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given,"<sup>177</sup> all other cases may be properly heard in federal court if the litigants otherwise meet the federal jurisdictional requirements.

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<sup>170</sup> See, e.g., *Norton v. McOsker*, 407 F.3d 501, 505 (1st Cir. 2005) ("The domestic relations exception 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.'" (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992))).

<sup>171</sup> See, e.g., *Matusow v. Trans-Cty. Title Agency, LLC*, 545 F.3d 241, 246 (3d Cir. 2008) (explaining that the plaintiff did "not seek the modification of a divorce decree, and the narrow domestic relations exception [did] not divest the federal court of jurisdiction over her claims").

<sup>172</sup> See, e.g., *Reale v. Wake Cty. Human Servs.*, 480 F. App'x 195, 197 (4th Cir. 2012) ("[T]he domestic relations exception encompasses only cases involving the issuance of a divorce, alimony, or child custody decree." (internal quotation marks omitted) (quoting *Ankenbrandt*, 504 U.S. at 704)).

<sup>173</sup> See, e.g., *United States v. Bailey*, 115 F.3d 1222, 1231 (5th Cir. 1997) ("Federal courts have long divested themselves of jurisdiction over only the *issuance* of divorce, alimony, and child custody decrees . . .").

<sup>174</sup> See, e.g., *Chevalier v. Estate of Barnhart*, 803 F.3d 789, 795 (6th Cir. 2015) ("The message from *Ankenbrandt* and *Marshall* is clear: the domestic-relations exception is narrow, and lower federal courts may not broaden its application.").

<sup>175</sup> *Ankenbrandt*, 504 U.S. at 704.

<sup>176</sup> See, e.g., *Chevalier*, 803 F.3d at 795 ("The Court made clear [in *Ankenbrandt*] that the domestic-relations exception extended no further than 'cases involving the issuance of a divorce, alimony, or child custody decree.'" (quoting *Ankenbrandt*, 504 U.S. at 704)).

<sup>177</sup> *Id.* at 795 (internal quotation marks omitted) (quoting *Marshall v. Marshall*, 547 U.S. 293, 298–99 (2006)).

Illustrative of the core-only approach is *Chevalier v. Estate of Barnhart*.<sup>178</sup> In *Chevalier*, the issue was whether the domestic relations exception barred a claim concerning one spouse's default on loans from the other spouse.<sup>179</sup> Once the couple separated, Chevalier sued Barnhart for repayment of the loans in federal district court, asserting diversity jurisdiction because she was a Canadian citizen and Barnhart was a citizen of Ohio.<sup>180</sup> Before answering Chevalier's complaint, Barnhart sued for divorce in Canada.<sup>181</sup> The district court subsequently dismissed Chevalier's claim via the domestic relations exception.<sup>182</sup> It reasoned that although Chevalier "framed her complaint in terms of contract and tort claims," the domestic relations exception barred her claims because she sought the "functional equivalent of a divorce proceeding."<sup>183</sup>

The Court of Appeals for the Sixth Circuit rejected the district court's reasoning.<sup>184</sup> It held that "the domestic-relations exception to federal diversity jurisdiction does not deprive federal courts of jurisdiction . . . unless 'a plaintiff positively sues in federal court for divorce, alimony, or child custody,' . . . or seeks to modify or interpret an existing divorce, alimony, or child custody decree."<sup>185</sup> The court reviewed *Ankenbrandt* and noted that the Supreme Court "expressed concern that 'the lower federal courts ha[d] applied [the domestic-relations exception] in a variety of circumstances . . . [that] go well beyond the circumscribed situations' where it applies."<sup>186</sup> Ignoring the Supreme Court's language since *Ankenbrandt*, the circuit court implied that the district court's use of the domestic relations exception was another one of those circumstances.

To explain its decision, the court wrote: "When analyzing the applicability of the domestic-relations exception, we must focus on the remedy that the plaintiff seeks . . ."<sup>187</sup> Here, Chevalier did not seek an issuance or modification of a divorce or alimony decree.<sup>188</sup> Instead, she "request[ed] that the federal court adjudicate whether she is entitled to repayment for past-due

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<sup>178</sup> *Id.* at 789.

<sup>179</sup> *Id.* at 792.

<sup>180</sup> *Id.* at 791.

<sup>181</sup> *Id.* at 793.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 797.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 795 (alterations in original) (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 701 (1992)).

<sup>187</sup> *Id.* at 797.

<sup>188</sup> *Id.* at 798.

loans.”<sup>189</sup> That type of remedy, even though it involved the marital status of the litigants, was not barred by the domestic relations exception.<sup>190</sup>

The core-only approach has significant support amongst the circuits. It seems to provide a clear rule: if a litigant invokes the federal court’s diversity jurisdiction to seek a modification or issuance of a divorce, alimony, or child custody decree, then she is barred by the domestic relations exception.<sup>191</sup> Yet the approach suffers from at least two deficits. First, what if a litigant invokes federal question jurisdiction to reach similar ends? The core-only approach would seem to allow the case to go forward, even though a litigant is functionally achieving the same result. If one of the exception’s values is federalism, should federal courts permit a litigant to use artful pleading to escape the application of the exception? Second, the core-only approach would seem to allow related matters, such as abuse, neglect, guardianship, and adoption, to proceed in federal court, undermining federalism and in contradiction to at least some language by the Supreme Court.<sup>192</sup>

Two cases highlight the core-only approach’s federal question deficit: *Reale v. Wake County Human Services*<sup>193</sup> and *Chambers v. Michigan*.<sup>194</sup> In *Reale*, two parents filed a § 1983 action<sup>195</sup> “claiming that state actors had deprived them of their children without due process.”<sup>196</sup> Although the district court dismissed the case via the domestic relations exception, the appellate court reversed and held first, that the exception only applies to “the issuance of a divorce, alimony, or child custody decree,” and second, the exception only applies to diversity, and not federal question, cases.<sup>197</sup> Although the litigants, seeking injunctive relief, could potentially use a § 1983 claim to obtain custody of their children (which may be construed as the functional equivalent of seeking the modification of a child custody decree), the suit was not barred by the domestic relations exception. In a directly opposite conclusion, the court in

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<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 797 (“The domestic-relations exception to federal diversity jurisdiction does not apply when the parties do not ask the federal court to perform these status-related functions—issuing a divorce, alimony, or child-custody decree—even if the matter involves married or once-married parties.”).

<sup>191</sup> *See id.*

<sup>192</sup> *See Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (noting that it may be appropriate for federal courts to abstain from exercising subject matter jurisdiction “in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody”).

<sup>193</sup> 480 F. App’x 195, 197 (4th Cir. 2012).

<sup>194</sup> 473 F. App’x 477, 479 (6th Cir. 2012).

<sup>195</sup> Section 1983 provides a cause of action for individuals who assert that a person acting under color of state law has violated their federal rights. *See* 42 U.S.C. § 1983 (2012).

<sup>196</sup> *Reale*, 480 F. App’x at 197.

<sup>197</sup> *Id.*

*Chambers* held: “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.”<sup>198</sup> Thus, even though both circuits here use the core-only approach, they vary on whether the exception applies to federal question cases.

The second deficit is that the approach provides no guidance on handling matters related to divorce, alimony, and child custody. This deficit is expressly highlighted in *Dunn v. Cometa*.<sup>199</sup> Although the claims at issue in *Dunn* involved a breach of fiduciary duty and fell outside of the exception, the court expressly noted the problem with the core-only approach.<sup>200</sup> The court wrote in a footnote that “this narrow construction of the exception,” that is, the core-only approach, “leaves open difficult cases at the margin.”<sup>201</sup> The court gave no direction as to how to deal with those cases at the margin, even though they implicate the same federalism concerns as the core cases. To handle that problem, the Second<sup>202</sup> and Seventh<sup>203</sup> Circuits employ the “core and penumbra” approach.

#### B. The “Core and Penumbra” Approach

The second approach is the core and penumbra approach, which is used by the Second<sup>204</sup> and Seventh<sup>205</sup> Circuits, attempts to account for cases involving abuse, neglect, guardianship, and adoption. The term “core and penumbra” is derived from a Seventh Circuit case.<sup>206</sup> Courts that use this method note that the core of the domestic relations exception consists of cases involving the issuance or modification of divorce, alimony, or child custody decrees, and the penumbra consists of proceedings “that state law would require be litigated as a tail to the original domestic relations proceeding.”<sup>207</sup> Such claims would include, for example, suits for child support or unpaid alimony.<sup>208</sup> In both the

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<sup>198</sup> 473 F. App’x 477, 479 (6th Cir. 2012) (quoting *Firestone v. Cleveland Tr. Co.*, 654 F.2d 1212, 1215 (6th Cir. 1981)).

<sup>199</sup> 228 F.3d 38, 41 n.1 (1st Cir. 2001).

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *See, e.g.,* *Martinez v. Queens Cty. Dist. Att’y*, 596 F. App’x 10, 12 (2d Cir. 2015). The Second Circuit Court of Appeals does not use the label “core and penumbra,” but nevertheless assesses the claims using the same process.

<sup>203</sup> *See, e.g.,* *Friedlander v. Friedlander*, 149 F.3d 739, 740 (7th Cir. 1998).

<sup>204</sup> *See, e.g.,* *Martinez*, 596 F. App’x at 12.

<sup>205</sup> *See, e.g.,* *Friedlander*, 149 F.3d at 740.

<sup>206</sup> *Id.* (“The domestic relations exception has a core and a penumbra.”).

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

core and penumbra matters, the domestic relations exception would strip the federal court of jurisdiction.

Like the core-only approach, courts that follow the core and penumbra approach find endorsement for this approach in *Ankenbrandt*'s language. The core cases are those that consist of suits for divorce, alimony, and child custody, the narrow scope arguably set out by the Supreme Court in *Ankenbrandt*.<sup>209</sup> The penumbra cases are those that the *Ankenbrandt* Court noted that may be appropriate for federal court abstention.<sup>210</sup> These are cases "involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody."<sup>211</sup>

The justification for the core and penumbra cases is highly questionable. It comes from the part of the *Ankenbrandt* opinion concerning abstention as opposed to the domestic relations exception.<sup>212</sup> On the other hand, a reliance on this portion of the *Ankenbrandt* opinion may now be reasonable since the Supreme Court set the example, in a later case, by importing this same language to apply to the domestic relations exception.<sup>213</sup> Thus, some lower courts have followed suit.

In its attempt to account for cases related to child custody, divorce, and alimony, the core and penumbra approach promotes federalism. By allowing state courts to address principal and related matters of domestic relations, the federal courts leave those matters in the hands of those who already have much proficiency in handling them. The approach also seems to account for domestic relations suits brought as federal question cases.<sup>214</sup> These suits would be part of the penumbra, and thus barred. While applause is due for the core and penumbra's comity-focused procedure to clarify the scope of the exception, this approach, like core-only approach, also poses problems.

The main problem is that no court has outlined exactly how to define when a suit is inside or outside of the penumbra. This lack of instruction is demonstrated in the Seventh Circuit case *Friedlander v. Friedlander*.<sup>215</sup> In

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<sup>209</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992).

<sup>210</sup> *Id.* at 705.

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

<sup>212</sup> *Id.*

<sup>213</sup> *See supra* notes 143–45 and accompanying text.

<sup>214</sup> *See, e.g.*, *Lynk v. LaPorte Superior Court No. 2*, 789 F.2d 554, 563 (7th Cir. 1986) ("The judge-made doctrine that prevents federal courts from adjudicating certain types of domestic relations case[s] under the diversity jurisdiction can be restated as a doctrine of abstention also applicable to cases brought in federal court under the federal-question jurisdiction.")

<sup>215</sup> *See* 149 F.3d 739, 740–41 (7th Cir. 1998).

*Friedlander*, the court wrote that the domestic relations exception would bar a suit for the collection of unpaid alimony, but would not bar a suit of wrongful death over the murder of a father-in-law by his former son-in-law.<sup>216</sup> These examples, while helpful to define the extreme limits of the penumbra, provide little guidance to courts seeking to apply this approach.

A secondary concern is the basis for which some courts justify the penumbra of the exception. One court views *Ankenbrandt*'s narrow language as dicta and implies that it does not have to follow it.<sup>217</sup> Another court relies on a different section of *Ankenbrandt*, which is dicta as it relates to the domestic relations exception, and follows it.<sup>218</sup> Thus we have one court disregarding what they view as dicta, and another implementing dicta as precedent, but both arriving at the same place. This highlights the Supreme Court's ambiguity on the exception and a need for an explicit holding concerning its application.

### C. The Eighth Circuit's "Inextricably Intertwined" Approach

The third method to determine the application of the domestic relations exception is the Eighth Circuit's inextricably intertwined approach.<sup>219</sup> This approach focuses on a litigant's claims and whether they are inextricably intertwined with a state proceeding, either in the remedy sought or the inquiry the federal court must make.<sup>220</sup> The Eighth Circuit used this approach in two cases, *Kahn v. Kahn*<sup>221</sup> and *Wallace v. Wallace*.<sup>222</sup>

In *Kahn*, the court held that a woman's tort claims against her former husband were barred by the domestic relations exception.<sup>223</sup> In her complaint, the wife alleged the same misconduct against her former husband as she had in their divorce proceedings.<sup>224</sup> The court concluded that the ex-wife's claims, "although drafted to sound in tort, [were] so inextricably intertwined with the prior property settlement incident to the divorce proceeding that subject matter jurisdiction [did] not lie in the federal court."<sup>225</sup> Since the proffered evidence

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<sup>216</sup> *Id.*

<sup>217</sup> *See id.* at 740 ("A dictum in *Ankenbrandt* might be thought to cast doubt on the existence of the penumbra . . .").

<sup>218</sup> *See supra* notes 143–45 and accompanying text.

<sup>219</sup> *See, e.g., Kahn v. Kahn*, 21 F.3d 859, 861 (8th Cir. 1994).

<sup>220</sup> *Id.*

<sup>221</sup> *See id.*

<sup>222</sup> *See* 736 F.3d 764, 765 (8th Cir. 2013).

<sup>223</sup> *Kahn*, 21 F.3d at 860.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* at 861.

would be the same as that in the divorce proceeding, and the conduct occurred exclusively in the marriage, the domestic relations exception barred the federal claims.<sup>226</sup>

Similarly, in *Wallace v. Wallace*, the court used the domestic relations exception to bar an identity theft claim.<sup>227</sup> As a result of an ongoing divorce proceeding, the husband in *Wallace* learned that his wife “had used his social security number and other personal information . . . to obtain several credit cards” and charge nearly \$40,000 on them.<sup>228</sup> Although the state court labeled the debt as marital, the husband invoked the federal court’s diversity jurisdiction, suing for identity theft.<sup>229</sup> Relying on *Kahn* to affirm the district court’s decision, the court held that the domestic relations exception precluded subject matter jurisdiction in this case.<sup>230</sup> Because the injunctive and declaratory relief the husband sought in federal court was “based on conduct that occurred during the marriage” and would “undermine the judgment of the state court,” his claims could not go forward.<sup>231</sup>

The Eighth Circuit’s approach respects notions of federalism and judicial efficiency by allowing state courts to handle all matters inextricably intertwined with domestic relations issues.<sup>232</sup> While laudable for its efficacy, how does one know when a claim is inextricably intertwined? The Eighth Circuit provided some guidance by finding persuasive facts such as if the conduct occurred during the marriage relationship or if the federal courts had to inquire into matters handled by the state court,<sup>233</sup> but these facts are true of many domestic relations issues. Thus, the test is understandable in theory, but may prove difficult to apply in practice. Without more guidance as to what a court should look for to determine if a matter is inextricably intertwined, the approach falls short.

#### *D. The Eleventh Circuit’s Factor Approach*

A final approach to applying the domestic relations exception is the Eleventh Circuit’s factor approach.<sup>234</sup> Like some courts that endorse the core

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<sup>226</sup> *Id.* at 861–62.

<sup>227</sup> *Wallace*, 736 F.3d at 765.

<sup>228</sup> *Id.*

<sup>229</sup> *Id.* at 767.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

<sup>232</sup> *Kahn v. Kahn*, 21 F.3d 859, 861 (8th Cir. 1994).

<sup>233</sup> *Wallace*, 736 F.3d at 767.

<sup>234</sup> *See, e.g., McCavey v. Barnett*, 629 F. App’x 865, 867 (11th Cir. 2015) (per curiam).

and penumbra method, the factor approach relies on *Ankenbrandt*'s language concerning abstention.<sup>235</sup> The Eleventh Circuit outlined the following factors for barring a matter under the domestic relations exception: "(1) [a] strong state interest in domestic relations; (2) competency of state courts in settling family disputes; (3) the possibility of incompatible federal and state decrees in cases of continuing judicial supervision by the state; and (4) the problem of congested federal court dockets."<sup>236</sup> When these factors are present, federal courts should abstain from exercising jurisdiction over domestic relations matters.<sup>237</sup>

Although the Eleventh Circuit has explicitly outlined the factors in recent cases,<sup>238</sup> it has not applied them since the 1978 case *Crouch v. Crouch*, in which the factors were first introduced.<sup>239</sup> *Crouch* involved a "suit between former spouses for damages caused by the breach of a voluntary separation agreement."<sup>240</sup> On appeal, the ex-husband argued that the lower court lacked jurisdiction due to the domestic relations undertones of the dispute.<sup>241</sup> To form its decision, the court reviewed cases in which courts applied the exception and deduced the aforementioned factors, but in *Crouch* the court found most of the factors were lacking.<sup>242</sup> The court found that the case only implicated the last factor, congested federal dockets.<sup>243</sup> That factor, standing alone, was not enough to bar the suit.<sup>244</sup>

The Eleventh Circuit's factor approach is the only one of the four approaches that provides a true test on how to approach a domestic relations jurisdictional issue. While it is useful and simple to apply, it suffers in other respects. First, it fails to consider other significant factors that should be

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<sup>235</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (noting that it may be appropriate for federal courts to abstain from exercising subject matter jurisdiction "in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody"); *see also* *Martinez v. Queens Cty. Dist. Att'y*, 896 F. App'x 10, 12 (2d Cir. 2015); *Friedlander v. Friedlander*, 149 F.3d 739, 740 (7th Cir. 1998).

<sup>236</sup> *Stone v. Wall*, 135 F.3d 1438, 1441 (11th Cir. 1998), *certifying question to* 734 So. 2d 1038 (Fla. 1999).

<sup>237</sup> *Id.*

<sup>238</sup> *E.g., McCavey*, 629 F. App'x at 867.

<sup>239</sup> 566 F.2d 486, 487 (5th Cir. 1978). The districts that are now part of the Eleventh Circuit split off from the Fifth Circuit effective October 1, 1981. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994.

<sup>240</sup> 566 F.2d at 487.

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

<sup>242</sup> *Id.* at 488.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

included, such as whether a litigant relies on federal question as opposed to diversity jurisdiction. Second, apart from a determination that the final factor, congested federal dockets, is alone not enough to bar jurisdiction,<sup>245</sup> the Eleventh Circuit provides little direction on whether one factor is more important than the others.

The approaches outlined in this section illustrate how the lower courts treat the Supreme Court's dubious precedent on the domestic relations exception. Because the Court has never provided a test for the exception, and has been inconsistent in its treatment of its scope, lower courts remain lost in the haze. Trying to feel their way out, courts grapple with the values identified and alluded to by the Supreme Court. The result is the four approaches outlined, but, as demonstrated, each method has its flaws.

### III. A NEW THREE-STEP ANALYSIS

The different approaches utilized by the circuits illustrate the lack of uniformity in the federal courts. This lack of uniformity stems from the attempt to balance the states' interest to decide cases of local concern with an individual's interest in having access to a federal forum. Because the cases that present themselves are highly fact-sensitive, the balance teeters between the two interests, resulting in what we see now—various approaches leading to conflicting outcomes among jurisdictions. This Comment proposes a new three-step test that accounts for the underlying values of the exception, provides uniformity, and will result in a scope that reduces the judicial inconsistency across and within the circuits.

This Part proceeds in three sections. Section A describes the three-step analysis in terms of its features and operation. Section B applies the three-step approach to the factual scenario in this Comment's introduction. Section C discusses the implications of the new approach, which include respecting stare decisis, fulfilling federalism, honoring access to courts, providing uniformity, and reducing judicial inconsistency.

#### A. *The Three-Step Analysis*

In *Ankenbrandt*, the Court referenced and alluded to the values that underlie the domestic relations exception: stare decisis, federalism, and access

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

to federal courts.<sup>246</sup> This Comment’s approach accounts for those values in its three-step inquiry. The three steps of the test and each inquiry’s corresponding value are:

1. Stare decisis: Is the litigant affirmatively or functionally seeking an issuance or modification of a divorce, alimony, or child custody decree?
2. Federalism: Does the state have a strong interest in the suit?
3. Access to federal courts: Is there an overriding necessity that a federal court be accessible to the litigant?

If the answer to the first inquiry is yes, then the domestic relations exception bars the suit. If not, a court then moves on to the second inquiry, which looks at the state’s interest in the matter. If the state’s interest is significant, then the case should be dismissed, unless, as the final inquiry indicates, there is a superseding need to provide the litigant a federal forum. If so, the litigant will continue in federal court, but if not, the federal court should dismiss the suit via the domestic relations exception.

1. *Is the Litigant Affirmatively or Functionally Seeking an Issuance or Modification of a Divorce, Alimony, or Child Custody Decree?*

The first inquiry in this analysis encourages the federal court to determine if the litigant seeks one of the three remedies barred by the domestic relations exception. In *Ankenbrandt*, which was the last Supreme Court case directly discussing the exception, the Court wrote that the domestic relations exception “encompasses only cases involving the issuance of a divorce, alimony, or child custody decree.”<sup>247</sup> If the litigant seeks one of those remedies, the case is barred, and no further inquiry is necessary.

The result of this inquiry will depend on the type of federal subject matter jurisdiction on which the litigant relies. Usually, the domestic relations exception is discussed in terms of diversity jurisdiction,<sup>248</sup> but some scholars have since begun to explore the exception as it relates to federal question cases given the inconsistency amongst the circuits.<sup>249</sup> But “[t]o say that a circuit split exists, however, would paint too orderly a scene; several circuits have been

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<sup>246</sup> *Ankenbrandt v. Richards*, 504 U.S. 689, 701, 703–04 (1992); see also Stein, *supra* note 10, at 679 (“With one notable exception, district courts agree that their jurisdiction does not extend to core suits.”).

<sup>247</sup> *Ankenbrandt*, 504 U.S. at 704.

<sup>248</sup> See Harbach, *supra* note 8, at 137–38.

<sup>249</sup> For a thorough overview of this inconsistency, see Silverman, *supra* note 8, at 1381–82.

internally inconsistent in how they approach the issue.”<sup>250</sup> Consider, for example, the Court of Appeals for the Second Circuit. In *Williams v. Lambert*, the court announced that the domestic relations exception is inapplicable in federal question cases.<sup>251</sup> But just one year later, in *Mitchell-Angel v. Cronin*, the same court indicated the opposite.<sup>252</sup> More recently, the Second Circuit has “expressly decline[d] to address whether the domestic relations exception to federal subject matter jurisdiction applies to federal question actions.”<sup>253</sup> Indeed, this type of internal judicial inconsistency highlights the renewed focus on the problem by writers.

Unlike some scholars<sup>254</sup> and courts,<sup>255</sup> this Comment’s suggested analysis does not advocate a blanket non-application of the domestic relations exception to federal question cases.<sup>256</sup> Because artful pleading can appear to change a diversity case concerning domestic relations into a federal question case alleging violation of federal civil rights,<sup>257</sup> this analysis urges federal courts to “sift through the claims of the complaint to determine the true character of the dispute to be adjudicated.”<sup>258</sup> In other words, this inquiry charges federal courts to carefully look at the pleadings to determine if a litigant is seeking a remedy concerning the issuance or modification of a divorce, alimony, or child custody decree.

This process is equally true if the litigant is relying on diversity jurisdiction. Of course, if a plaintiff files a petition to modify a child custody order in federal court, the case would be barred by the domestic relations exception. But if a litigant files a breach of contract action concerning a custody agreement, he or she may be functionally doing the same thing.

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<sup>250</sup> *Id.* at 1382.

<sup>251</sup> 46 F.3d 1275, 1284 (2d Cir. 1995).

<sup>252</sup> No. 95-7937, 1996 WL 107300, at \*2 (2d Cir. Mar. 8, 1996) (“District courts in this [c]ircuit have held that the exception includes civil rights actions directed at challenging the results of domestic relations proceedings.”).

<sup>253</sup> *Ashmore v. Prus*, 510 F. App’x 47, 49 (2d Cir. 2013).

<sup>254</sup> *See, e.g.*, Harbach, *supra* note 8, at 139 (arguing that “there is no principled, existing doctrinal basis for expansion” of the domestic relations exception).

<sup>255</sup> *See, e.g.*, *Atwood v. Fort Peck Tribal Court Assiniboine & Sioux Tribes*, 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.”).

<sup>256</sup> This argument is further supported by the fact that some of the earliest cases on the exception involved federal question jurisdiction. *See, e.g.*, *In re Burrus*, 136 U.S. 586, 596–97 (1890).

<sup>257</sup> *See, e.g.*, *Allen v. Allen*, 48 F.3d 259, 260–61 (7th Cir. 1995) (dismissing, via the domestic relations exception, a constitutional challenge to visitation proceedings which sought a vacating of the state’s visitation order).

<sup>258</sup> *Firestone v. Cleveland Tr. Co.*, 654 F.2d 1212, 1216 (6th Cir. 1981).

The purpose of this inquiry is twofold. First, it honors stare decisis. The Court has noted that the domestic relations exception has questionable beginnings<sup>259</sup> and some see it as unnecessary.<sup>260</sup> But the exception has been around for over a century and continues to serve important values. Thus, courts should continue to acknowledge it as an important federalism doctrine.

Second, this inquiry permits a court to make an initial, threshold determination that has the potential to dispose of the case without further analysis. Since the application of the domestic relations exception to these suits is unchallenged, quick disposal is possible. Thus, should a court determine that the litigant is affirmatively or functionally suing for an issuance or modification of a divorce, alimony, or child custody decree, the domestic relations exception bars the suit. If not, the court moves on the second inquiry: the state's interest.

## 2. *Does the State Have a Strong Interest in the Suit?*

The second inquiry concerns the state's interest in the matter. For this inquiry, the court will look at facts that support a conclusion that the case should be handled in state court. The court should consider questions such as whether a decision from the federal court will modify a state order, whether there are current state actions pending on the same matter, whether there is a "threat that a feuding couple will play one court system off another,"<sup>261</sup> or whether there are unique state laws that will inform the decision. Together, these facts can give rise to the state's interest in the matter.

Some courts are already performing many of the factual inquiries relevant to this step. An example of a court assessing this step is found in the 1992 case *Johnson v. Thomas*.<sup>262</sup> In *Johnson*, the plaintiff invoked the federal court's diversity jurisdiction to sue Mary Thomas, the plaintiff's former wife/domestic partner.<sup>263</sup> Thomas's marital status was at the time being litigated in state court because when she married the plaintiff, she was also married to another

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<sup>259</sup> See *Ankenbrandt v. Richards*, 504 U.S. 689, 694 (1992) (noting that when the Court first announced the exception, it cited no precedent); Atwood, *supra* note 97, at 578–84.

<sup>260</sup> See Calabresi & Sinel, *supra* note 7, at 754–55 (arguing that the domestic relations exception is an archaic doctrine and should be overruled); Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1511 (2006) ("The overruling of the domestic relations exception is a critical step in the process toward equality.").

<sup>261</sup> *Johnson v. Thomas*, 808 F. Supp. 1316, 1319 (W.D. Mich. 1992).

<sup>262</sup> *Id.* at 1320.

<sup>263</sup> *Id.* at 1317.

man.<sup>264</sup> In federal court, the plaintiff claimed that he and Thomas entered into a domestic partnership agreement before their divorce whereby the plaintiff agreed to pay for Thomas's college education.<sup>265</sup> In exchange she would provide him with professional services upon graduation.<sup>266</sup> Among other claims, the plaintiff alleged violation of that contractual agreement, causing him emotional distress and leaving Thomas with unjust enrichment.<sup>267</sup>

Thomas filed a motion to dismiss based on the domestic relations exception, which the district court granted.<sup>268</sup> Key to the court's decision was the state's interest, which was significant. The court found four facts persuasive. First, the parties had pending cases in the state courts of Michigan, Texas, and Iowa, all involving the marital status of the litigants.<sup>269</sup> Second, in the state court of Michigan, with few exceptions, the claims were identical to those presented in the federal court.<sup>270</sup> Third, the claims that were not identical depended upon the resolution of the marital status of the litigants.<sup>271</sup> Fourth, the court noted the plaintiff "appear[ed] to have filed lawsuits in as many jurisdictions as possible in the hope of achieving a favorable result in one [of them]."<sup>272</sup> Taken together, these facts were strong enough for the court to dismiss the claim via the domestic relations exception.

There is some debate on whether the interest of the states in domestic relations is still a "sufficient justification" for the exception, especially given the significant amount of federal legislation around family law.<sup>273</sup> Despite that fact, and despite the drastic changes in family law since the genesis of the exception,<sup>274</sup> family law is still currently and traditionally a matter for the states. While the fundamental right to marry may be announced by the federal

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<sup>264</sup> *Id.*

<sup>265</sup> *Id.*

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

<sup>267</sup> *Id.* at 1318.

<sup>268</sup> *Id.* at 1321.

<sup>269</sup> *Id.* at 1320.

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

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

<sup>272</sup> *Id.*

<sup>273</sup> Justice Blackmun shared this concern in *Ankenbrandt v. Richards*, 504 U.S. 689, 715 (1992) (Blackmun, J., concurring).

<sup>274</sup> In her article, Professor Emily Sack concludes that the domestic relations exception "may be best explained as a description of the inability to establish diversity in divorce and alimony cases, primarily because at the time of these early cases a married woman could not establish a domicile separate from that of her husband." Sack, *supra* note 260, at 1445. During that time, married women had few rights. See Richard H. Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1368 (1983). Now, of course, women can live separately, whether locally or internationally, from their husbands.

government, the policies and procedures for getting married are determined by the states.<sup>275</sup> Therefore, if the state's interest is implicated, the domestic relations exception should apply. But if the state's interest is not strong or if it is overridden by the litigant's unique need for access to a federal forum, the case should proceed in federal court.

### *3. Is There an Overriding Necessity to Provide the Litigant with Access to a Federal Forum?*

The final inquiry in this Comment's proposed approach is whether there is an overriding necessity to provide the litigant with access to a federal forum. This is mainly demonstrated in a litigant's constitutional challenge to a state action or law. Countless Supreme Court cases implicate legal issues that concern the family. The Court has reviewed state laws about who may marry,<sup>276</sup> procedures in place for divorce proceedings,<sup>277</sup> parental rights regarding child rearing and education,<sup>278</sup> and individuals' rights of procreation and contraception.<sup>279</sup> The domestic relations exception did not, and should not, block these constitutional claims as they serve the important value of access to a federal court. Thus, if a federal court appropriately characterizes a litigant's claim as one challenging the constitutionality of a state's law or action, it will override the state's interest and the claim will continue in the federal forum.

### *B. Applying the Test*

The previous section outlines the three-step approach advocated by this Comment. The approach first asks if a litigant is affirmatively or functionally suing for divorce, alimony, or child custody. If so, due to stare decisis, the domestic relations exception prevents federal jurisdiction. If not, the court proceeds to the second inquiry: Is there any significant state interest that should prevent the matter from continuing in federal court? If the state's interest is significant, then the case should be dismissed, unless, as the final

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<sup>275</sup> See, e.g., *State Laws on Marriage*, FINDLAW, <http://family.findlaw.com/marriage/state-laws-on-marriage.html> (last visited Jan. 7, 2017).

<sup>276</sup> See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (finding a fundamental right to marry for those of the same sex); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding that "[t]he Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations").

<sup>277</sup> See *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971) (finding unconstitutional a state statute that required the payment of fees to commence divorce proceedings).

<sup>278</sup> See, e.g., *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534–35 (1925) (holding that parents have a right to send their children to private school).

<sup>279</sup> See *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

inquiry indicates, there is a superseding need to provide the litigant a federal forum. If so, the litigant will continue in federal court, but if not, the federal court should dismiss the suit via the domestic relations exception.

Consider the test's application to the factual situation presented in this Comment's introduction. In the scenario, a divorced mother and father are entrenched in a bitter legal dispute concerning their children's custody and visitation. The mother has filed claims in her state court and in the state court where the father resides. Relying on diversity jurisdiction, she files a claim in her federal court for tortious interference with visitation rights.

In applying this Comment's approach, the first inquiry is whether the mother is affirmatively or functionally seeking a divorce, alimony, or child custody decree. Based on these facts, it does not seem so. The mother's claim concerns her visitation rights, which does not fall within the named core cases. As such, the federal court would move on to the second inquiry, the state's interest, which seems high in this case. The mother has filed claims in two state courts, presumably to litigate the same matter. Therefore, this may be a situation in which the mother is trying to forum shop.<sup>280</sup> Since the fact pattern implicates the state's interest, the court would move on to the third inquiry: whether there is an overriding necessity to provide this litigant with access to a federal forum. The scenario does not give that impression. There is no indication that this mother is challenging the constitutionality of a state law or action. Thus, in this circumstance, the domestic relations exception would apply, and the federal court should dismiss the claim.

### *C. The Test's Implications*

There are two primary implications of this Comment's proposed test. First, the three-step method provides a standardized approach to the application of the domestic relations exception. As the law currently stands, there is no uniform method that the federal courts employ to determine if the domestic relations exception applies. Due to that lack of uniformity, litigants across<sup>281</sup> and within the circuits<sup>282</sup> meet opposing jurisdictional outcomes. This Comment provides a uniform approach.

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<sup>280</sup> See *Johnson v. Thomas*, 808 F. Supp. 1316 (W.D. Mich. 1992) (implying that preventing forum shopping is a strong state interest).

<sup>281</sup> See *supra* INTRODUCTION.

<sup>282</sup> See *supra* notes 251–53 and accompanying text.

Second, this Comment's three-step inquiry is one that properly accounts for the important values that underlie the exception's creation and continued existence. The test first recognizes the Supreme Court's existing precedent, noting that as a matter of stare decisis, the domestic relations matter will bar suits for divorce, alimony, or child support. The test then moves on to assess the important federalism value of a state's interest. Federal courts defer to states in many ways,<sup>283</sup> and the domestic relations exception is no different. If the state's interest is high, the matter should typically be left to the states. But if there is no significant state interest or if there is a unique need to provide the litigant access to federal forum, the competing value of access to federal courts will override the state interest, and the domestic relations exception will not apply. The proposed test represents a balancing of all the values that underlie the exception, rather than elevating one at the expense of another.

### CONCLUSION

The scholarship surrounding the domestic relations exception typically promotes an all-or-nothing method. Some advocate abolishing the exception, or that it should only apply to diversity cases and never to federal question cases. This Comment's approach does not suggest either of those extreme views. Instead, this Comment highlights and accounts for the values that underlie the exception and proposes a uniform approach to its application. It urges federal courts to adopt a test that allows the judiciary to address the exception's competing values and thoroughly assess each unique, factual presentation. The desired result is a uniform approach to the domestic relations exception, a more consistent application, and, ultimately, a better-defined scope.

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<sup>283</sup> Other areas of state court deference exist in abstention doctrines, deference in federal habeas corpus, the general rule that lower federal courts should not sit in review of state courts, and rules surrounding state high court review. See generally Barry Friedman, *Under the Law of Federal Jurisdiction: Allocating Cases Between Federal and State Courts*, 104 COLUM. L. REV. 1211, 1246 (2004).

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