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Note
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THE DOMESTIC RELATIONS EXCEPTION IS NARROWED AFTER ANKENBRANDT v. RICHARDS

Introduction

For nearly a century and a half, the federal courts operated on the premise that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States, and not to the laws of the United States." [1] Federal courts refused to exercise jurisdiction over matters of domestic relations even when litigants could establish diversity of citizenship and the amount in controversy requirements. [2] However, neither Article III [3] of the United States Constitution nor the federal diversity statute [4] contains language suggesting the existence of a domestic relations exception to federal jurisdiction. Instead, Supreme Court dicta established the exception.

In 1858 the Supreme Court in Barber v. Barber [5] disclaimed jurisdiction "upon the subject of divorce, or for the allowance of alimony." [6] The majority opinion neither cited authority nor offered a rationale for the exception. After Barber, federal courts accepted this judge-made exception as a limitation on their jurisdiction. While all courts adhered to the concept of a domestic relations exception, the parameters of the exception and the justifications for it remained unclear. Ambiguous precedent and a lack of Supreme Court leadership resulted in each federal circuit adopting its own approach to domestic relations cases. This lack of uniformity ***1138** led to inconsistent, unpredictable, and sometimes unjustifiable refusals to hear actions tenuously characterized as "domestic."

In Ankenbrandt v. Richards, [7] the Supreme Court finally answered many questions about the breadth and origin of the domestic relations exception. Ankenbrandt presented the issue of whether the federal courts have jurisdiction over a tort claim alleging sexual abuse by a father against his children. [8] The Court held that "the domestic relations exception . . . divests the federal courts of the power to issue divorce, alimony, and child custody decrees." [9] Since the dispute in Ankenbrandt did not involve any of these decrees, the majority ruled that the district court improperly dismissed the tort action. [10] Ankenbrandt is significant because, in addition to identifying the authority for the exception, it substantially narrows the scope of the exception. Unless a party seeks a decree of divorce, alimony, or child custody, the federal courts cannot refuse jurisdiction if the party otherwise meets the diversity requirements.

This note first discusses the Supreme Court precedent and historical rationale for the domestic relations exception to federal jurisdiction. This note then addresses the various modern approaches to the exception utilized by the federal circuits prior to Ankenbrandt. Finally, this note comments upon the ramifications of Ankenbrandt upon the future understanding and application of the domestic relations exception in federal court.

I. The Case

On September 26, 1989, Carol Ankenbrandt, a citizen of Missouri, filed a lawsuit on behalf of her daughters against Jon A. Richards and Debra Kesler, citizens of Louisiana, in the United States District Court for the Eastern District of Louisiana. [11] Richards was the divorced father of Ankenbrandt's daughters and Kesler was his female companion. [12] Ankenbrandt sought monetary damages for the alleged sexual and physical abuse of her daughters and alleged diversity jurisdiction under 28 U.S.C. § 1332. [13]

Noting that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States," the district court dismissed the action on the basis of the domestic relations exception to diversity jurisdiction. [14] The district court also relied upon Younger v. Harris, [15] which announced ***1139** several abstention principles for

federal courts. [16] The Fifth Circuit Court of Appeals affirmed, but did not publish an opinion. [17]

On writ of certiorari, the United States Supreme Court, concluding that neither the domestic relations exception nor the Younger abstention doctrine applied to the tort action, reversed the summary affirmance of the district court by the Fifth Circuit Court of Appeals. [18] The Court affirmed, however, the existence of a domestic relations exception to diversity jurisdiction. [19] The majority opinion, authored by Justice White and joined by five other justices, [20] held that the domestic relations exception prohibited federal courts from issuing divorce, alimony, and child custody decrees. [21]

Rejecting Article III of the Constitution as the basis of the exception. [22] The Court instead relied upon statutory interpretation of 28 U.S.C. § 1332. [23] According to the Court, " w hen Congress amended the diversity statute in 1948 to replace the law/equity distinction with the phrase 'all civil actions,' . . . Congress presumably did so with full cognizance of the Court's nearly century-long interpretation of the prior statutes." [24] Since these prior statutes had been construed to contain an exception for certain domestic relations matters, the Court concluded that Congress acquiesced in that construction when it reenacted the diversity statute. [25]

Despite the affirmation of the domestic relations exception, the Court found that many applications of the exception by the lower federal courts "go well beyond the circumscribed situations posed by Barber and its progeny." [26] The Court observed that the exception does not "strip the ***1140** federal courts of authority to hear cases arising from the domestic relations of persons unless they seek the granting or modification of a divorce, child custody , or alimony decree." [27] In Ankenbrandt, the exception to federal jurisdiction did not apply because the case involved tort liability, rather than the issuance or modification of a decree. [28]

The Court supported its decision with several policy considerations. First, the issuance of divorce, child custody, and alimony decrees often requires the "retention of jurisdiction by the court and deployment of social workers to monitor compliance." [29] Since state courts have closer associations with state and local government agencies, the state courts can fulfill these requirements more efficiently than the federal courts. [30] Furthermore, the Court concluded that the state courts

offered greater judicial expertise after many years of addressing issues associated with divorce, child custody, and alimony decrees. [31]

The Court also held that the Younger doctrine of abstention did not apply in Ankenbrandt. [32] Younger held that, "absent unusual circumstances, a federal court could not interfere with a pending state criminal prosecution." [33] Since no state proceeding was pending and Ankenbrandt failed to assert any important state interests, the Court ruled that the lower courts had applied Younger erroneously. [34] Although the Court determined that abstention should not be invoked often, [35] the Court did not rule out altogether the use of abstention in domestic relations cases. [36] The Court noted that " i t is not inconceivable . . . that in certain circumstances, the abstention principles . . . might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody." [37] As an example, the Court raised the possibility of a federal suit filed before the issuance of a divorce, ***1141** alimony, or child custody decree, which then would cause the suit to depend upon the citizenship of the parties. [38]

In his concurring opinion, Justice Blackmun agreed that the district court had jurisdiction over Ankenbrandt's tort claims and that "the federal courts should not entertain claims for divorce, alimony, and child custody." [39] Justice Blackmun disagreed, however, with the majority's underlying rationale. In his view, the diversity statute does not provide an exception for domestic relations matters. [40] Rather, Justice Blackmun believed that the federal courts' long-standing refusal of jurisdiction in domestic relations cases offered precedent for discretionary abstention, but did not justify statutory limitation of federal jurisdiction. [41]

Justice Stevens offered another concurring opinion, joined by Justice Thomas, which argued that Ankenbrandt "should be an exceedingly easy case." [42] In the view of Justice Stevens, the case presented a simple diversity tort that did not depend upon the domestic relations exception for its resolution. [43] For that reason, the determination of the existence or nature of the exception should have been left unresolved by Ankenbrandt. [44]

II. Background

A. The Supreme Court Cases

During the nineteenth and twentieth centuries, a handful of decisions by the United States Supreme Court recognized the existence of a domestic relations exception to federal diversity jurisdiction.[45] The scope and ***1142** rationale for the exception, however, remained largely unclear.

In Barber v. Barber,[46] the progenitor of the domestic relations exception, a wife brought a diversity action against her husband to enforce a previous state court divorce decree which awarded alimony to her.[47] Though the Court upheld federal jurisdiction, the majority opinion carefully emphasized that the plaintiff merely sought the enforcement of an existing decree, not an initial determination of alimony.[48] The Court then stated in dicta: "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 . . . ."[49] However, the majority opinion failed to provide a rationale for its broad disclaimer of federal court jurisdiction.[50]

In a dissent that later would be cited by the Court in Ankenbrandt v. Richards[51] as the rationale for the Barber majority's dicta,[52] Justice Daniel argued that the nature and extent of the jurisdiction of the English courts defined the scope of federal power.[53] Justice Daniel observed that the English ecclesiastical courts had exclusive jurisdiction over domestic relations cases.[54] Therefore, because jurisdiction over such cases did not extend to the English chancery courts, and the jurisdiction of United States courts was bound by that of the English chancery courts, the United States courts similarly lacked jurisdiction.[55]

***1143** The Barber dicta, which stated that federal courts lack jurisdiction over divorce and alimony suits, provided the sole basis for the domestic relations exception for more than thirty years. In In re Burrus,[56] the second major decision in the exception's development, child custody matters were added to the parameters of the exception, once again in broad, unsupported language. In Burrus, the Supreme Court denied a petition for a writ of habeas corpus[57] brought by a father seeking to recover custody of his child from the child's grandparent.[58] The Burrus Court held narrowly that the federal court lacked jurisdiction over the case because of the absence of essential facts in the petition.[59] Like Barber, however, the Court stated in subsequent dicta: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not

to the laws of the United States." [60] Although the question of custody cases within the diversity jurisdiction was reserved expressly, [61] lower federal courts have relied on this language to deny federal jurisdiction, particularly in child custody cases. [62]

In Simms v. Simms, [63] which originated in a federal territorial court, [64] the Supreme Court reaffirmed its language in Barber and Burrus. [65] Significantly, ***1144** [66] however, the Court held that the exclusion of domestic matters from federal jurisdiction did not apply to territorial district courts. [67] Despite the fact that territorial courts could properly adjudicate domestic problems, the Court nevertheless ruled that it lacked jurisdiction because the issue of marriage dissolution "was a matter the value of which could not be estimated in money." [68]

In De La Rama v. De La Rama, [69] the Supreme Court once again reviewed a divorce case which originated in a territorial court. As in Simms, the De La Rama Court sustained jurisdiction because the territorial courts were exempt from the domestic relations exception. [70] The Court's holding reversed a decision by the Philippine Supreme Court and reinstated a lower court's divorce decree and award of property. [71] In subsequent dicta, however, the Court noted:

> It has been a long established rule that the courts of the United States have no jurisdiction upon the subject of divorce, or for the allowance of alimony, either as an original proceeding in chancery, or an incident of a divorce or separation, both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues . . . and for the further reason that a suit for divorce in itself involves no pecuniary value. [72]

The Court's decision in De La Rama is significant because it was the first decision to provide a rationale for the Court's earlier dicta; however, the Court solely justified the domestic relations exception with the failure to meet statutory diversity requirements. [73]

***1145** The final Supreme Court decision in the development of the domestic relations exception was Ohio ex rel. Popovici v. Agler. [74] In Popovici, the vice-consul of Romania challenged the validity of an Ohio divorce decree and alimony

award obtained by his wife.[75] The vice-consul argued to the Supreme Court that the state court improperly issued the decree because Congress and the Constitution assigned exclusive jurisdiction over cases involving foreign officers to the federal courts.[76] In rejecting this argument, the Court held that federal law did not diminish states' jurisdiction over domestic relations matters.[77] Justice Holmes cited the dicta from earlier cases and briefly referred to the rationale proposed by Justice Daniel's dissent in Barber.[78]

B. The Spectrum of Modern Approaches

Until Ankenbrandt v. Richards,[79] the Supreme Court had remained silent on the subject of the domestic relations exception for over sixty years.[80] With no guidance on the interpretation of the ambiguities of Supreme Court precedent, the lower courts struggled to define the parameters of the exception.[81] While all of the circuits recognized that federal courts do not have jurisdiction to hear cases of divorce, alimony, and child custody,[82] each circuit developed its own method to determine the ***1146** proper scope and rationale for the exception's application. Some circuits interpreted the exception narrowly,[83] while others broadened its scope to encompass tort suits between lovers[84] and federal question cases.[85] Law and society had changed dramatically since Ohio ex rel. Popovici v. Agler,[86] the last Supreme Court decision discussing the exception; therefore, lower courts did not know whether the exception, if one still existed, was justified by a lack of jurisdiction[87] or by modern abstention principles.[88] The confusion resulted in a striking lack of uniformity in the federal courts' application of this significant area of law.

1. The historical rationale

The historical rationale for the domestic relations exception, which was first articulated in Justice Daniel's dissent in Barber v. Barber[89] and briefly mentioned in Popovici, failed to surface in other Supreme Court decisions. Nevertheless, some federal courts have justified the lack of federal jurisdiction over domestic relations cases by noting that the English ecclesiastical courts had exclusive jurisdiction over domestic relations cases.[90] This justification is based on the premise that the jurisdiction of the federal courts is coextensive with that of the English chancery courts at the time of the Revolution[91] and the fact that in Revolutionary times

the English ecclesiastical courts had exclusive jurisdiction over domestic relations cases. [92]

***1147** a. Flaws in the historical rationale. Many courts, however, have recognized several flaws in the historical rationale. [93] First, though the English ecclesiastical courts were empowered to hear domestic cases, their jurisdiction was a matter of privilege, not of right. [94] In 1656 Protector v. Ashfield [95] established that the jurisdiction of ecclesiastical courts was derived from the crown. The court stated:

> The common law is the most ancient, general, and fundamental law of the land. And the privileges of the church derive themselves only from the indulgence and favour of princes; and they had no foundation in the ancient common law . . . . And although the privileges of the church are confirmed by divers acts of parliament, that hinders not but that there was an ancient common law, in which they had no bottom. [96]

Therefore, since the jurisdiction of the ecclesiastical courts was not of right, it also was not exclusive.

The second flaw in the historical rationale recognized by the courts was the fact that secular English courts exercised a significant, if limited, jurisdiction over domestic relations cases. [97] Though secular courts rarely issued divorce decrees, [98] they often decided issues of marital status incidental to the exercise of their primary jurisdiction. [99] For example, the property rights cases frequently required determination of the validity of a marriage. [100] Secular courts also entertained suits concerning spousal support. [101] In Colmer v. Colmer, [102] the chancery court stated that a case involving spousal support was "proper not only for the spiritual Court, but also for a court of common law, it is a breach of the peace in the husband not to maintain his wife." [103] The chancery could also review decisions by the ecclesiastical courts. [104] Moreover, as noted in Barber, lay ***1148** courts often worked with the ecclesiastical courts in the enforcement of domestic matters. [105] These facts and others dissuaded many federal courts from a reliance upon Justice Daniel's dissent as the basis for the domestic relations exception. [106]

The third flaw observed in the historical rationale was the questionable desirability of determining the authority of federal courts with a prototype of 1789 English

judicial practice. [107] In construing the jurisdiction of Article III courts, the Supreme Court in other contexts rejected such an antiquated limitation on judicial function. For example, in Revolutionary times probate proceedings were handled exclusively by ecclesiastical courts. [108] Today, however, federal courts routinely hear cases involving claims that historically would have been entertained only in ecclesiastical courts. [109] In another example of historical non-conformity, Chief Justice Warren concluded that the historical bar against advisory opinions in the federal courts was not rooted in English judicial practice of 1789, since English judges clearly had enjoyed such power. [110] Justice Warren stated that the identity of modern federal courts derives from "the implicit policies embodied in Article III, and not history alone." [111]

Moreover, if the federal courts look to English judicial practice as it existed in 1789, it would conform to a dual system of church and state which the English abandoned long ago. Two years before Barber, Parliament removed jurisdiction over marital disputes from the English ecclesiastical authorities. [112] Judge Posner of the Seventh Circuit captured the irony of the situation when he stated that "it would be odd if the jurisdiction of England's ecclesiastical courts, theocratic institutions unlikely to be well regarded in America, should have been thought to define the limits of the jurisdiction of the new federal courts." [113]

Despite their awareness of the possible inaccuracy of the historical rationale, federal courts nevertheless continued to rely on it as the basis for the domestic relations exception. Some courts were reluctant to depart from what they considered to be an interpretation of history promoted ***1149** by the Supreme Court. [114] For example, in Lloyd v. Loeffler, [115] the court stated that although " t he historical account is unconvincing . . . it is too well established to be questioned any longer by a lower court." [116] Other courts adhered to the historical rationale because they construed Congress' failure to reject the domestic relations exception by legislative means as implicit congressional approval of the Supreme Court's interpretation. [117] In a sense, the historical rationale existed for so long that it acquired an historical significance notwithstanding its questionable intrinsic worth.

b. A constitutional or statutory distinction. Before Ankenbrandt, the courts debated whether the historical rationale for the domestic relations exception [118] applied on a constitutional or statutory level. [119] Some courts concluded that the exception arose from the Judiciary Act of 1789, which contained limiting words which granted federal courts jurisdiction over "suits of a civil nature at common

law or in equity." [120] Since the power to grant divorces or alimony did not fall within either the common law or the equity jurisdiction referred to in the Judiciary Act, [121] federal courts could not hear such actions. Other federal courts, however, determined that the exception was rooted in the Constitution itself. [122] According to these courts, the constitutional provision that " t he judicial Power shall extend to all Cases, in Law and Equity" [123] limited the jurisdiction of all federal courts to non-domestic matters. Since English ecclesiastical courts had exclusive jurisdiction over domestic issues at the time of the Revolution, the words "Law and Equity" precluded federal courts from hearing those cases. [124]

***1150** This distinction between the Constitution and the Judiciary Act of 1789 as the basis for the exception was significant because it determined the nature of the exception and the extent of its entrenchment as a jurisdictional limitation. If the exception was the product of the Supreme Court's interpretation of the Judiciary Act, [125] then Congress could modify the exception simply by enacting a more expansive grant of jurisdiction. On the other hand, if the exception was rooted in the Constitution, then the principle of separation of powers would restrict any such modification. In addition, an exception rooted in the Constitution would apply to domestic cases arising under federal question jurisdiction as well as diversity of citizenship. [126]

2. Absence of diversity jurisdiction

In De La Rama v. De La Rama, [127] the Supreme Court's only justification for the domestic relations exception was that domestic cases failed to meet the statutory requirements for diversity jurisdiction. [128] This justification was based originally on two premises: A wife had the same legal domicile as her husband, and a divorce or alimony suit could not be reduced to a pecuniary value. [129] At English common law, a wife could not acquire a domicile separate from her husband while the marriage was in force. [130] The American courts adopted this rule, thus preventing spouses from asserting diversity of citizenship. [131] Although modern courts generally have recognized constitutional and statutory guarantees that protect the right of a married woman to establish diverse citizenship, [132] some ***1151** later cases have adhered stubbornly to the traditional rule that a wife's domicile was synonymous with that of her husband. [133]

The amount in controversy requirement continues to significantly hinder diversity jurisdiction.[134] Following the example of the Supreme Court, federal circuits have held that divorce,[135] marital status,[136] and child custody[137] cases cannot be measured by a monetary sum. Some noted scholars, however, have disputed the logic of these limitations.[138] For example, they observe that wrongful death actions have assigned pecuniary values to the company of a child.[139] Furthermore, since divorce cases frequently involve substantial assets, monetary requirements should not pose a barrier to such actions.[140] Though perhaps influential with those circuits interpreting the exception narrowly, arguments attacking the amount in controversy requirement for diversity jurisdiction have failed to make inroads into the "core" areas of divorce, alimony, and child custody.[141]

3. An abstention rationale

a. Burford and Younger. With the weakening of the jurisdictional justifications for the domestic relations exception, many federal courts began to rely increasingly on the doctrine of abstention.[142] Federal courts ordinarily have a "virtually unflagging obligation" to exercise their jurisdiction.[143] Under "extraordinary and narrow" circumstances, however, this jurisdiction may be declined.[144] Although some courts have declined ***1152** jurisdiction without reference to a particular doctrine,[145] other courts have relied expressly on Younger v. Harris[146] and Burford v. Sun Oil Co.[147] The principles of comity and federalism[148] which sustain abstention provided a broad basis upon which courts could expand the domestic relations exception beyond its traditional "core" parameters.[149] The uneven expansion of the exception, however, led to a proliferation of divergent approaches among the circuits and a general lack of uniformity.

When declining jurisdiction over domestic relations cases, the federal courts most frequently relied upon the abstention doctrines of Burford and Younger.[150] Under Burford, a court may decline jurisdiction when a federal adjudication would disrupt state efforts to establish a coherent policy on a matter of substantial public concern.[151] In Burford, the claimant sought to enjoin on state and federal grounds the Texas Railroad Commission's grant of an oil drilling permit.[152] The Supreme Court upheld abstention and emphasized the local complexity of the issue.[153] The Court cited the comprehensive state regulatory system and the fact that the Texas legislature had assigned exclusive judicial review of Railroad Commission actions

to a single state court. [154] The Court found that the issue so "clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them." [155]

In applying Burford to domestic relations cases, federal courts reasoned that the state's interest in domestic matters sufficiently qualified as a "substantial public concern." [156] Many courts also willingly reached the ***1153** more difficult conclusion that the "coherent policy" requirement was satisfied. [157] In reaching this conclusion, the federal courts equated the specialized state courts and social agencies with the kind of "complex administrative scheme" described in Burford. [158]

Under Younger, a federal court may decline to enjoin a state civil proceeding which involves important state interests. [159] The Younger abstention doctrine, which rests on the interests of equity, comity, and federalism, stands for the notion that, when the federal plaintiff can pursue his claim in a pending state court proceeding, "the intrusive remedy of a federal injunction is unwarranted." [160] Some courts have applied Younger to domestic relations cases. [161] The most common example of this is in child custody cases in which the custody issue is an ongoing dispute in the state courts. [162] Since state courts retain continuing jurisdiction in custody cases, federal courts conclude that they should not interfere with the ongoing state proceeding. [163] Even if the state court has issued a custody order, the custody proceeding remains "pending" since the parties may return to the state court for a modification. [164] The Younger abstention doctrine applies in such cases because an adequate state proceeding is pending, and an important state interest is at stake.

b. Policy considerations. Federal courts have relied on several policy considerations to support their use of discretionary abstention. Courts have argued that the states have special interests in domestic matters that merit federal deference. [165] Other circuits have based their abstention on the rationale that state courts possess superior expertise and competence in domestic matters. [166] These circuits reason that state courts can ***1154** adjudicate a large volume of domestic cases more efficiently than federal courts and can provide superior monitoring of ongoing cases. [167] Courts also express concern that diversity jurisdiction will lead to the possibility of incompatible state and federal decrees, [168] allowing the manipulation of these inconsistencies by litigants. [169] Another policy promoting abstention has

been the potential for congested federal courts. [170] Finally, federal courts have been reluctant to exercise jurisdiction over domestic cases in the absence of congressional or Supreme Court approval. [171]

Some of these policies, however, are not compatible with the abstention doctrine's underlying principles of federalism. For example, most observers believe the federal courts' fear of docket congestion weakly justifies a denial of jurisdiction. [172] The courts themselves have recognized that overcrowding insufficiently supports the dismissal of a case within the court's assigned jurisdiction. [173] If courts could choose among cases statutorily assigned to them, the courts would undermine Congress' constitutional power to grant jurisdiction. [174] Critics also have attacked the argument that diversity jurisdiction might lead to inconsistent federal and state decrees. [175] Under the doctrine of Erie R.R. v. Tompkins [176] and the Rules of Decision Act, [177] the federal courts must apply state law unless there is an applicable constitutional provision, federal statute, or valid rule of federal common law. [178] Since the federal court in a diversity action must strive to apply the same substantive law which would have been used by the highest court of the state in which the federal court sits, the threat of inconsistency is minimal. [179]

Observers also argue that the state is not alone in its interest in family ***1155** relations. [180] It has been noted that the federal government also has a significant and growing interest in the family as well. [181] Moreover, federal courts have not hesitated to exercise diversity jurisdiction in other areas, such as eminent domain, in which the states have an equally substantial interest. [182] For these reasons, many of the underlying policies of discretionary abstention have been viewed as inapplicable to the domestic relations exception.

c. Circuit confusion. A lack of Supreme Court leadership, compounded by the discretionary nature of abstention, led to a wide variety of approaches to the domestic relations exception among the federal circuits. [183] Whether a litigant who otherwise fulfilled the diversity requirements had access to the federal judicial system depended to a large extent on the particular circuit where that person resided. This disparity arose because no circuit had devised a bright-line test to determine the boundaries of the exception. [184] Modern federal courts faced numerous domestic relations issues previously unaddressed, and many courts "were reluctant to open their doors to this domestic relations imbroglio." [185]

Some circuits flinched in the face of this onslaught, broadly interpreting the exception to bar even those cases "on the verge" of domestic relations matters. [186] For example, the Sixth Circuit refused jurisdiction in tort actions about child abduction. [187] Similarly, the Third Circuit interpreted the exception broadly, dismissing actions based in contract for breach of separation agreements [188] and tort actions alleging fraud, deceit, and intentional infliction of emotional distress. [189] The Third Circuit also dismissed palimony suits. [190] In addition, the circuits which construed the exception broadly were likely to extend the exception to the federal question area as well. Therefore, the Sixth Circuit indicated that it might apply ***1156** the exception to civil rights actions. [191]

Other courts, however, narrowly construed the exception to be more consistent with the underlying rationale of the abstention doctrine. For example, in 1980 the Fourth Circuit Court of Appeals in Cole v. Cole [192] allowed jurisdiction over a tort action brought against a former spouse. [193] The court rejected the notion that a case could be dismissed merely for having domestic relations aspects, and held instead that the exact nature of the case must be considered to determine if the exception applied. [194] After Cole, the Fourth Circuit exercised jurisdiction over tort actions not requiring an incidental adjudication of familial status. [195] The Seventh Circuit allowed similar tort actions. [196] In Jagiella v. Jagiella, [197] the Fifth Circuit entertained a case to enforce the payment of alimony and child support in arrears. [198] In Korby v. Erickson, [199] the Southern District of New York exercised jurisdiction over a palimony suit holding that "the fact that . . . the parties also agreed to live together and did live together as husband and wife did not create a matrimonial status so as to come within the exception." [200] This brief listing of cases illustrates the lack of uniformity in the federal court system's application of the domestic relations exception to diversity jurisdiction.

Two tests generally have been used by the circuit courts to determine whether a case falls within the domestic relations exception: the property-status test and the modifiability test. Under the property-status approach, [201] federal courts were required to "decline jurisdiction of cases concerning domestic relations when the primary issue concerns the status of parent and child or husband and wife," while disputes involving property interests fell outside the restrictions of the exception. [202] Since habeas corpus petitions for custody, [203] suits for divorce, [204] and adoption proceedings [205] turned on questions of family status, federal courts could not adjudicate those matters. However, actions to collect damages for

a breach of ***1157** a separation agreement and enforce alimony payments in a divorce decree could be heard properly because only property issues were involved.[206] Courts found support for a distinction between status and property in Maynard v. Hill,[207] in which the Supreme Court concluded that " i f the act declaring the divorce should attempt to interfere with rights of property vested in either party, a different question would be presented."[208] The courts interpreted this language to suggest that "states should not have exclusive jurisdiction over property rights issues simply because they arise out of the same factual situation as the status issues."[209]

The modifiability test offered another approach to determine the applicability of the domestic relations exception.[210] Under this approach, modifiable cases could not be litigated in federal courts. On the other hand, a federal court generally could hear non-modifiable cases because the exercise of jurisdiction was not viewed as direct involvement in a domestic relations matter.[211]

The modifiability approach was premised on considerations of policy. Modifications of alimony or child support fell within the special expertise and competence of state courts.[212] However, the modifiability test frequently led to incomplete decisions. For example, the Seventh Circuit allowed damages for interference with a child custody award without first determining the appropriateness of either the original custody award or an injunction ordering enforcement of custody.[213] Furthermore, since courts could not consider the question of future damages, litigants often could pursue a remedy for past damages, but not future damages.[214]

III. Analysis

A. The "New" Exception

Ankenbrandt v. Richards[215] resolved a mystery that had perplexed the nation's pundits for well over a century. A domestic relations exception does indeed exist and will continue to prevent a host of potential claimants from taking their disputes to the federal forum for the foreseeable future. In addition to affirming the exception, the Ankenbrandt decision also revealed its underlying rationale. Federal courts cannot hear domestic relations cases because they lack jurisdiction. This lack of jurisdiction ***1158** results from a statutory construction of the diversity statute and not from a constitutional limitation. Moreover, the statutory construction

rationale does not derive its authority from its historical accuracy, but instead survives due to Congress' silent approval. [216] Such a finding is remarkable because it counters the prevailing wisdom of the vast majority of modern scholars and judges who had speculated that the modern exception rested on the abstention doctrine. [217]

1. Narrowing the domestic relations exception

The truly significant consequence of Ankenbrandt is the very real way in which it narrows the domestic relations exception. Although stated indirectly, the language of the decision limits the exception to the issuance of divorce, alimony, or child custody decrees. The Court concluded that "[b]ecause the allegations in this complaint do not request the [d]istrict [c]ourt to issue a divorce, alimony, or child custody decree, we hold that the suit is appropriate for the exercise of § 1332 jurisdiction." [218] The Court's language implies that domestic matters other than divorce, alimony, or child custody do not fall under the exception. Thus, the exception has been tailored to include only the "core" actions, while the more peripheral domestic suits are no longer barred from the federal forum.

Many types of actions which various circuits formerly had refused to hear under the exception no longer can be repulsed. For example, if the diversity requirements are established, domestic tort suits can be brought in a federal district court. [219] In addition, federal courts now must accept cases to enforce alimony and custody awards by state courts. [220] The Supreme Court sanctioned such enforcement cases in Barber v. Barber, [221] the first acknowledgement of the existence of a domestic relations exception. Furthermore, many domestic contract actions now fall outside the exception. Since the "core" exception did not include palimony suits or other cohabitation actions based on contracts, such suits should not be denied access to a federal forum. Federal question cases also should not be dismissed under the exception; holdings to the contrary should be overruled. [222]

***1159** 2. Narrowed, but not meaningless

Indeed, the narrowing effects of Ankenbrandt might lead one to conclude that almost nothing remains of the domestic relations exception. Certainly the jurisdictional ramifications of the "new" exception seem little greater than those already produced by the existing statutory requirements of diverse citizenship and an amount in controversy. If divorce, alimony, and custody disputes are not

reduced to a pecuniary value by most courts, one might ask, what practical effect does the exception have? The new exception, however, is far from meaningless.

Though Ankenbrandt substantially narrows the exception's parameters, the domestic relations exception still presents at least two barriers to litigants who desire a federal forum. First, even a technically non-core dispute may be dismissed from a federal court if the nature or effect of the case essentially determines family status. For example, an action by a birth mother seeking rescission of a contract for adoption might be dismissed under the exception. Even though the underlying action is contractual, the case effectively determines family status. Moreover, since the new exception also includes "modifications" of divorce, alimony, or child custody decrees,[223] some question exists about what constitutes a modification.

The second barrier for litigants seeking a federal forum is that a domestic case cannot be heard in a federal court even though the claimant could otherwise establish diversity jurisdiction. Before Ankenbrandt, some scholars and judges urged federal courts to place a monetary value on divorce and alimony since disputes frequently involved substantial assets.[224] In addition, some evidence indicated that courts had shown an increasing willingness to reduce domestic disputes to a pecuniary value.[225] This debate, however, is now academic. Since the new exception is based on a limited congressional grant of power, federal courts may not hear domestic cases even if the court determines that the amount in controversy requirement has been met.

3. The near-elimination of the abstention doctrine

Another significant consequence of Ankenbrandt is that it nearly, though not entirely, eliminates the abstention doctrine as a basis for denying domestic disputes access to a federal forum.[226] The Ankenbrandt Court stated that " a bstention rarely should be invoked, because the ***1160** federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'"[227] The Court's language suggests that abstention should be used only in extraordinary circumstances. Furthermore, the opinion contradicts the notion fostered by some of the circuits that a special abstention doctrine existed for domestic relations cases separate from those doctrines already identified by the Supreme Court.[228] In other words, abstention is to be used no more or less frequently than in any other area of the law, which is very sparingly.

In Ankenbrandt, the Court rejected the use of the Younger v. Harris[229] doctrine.[230] The opinion stated that "we have never applied the notions of comity so critical to Younger's 'Our Federalism' when no state proceeding was pending" and since "there is no allegation by respondents of any pending state proceedings, . . . application by the lower courts of Younger abstention was clearly erroneous."[231] The Court's decision, however, did not preclude abstention in some circumstances. According to the Court, it was not "inconceivable" that the Burford v. Sun Oil Co.[232] doctrine, which allows abstention when a federal adjudication would disrupt state efforts to establish a coherent policy concerning a matter of substantial public concern,[233] might be relevant "even when the parties do not seek divorce, alimony, or child custody."[234] "Such might well be the case if a federal suit were filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the status of the parties."[235] The Court therefore suggested that a federal court can dismiss non-core domestic disputes which turn on threshold issues of family status. In a footnote, the Court also stated, however, that "it may be appropriate for the court to retain jurisdiction to insure prompt and just disposition of the matter upon the determination by the state court of the relevant issue."[236]

***1161** B. The Ankenbrandt Rationale's Flaws

The bold simplicity of the Court's rationale in Ankenbrandt v. Richards[237] is breathtaking. Barber v. Barber[238] construed the "law and equity" language of the Judiciary Act of 1789 to preclude jurisdiction of domestic matters in federal courts. Furthermore, since Congress acquiesced in the Supreme Court's interpretation of the diversity statute for over one hundred years, the domestic relations exception is valid regardless of this interpretation's historical accuracy.[239] Faced with contradictions and ambiguity, the Ankenbrandt Court declined to delve into the technical debate over the exception's origin, and instead fashioned a decision which satisfied the Court's policy and political concerns.

1. Interpretation of the Barber dicta

Though not devoid of logic, the Ankenbrandt rationale certainly is not without its weaknesses. The first basis for the Court's rationale is that the Barber dicta was based on a statutory construction of the Judiciary Act;[240] such a conclusion can be disputed. The Barber majority opinion did not give any express basis for

its dicta which created the exception; it was entirely silent about its reasoning.[241] Rather, Ankenbrandt presumes that Barber is based on a statutory construction since the Barber majority did not rebut the dissenting opinion on the point.[242] Such a conclusion is speculative at best.

In addition to relying on a mere inference, the Supreme Court failed to reconcile its conclusion about Barber with other Supreme Court decisions. For example, the Court in De La Rama v. De La Rama[243] based the exception on the inability of a married woman to meet the diversity of citizenship and amount in controversy requirements.[244] However, De La Rama does not refer to the lack of federal jurisdiction in domestic cases. This and other Supreme Court decisions[245] were unaddressed by ***1162** Ankenbrandt.

2. Assessment of congressional silence

The most questionable conclusion drawn by the Ankenbrandt Court was that congressional silence amounted to congressional approval of the Supreme Court's statutory construction of the diversity statute.[246] First, the Court tenuously concluded that Congress actually understood that the domestic relations exception was based on a statutory interpretation not found in Barber or any other decision.[247] No one, including the federal circuit courts, knew the basis for the exception until the decision in Ankenbrandt. On the contrary, the courts had given the exception a variety of definitions that differed greatly in nature and in practice.[248] Thus, congressional silence cannot be deemed an approval of a position of which Congress had no knowledge. Even if such knowledge could be imputed to Congress, however, it remains questionable whether silence should properly be equated with congressional approval. Such reasoning is rooted in the inherently speculative assumption that congressional silence evidences a specific congressional intent. The Supreme Court cautioned against such inferential leaps when it stated:

> It would require very persuasive circumstances enveloping Congressional silence to debar this Court from reexamining its own doctrines. It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law . . . . The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence of the rule of those cases.[249]

Since the circumstances "enveloping" Congress' silence regarding the domestic relations exception were ambiguous at best, the Supreme Court in Ankenbrandt contradicted its earlier advice by inferring congressional approval from silence.

On the other hand, some evidence supported the Supreme Court's conclusion that Congress' silence manifested congressional approval. For instance, the legislative history of the Parental Kidnapping Prevention Act (PKPA)[250] provides an example, at least in regard to child custody, in which Congress seemingly gave its specific approval to the domestic relations exception. The original PKPA bill included first instance federal ***1163** jurisdiction to enforce state custody orders.[251] The implicit purpose of the bill was the circumvention of the domestic relations exception and the amount in controversy requirement of 28 U.S.C. § 1332.[252] Since Congress rejected the original bill, the conclusion might be drawn that Congress intended for the domestic relations exception to remain in force. It could also be true, however, that Congress rejected the bill because it did not want to alter the amount in controversy requirement, or for some other unrelated reason.[253]

These flaws in the Court's reasoning do not render Ankenbrandt improper. On the contrary, the rationale applied by the Court offered the best means available of promoting good law and sound public policy.

C. Important Benefits Despite the Flaws

1. Preservation of congressional power

One important benefit of the rationale in Ankenbrandt v. Richards[254] is that it preserves the power of Congress to abolish or modify the domestic relations exception if it decides to do so. By basing the exception on the statutory construction of the diversity statute rather than on the language of the Constitution, Congress may grant jurisdiction over domestic relations cases to the federal courts. Article III, section 1, of the Constitution provides that Congress may vest federal courts with jurisdiction.[255] Since the right to hear domestic relations cases falls within Article III of the Constitution, Congress may properly grant that power to federal courts.[256] Such a grant would not be possible, however, if Ankenbrandt had found that the Barber v. Barber[257] dicta was rooted in

the language of the Constitution, rather than the Judiciary Act. Thus, even if Ankenbrandt was wrongly decided, Congress can correct the mistake by passing the appropriate legislation.

***1164** 2. Avoidance of the debate about ecclesiastical courts

Another benefit of the Ankenbrandt rationale is the wise avoidance of the convoluted debate over the jurisdictional scope of English ecclesiastical courts and its relationship with American federal court jurisdiction.[258] Federal courts had been reluctant to justify the domestic relations exception on jurisdictional grounds, largely because the historical accuracy of the rationale had been discredited and the premise that modeling modern federal jurisdiction after eighteenth-century English judicial practice seemed undesirable.[259] This reluctance, however, forced the courts to rely on discretionary abstention as the basis for their dismissal of domestic matters.[260] Ankenbrandt resolved this dilemma. The domestic relations exception existed "as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but rather on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions in the years prior to 1948."[261] By relying on Congress, and not on history, the Supreme Court circumvented the weak aspects of the jurisdictional rationale, thereby allowing it to rise like a phoenix from the ashes of scholarly and judicial derision.

Several advantages result from the resurrection of a rationale based on jurisdiction. First, it narrows the exception by tying its scope to Supreme Court precedent. Since the existence of the exception is based on Congress' acquiescence in the Supreme Court's interpretation of the diversity statute, the breadth of the exception cannot be greater than that found in prior Supreme Court decisions. The line of cases from Barber to Ohio ex rel. Popovici v. Agler[262] limited the exception to the issuance or modification of divorce, alimony, or child custody decrees.[263]

A second advantage of a jurisdictional rationale is the elimination of the need to rely on abstention principles as a justification for the exception. Traditionally, discretionary dismissal of a case properly brought within federal jurisdiction was discouraged.[264] A denial of congressionally assigned jurisdiction contradicted separation of powers principles, and therefore should occur only in extraordinary circumstances.[265] In the area of domestic relations matters, however, abstention was used so frequently ***1165** by the federal courts that its implementation had

become common-place.[266] Moreover, the discretionary nature of abstention had resulted in widespread inconsistencies among the various circuits.[267] In resting the domestic relations exception on jurisdictional and not abstentional grounds, the Supreme Court discouraged the use of abstention, increased the likelihood that the exception will be applied uniformly, and eliminated the need to either invent a new abstention doctrine for domestic cases or expand an existing one. In rejecting abstention, the Supreme Court also avoided reliance upon a doctrine that was increasingly becoming inapplicable to the area of domestic relations. In his concurring opinion, Justice Blackmun commented that " w hether the interest of States remains a sufficient justification today for abstention is uncertain in view of the expansion in recent years of federal law in the domestic relations area."[268]

3. Promotion of sound public policy

Perhaps the most important benefit of the Ankenbrandt decision is the promotion of sound public policy through the retention of the "core" of the exception. The opinion recognizes that the issuance of divorce, alimony, and child custody decrees "frequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance."[269] "As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling" core domestic issues.[270] Moreover, as a matter of judicial expertise, the exception makes good sense "because of the proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees."[271] Countervailing policies do exist. For example, fear of local bias, which is the underlying reason for diversity jurisdiction,[272] is no less a concern in domestic disputes than in other civil areas.[273] However, the general concern for bias does not outweigh the numerous advantages of extensive state administrative machinery which exists solely to handle domestic matters.

*1166 Conclusion

Given the convoluted and ambiguous history of the domestic relations exception, Ankenbrandt achieves the best solution to a difficult problem. Though the Ankenbrandt Court's rationale is not flawless, the decision furthers the interests of all parties involved, whether federal, state, or private. Ankenbrandt provides relatively clear parameters which restrict the exception to decrees of divorce, alimony, and child custody. As a result, federal courts will apply the exception with

increased consistency and uniformity. The states' interest in the welfare of families can be promoted effectively through their own courts and agencies. Litigants will have greater access to the federal courts and will be afforded a more stable and predictable environment in which to advocate their claims. Finally, if Congress finds fault with the premise of the decision, Congress has the power either to erase or modify its effect.

Footnotes

1 In re Burrus, 136 U.S. 586, 593-94 (1890). For a further discussion of Burrus, see infra notes 56-61 and accompanying text.

2 See 28 U.S.C. § 1332 (1988 & Supp. III 1991). The Code provides: "The district court shall have original jurisdiction of all civil actions where the [amount] in controversy exceeds the sum or value of $50,000 . . .and is between . . . citizens of different States." Id. § 1332(a).

3 U.S. Const. art. III, § 2, cl. 1. The Constitution states:
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.
Id.

4 28 U.S.C. § 1332. The Judiciary Act provided that the circuit courts shall have jurisdiction "of all suits of a civil nature at common law or in equity." Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332(a) (Supp.1991) (provides jurisdiction for "all civil actions")).

5 62 U.S. (21 How.) 582 (1858).

6 Id. at 584.

7 112 S.Ct. 2206 (1992).

8 Id. at 2208.

9 Id. at 2215.

10 Id.

11 Id. at 2208.

12 Id.

13 Id.

14 Id. at 2209 (quoting In re Burrus, 136 U.S. 586, 593-94 (1890)).

15 401 U.S. 37 (1971). For a further discussion of the Younger doctrine of abstention, see infra notes 160-64 and accompanying text.

16 Ankenbrandt, 112 S.Ct. at 2209.

17 Id. The order from the court of appeals appears at 934 F.2d 1262 (5th Cir.1991), rev'd, 112 S.Ct. 2206 (1992).

18 Ankenbrandt, 112 S.Ct. at 2216. "The exception has no place in a suit such as this one, in which a former spouse sues another on behalf of children alleged to have been abused." Id.

19 Id. at 2210.

20 Justice White was joined by Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Souter. Id. at 2208.

21 Id. at 2216.

22 Id. at 2210. "An examination of Article III, Barber itself, and our cases since Barber makes clear that the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts." Id.

23 Id. at 2213.

24 Id. Barber v. Barber, 62 U.S. (21 How.) 582 (1858), was the first court decision to interpret the Congressional grant of diversity jurisdiction. Ankenbrandt, 112 S.Ct. at 2209. The Court concluded that the domestic relations exception identified in the dicta of Barber was based on that court's construction of the Judiciary Act of 1789. Id. at 2213. According to the Court, "Considerations of stare decisis have particular strength in this context, where the legislative power is implicated, and Congress remains free to alter what this Court has done." Id. at 2207-08 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 172-73 (1989)).

25 Ankenbrandt, 112 S.Ct. at 2213. The Court relied on its previous statements regarding the 1948 amendment that "no changes of law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." Id. (citing Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 227 (1957)).

26 Id. at 2214. For a discussion of the applications of the exception by the different circuits, see infra notes 183-214 and accompanying text.

27 Ankenbrandt, 112 S.Ct. at 2214 (emphasis added). The Court noted that the holding of Barber "sanctioned the exercise of federal jurisdiction over the enforcement of an alimony decree that had been properly obtained in a state court of competent jurisdiction." Id.

28 Id. at 2215.

29 Id.

30 Id.

31 Id. (citing Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir.1982)).

32 Id. at 2215-16.

33 Id. at 2216 (citing Younger v. Harris, 401 U.S. 37, 54 (1971)). For a further discussion of the Younger doctrine, see infra notes 160-64 and accompanying text.

34 Ankenbrandt, 112 S.Ct. at 2216. The respondents made no allegation of any pending state proceedings, and "Ankenbrandt contend[ed] that such proceedings ended prior to her filing [the] lawsuit." Id.

35 Id. at 2215. The Court stated that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them." Id. (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976)).

36 Id. at 2216.

37 Id. "This would be so when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.'" Id. (quoting Colorado River Water Conservation Dist., 424 U.S. at 814).

38 Id. In Ankenbrandt the status of the domestic relationship already had been determined as a matter of state law, and "in any event [had] no bearing on the underlying torts alleged." Id.

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

40 Id. According to Justice Blackmun, if the statute does not "clearly express" a contrary intention, the Supreme Court has determined that the statutory language is usually "conclusive." Id. (citing Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). Justice Blackmun believed that the congressional failure to address domestic relations cases in the diversity statute indicates that Congress did not realize that the diversity statute included the exception until Ankenbrandt. Id.

41 Id. Justice Blackmun argued that the "common concern reflected in [the earlier Supreme Court] cases is, in modern terms, abstentional—and not jurisdictional in nature." Id. at 2220. However, Justice Blackmun questioned whether the interest of states sufficiently justified abstention following the growth of federal law in domestic relations. Id. at 2221.

42 Id. at 2222 (Stevens, J., concurring) (footnote omitted).

43 Id.

44 Id. One commentator has observed:
Ironically, the Stevens and Thomas concurrence placed them solidly behind the position of the American Civil Liberties Union, which appeared as an amicus . . . . The ACLU apparently figured that with a conservative Supreme Court, the less said on the domestic relations exception, the better. The last thing the ACLU wanted was for a court majority to provide some legally reasoned basis for the domestic relations exception.
Linda S. Mullenix, Federal Jurisdiction Is Addressed, Nat'l L.J., Aug. 31, 1992, at S4, S5.

45 See Barbara A. Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L.J. 571 (1984); Sharon E. Rush, Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective, 60 Notre Dame L.Rev. 1 (1984); Bonnie Moore, Comment, Federal Jurisdiction and the Domestic Relations Exception: A Search for Parameters, 31 UCLA L.Rev. 843 (1984); Mark S. Poker, Comment, A Proposal for the Abolition of the Domestic Relations Exception, 71 Marq.L.Rev. 141 (1987); Anthony B. Ullman, Note, The Domestic Relations Exception to Diversity Jurisdiction, 83 Colum.L.Rev.1824 (1983).

46 62 U.S. (21 How.) 582 (1858).

47 Id. at 583-84. A New York court had issued a decree of divorce ordering the defendant to pay $360 in annual support. Id. at 585. The defendant shortly thereafter left New York and subsequently refused to make his payments. Id. at 584-85. The plaintiff then brought suit in federal district court in Wisconsin to enforce the decree. Id. at 586.

48 Id. at 584.

49 Id.

50 See Ankenbrandt v. Richards, 112 S.Ct. 2206, 2210 (1992).

51 112 S.Ct. 2206 (1992).

52 The majority in Ankenbrandt concluded that the Barber Court accepted Justice Daniel's statutory interpretation of the Judiciary Act of 1789, which effectively tied the scope of federal court jurisdiction to that of the English chancery courts at the time of the adoption of the Act by Congress. Id. at 2212. The majority reasoned:
Because the Barber Court did not disagree with this reason for accepting the jurisdictional limitation over the issuance of divorce and alimony decrees, it may be inferred fairly that the jurisdictional limitation recognized by the Court rested on this statutory basis and that the disagreement between the Court and the dissenters thus centered only on the extent of the limitation.
Id. at 2213-14 (emphasis added).

53 Barber, 62 U.S. (21 How.) at 605 (Daniel, J., dissenting).

54 Id. at 604.

55 Id. at 605. The Judiciary Act of 1789, which granted statutory jurisdiction to the federal circuit courts, limited diversity jurisdiction to "suits of a civil nature at common law or in equity." Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332(a) (Supp. III 1991)). The Constitution, however, grants jurisdiction over "[c]ontroversies . . . between Citizens of different states" and does not impose a "law and equity" qualification. U.S. Const. art. III, § 2, cl. 1.

56 136 U.S. 586 (1890).

57 Id. at 626.

58 Id. at 587.

59 Id. at 591.

60 Id. at 593-94. As in Barber, the Burrus opinion did not provide a rationale for the dicta.

61 Id. at 596. The question was reserved because the relevant habeas corpus petition had been filed in a federal district court. Id. at 587. Under the Judiciary Act of 1789, diversity cases were under the auspices of the federal circuit courts. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332(a) (Supp. III 1991)).

62 E.g., Solomon v. Solomon, 516 F.2d 1018, 1022 (3d Cir.1975); Hernstadt v. Hernstadt, 373 F.2d 316, 317 (2d Cir.1967); LaMontagne v. LaMontagne, 394 F.Supp. 1159, 1160 (D.Mass. 1975). But see Sea-Land Servs. v. Gaudet, 414 U.S. 573 (1974) (evaluation of husband-wife relationship in loss of consortium claim in wrongful death action); Crumpton v. Gates, 947 F.2d 1418 (9th Cir.1991) (evaluation of parent-child relationships in loss of consortium claim in personal injury action).

63 175 U.S. 162 (1899).

64 Id. at 162. In Simms, a husband petitioned the territorial court of Arizona for a divorce. Id. at 162-63. After denying the divorce, the court awarded the wife temporary alimony and attorney's fees. Id. at 163. On appeal to the Supreme Court, the husband challenged both judgments. Id. at 165. Relying on the domestic relations exception, the wife moved to dismiss. Id. at 165.

65 Id. at 167. The Court noted that there was no dissent from the Barber dicta, and therefore,
[i]t may . . . be assumed as indubitable that the Circuit Courts of the United States have no jurisdiction, either of suits for divorce, or of claims for alimony, whether made in a suit for divorce, . . . or by an original proceeding in equity, before a decree for such alimony in a state court. Within the States of the Union, the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not to the laws of the United States.
Id. (citing Burrus, 136 U.S. at 593-94).

66 In Ankenbrandt v. Richards, 112 S.Ct. 2206, 2212-13 (1992), the Court rejected Article III of the Constitution as a basis for the domestic relations exception in good part because the Court had heard appeals from territorial

courts involving divorce. Thus, "by hearing appeals from legislative, or Article I courts, this Court implicitly has made clear its understanding that the source of the constraint on jurisdiction from Barber was not Article III; otherwise the Court itself would have lacked jurisdiction over appeals from these legislative courts." Id. at 2211 (citing National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 643 (1949) (Vinson, C.J., dissenting)).

67 Simms, 175 U.S. at 167-68. The Court noted that Congress, pursuant to its plenary power over the territories, had authorized the territorial assemblies to legislate on "all rightful subjects of legislation." Id. at 168 (quoting Act of July 30, 1866, ch. 818, 24 Stat. 170). The Arizona legislature had legislated on the subject of domestic relations and properly assigned original jurisdiction over such matters to the territorial courts. Id.

68 Id. at 168-69. The contemporary diversity statute included an amount in controversy requirement of $500. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78.

69 201 U.S. 303 (1906).

70 Id. at 308.

71 Id. at 304, 318-19.

72 Id. at 307 (citing Barber v. Barber, 62 U.S. (21 How.) 582 (1858)).

73 States now recognize a wife's ability to establish a domicile separate from her husband. Robert A. Leflar, American Conflicts Law § 11, at 19 (1977). Moreover, the amount in controversy requirement can often be met when the divorce or custody question includes a dispute over property, alimony, or child support. Charles A. Wright, The Law of Federal Courts § 36, at 196 (4th ed. 1983) (discussing the aggregation of separate claims to satisfy the amount in controversy requirement).

74 280 U.S. 379 (1930). This case provides the only direct holding of the Supreme Court on the lack of federal jurisdiction over actions for divorce and alimony. See id. at 383.

75 Id. at 382.

76 Id. at 382-83. "The judicial Power shall extend . . . to all Cases affecting Ambassadors, other public Ministers and Consuls . . . ." U.S. Const. art. III, § 2, cl. 1; see also Act of March 3, 1911, ch. 231, §§ 24, 233, 256, 36 Stat. 1087, 1093, 1156, 1160 (granting exclusive jurisdiction over suits against consuls and vice-consuls, among others, to the federal courts) (codified as amended at scattered sections of 28 U.S.C.).

77 Popovici, 280 U.S. at 383. Justice Holmes noted that the Constitution and statutes must be interpreted in light of the common understanding that "'the whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States' and the jurisdiction of the Courts of the United States over divorces and alimony always has been denied." Id. (quoting In re Burrus, 136 U.S. 586, 593-94 (1890)) (citation omitted).

78 Id. at 383-84 Justice Holmes wrote "'Suits against consuls and vice-consuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts." Id.

79 112 S.Ct. 2206 (1992).

80 Ohio ex rel. Popovici v. Agler, 280 U.S. 389 (1930), had been the last case in which the domestic relations exception was mentioned specifically. One arguable exception is Lehman v. Lycoming County Children's Servs. Agency, 458 U.S. 502 (1982). Although it did not expressly mention the domestic relations exception, the Lehman Court held that federal subject matter jurisdiction did not exist to consider a collateral attack on a state court's termination of parental rights. Id. at 508-16.

81 Armstrong v. Armstrong, 508 F.2d 348, 350 (1st Cir.1974) ("Lower federal courts have had difficulty determining when to decline cases which, though not strictly speaking actions for divorce or for alimony, are related to those subjects.").

82 These issues are often referred to as the "core" of the exception. E.g., Ruffalo ex rel. Ruffalo v. Civiletti, 702 F.2d 710, 717 (8th Cir.1983); Lloyd v. Loeffler, 694 F.2d 489, 491-92 (7th Cir.1982); Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C.Cir.1982); Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.), cert. denied, 459 U.S. 1014 (1982); Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir.1981); Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir.1981); Cole v. Cole, 633 F.2d 1083, 1087 (4th Cir.1980); Crouch v. Crouch, 566 F.2d 486, 487 (5th Cir.1978); Solomon v. Solomon, 516 F.2d 1018, 1021-25 (3d Cir.1975); Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir.1968); Hernstadt v. Hernstadt, 373 F.2d 316, 317-18 (2d Cir.1967); McCarty v. Hollis, 120 F.2d 540, 542 (10th Cir.1941); Robinson v. Robinson, 523 F.Supp. 96, 97-98 (E.D.Pa. 1981); Lutsky v. Lutsky, 310 F.Supp. 517, 518-19 (S.D.Fla.), aff'd, 433 F.2d 346 (5th Cir.1970).

83 E.g., Bennett v. Bennett, 682 F.2d 1039, 1042 (D.C.Cir.1982) (holding that domestic suits which are primarily tort or contract in nature should be heard by federal court).

84 Anastasi v. Anastasi, 544 F.Supp. 866 (D.N.J. 1982) (holding palimony action within the domestic relations exception).

85 Zak v. Pilla, 698 F.2d 800 (6th Cir.1982) (per curiam) (concluding that civil rights suit against an adoption agency would come within the domestic relations exception).

86 280 U.S. 379 (1930).

87 For a discussion of the modern treatment of jurisdictional justifications for the domestic relations exception, see infra notes 183-214 and accompanying text.

88 The abstention doctrine was announced first in Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941). For a discussion of federal court use of abstention doctrine as a basis for the domestic relations exception, see infra notes 142-64 and accompanying text.

89 62 U.S. (21 How.) 582 (1858).

90 E.g., Csibi v. Fustos, 670 F.2d 134, 137-38 (9th Cir.1982); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 513-14 (2d Cir.1973); see also 13 Charles A. Wright et al., Federal Practice and Procedure § 3609, at 460 n.3 (2d ed. 1984).

91 Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909).

92 1 William S. Holdsworth, A History of English Law 621-24 (Arthur L. Goodhart et al. eds., 7th ed. 1956).

93 E.g., Lloyd v. Loeffler, 694 F.2d 489, 491-92 (7th Cir.1982); Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir.1981); Solomon v. Solomon, 516 F.2d 1018, 1021-26 (3d Cir.1975); Spindel v. Spindel, 283 F.Supp. 797, 809 (E.D.N.Y. 1968).

94 Ullman, supra note 45, at 1830, 1836.

95 145 Eng.Rep. 381 (Ex.D. 1656). Ashfield brought an action to recover his land which had been sequestered for a failure to attend church. Id. at 381. In Ashfield's case, however, the jurisdiction of the ecclesiastical courts had been suspended temporarily, id., due to Cromwell's uprising. Ullman, supra note 45, at 1835 n.76. The court held that the question could be tried by a jury in a secular court. Ashfield, 145 Eng.Rep. at 383.

96 Ashfield, 145 Eng.Rep. at 382.

97 Spindel v. Spindel, 283 F.Supp. 797, 802-03, 806-09 (E.D.N.Y. 1968). See generally Ullman, supra note 45 (collecting cases).

98 Spindel cites Terrell v. Terrell, 21 Eng.Rep. 123 (Ch. 1581), as an example of two divorce decrees issued by chancery. Spindel, 283 F.Supp. at 802.

99 Spindel, 283 F.Supp. at 807.

100 See, e.g., Pride v. Earl of Bath, 83 Eng.Rep. 755 (K.B. 1700) (question of marriage's validity submitted to jury where status determined title to land in ejection action).

101 Spindel, 283 F.Supp. at 808.

102 25 Eng.Rep. 301, 304 (Ch. 1729) (husband abandoned wife after putting his property in a trust; court secured these sums for the wife).

103 Id. at 305; see also Nicholls v. Danvers, 23 Eng.Rep. 1037 (Ch. 1711) (income of trust to be used for support of abandoned wife).

104 Spindel, 283 F.Supp. at 809.

105 Id.; see also Barber v. Barber, 62 U.S. (21 How.) 582, 590-91 (1858); Read v. Read, 22 Eng.Rep. 720 (Ch. 1668) (plaintiff's husband had threatened to leave the country to avoid paying alimony; chancery court issued an injunction to restrain him).

106 For a more detailed discussion of Justice Daniel's dissent, see supra notes 53-55 and accompanying text.

107 For a general discussion of the authority of federal courts in this area, see Atwood, supra note 45, at 584-87.

108 Markham v. Allen, 326 U.S. 490, 494 (1946).

109 Id. Federal courts, however, may not infringe on state probate proceedings or assume general jurisdiction over property in the local court's custody. Id. See generally Paul M. Bator et al., Hart & Wechsler's The Federal Courts and the Federal System 1456-59 (3d ed. 1988) (a note on federal jurisdiction in matters of probate and administration).

110 Flast v. Cohen, 392 U.S. 83, 96 (1968).

111 Id.

112 Act of Parliament, Aug. 28, 1857, 20 & 21 Vict. 733, ch. 85 (Eng.).

113 Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir.1982).

114 Ullman, supra note 45, at 1839, 1841.

115 694 F.2d 489 (7th Cir.1982).

116 Id. at 491-92 (citing Solomon v. Solomon, 516 F.2d 1018, 1021-26 (3d Cir.1975)). But see Thrower v. Cox, 425 F.Supp. 570, 573 (D.S.C. 1976) (noting that domestic relations exception “has a sound historical basis”).

117 E.g., Armstrong v. Armstrong, 508 F.2d 348, 349-50 (1st Cir.1974); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir.1973). Ankenbrandt used this reasoning to justify the continued existence of the exception. Ankenbrandt v. Richards, 112 S.Ct. 2206, 2213 (1992).

118 For a general discussion of the historical rationale, see supra notes 89-117 and accompanying text.

119 For a general discussion of this dichotomy, see Poker, supra note 45, at 146.

120 See, e.g., Clifford v. Williams, 131 F. 100, 102 (C.C.D.Wash. 1904).

121 “Common law or equity” was thought not to include domestic cases because at the time the Judiciary Act of 1789 was adopted, English common law and equity courts did not have domestic jurisdiction. For a general discussion of the historical rationale, see supra notes 89-117 and accompanying text.

122 E.g., Hoadly v. Chase, 126 F. 818, 821 (C.C.D.Ind. 1904).

123 U.S. Const. art. III, § 2, cl. 1.

124 Hoadly, 126 F. at 821. Another constitutional justification for the domestic relations exception was based on the principles of federalism. This rationale relied upon the idea that the federal government is limited to its enumerated powers. Thus, some courts concluded that jurisdiction over domestic matters was reserved to the state under the Tenth Amendment because an express grant is not contained in Article III of the Constitution. E.g., Blank v. Blank, 320 F.Supp. 1389, 1390 (W.D.Pa. 1971); Williamson v. Williamson, 306 F.Supp. 516, 518 (W.D.Okla. 1969). See generally Rush, supra note 45, at 15-19.

125 Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78 (codified as amended at 28 U.S.C. § 1332(a) (Supp. III 1991)). This Act granted federal courts the power to hear "suits of a civil nature at common law or in equity." See, e.g., Spindel v. Spindel, 283 F.Supp. 797, 802 (E.D.N.Y. 1968); Wright, supra note 73, § 25, at 143.

126 See Ullman, supra note 45, at 1844-46 (arguing that the exception precludes federal adjudication of federal issues).

127 201 U.S. 303 (1906). For a further discussion of De La Rama, see supra notes 69-73 and accompanying text.

128 De La Rama, 201 U.S. at 307.

129 For a general discussion of these original premises, see Rush, supra note 45.

130 De La Rama, 201 U.S. at 305; 1 William Blackstone, Commentaries 442 n.15 (William C. Jones ed., 1976).

131 See, e.g., Chicago & N.W.R. v. Ohle, 117 U.S. 123 (1886) (holding that the test for state citizenship is a person's domicile). An exception, however, was made for a wife who had been abandoned by her husband. 2 Joel P. Bishop, Commentaries on the Law of Marriage and Divorce § 125, at 103 (4th ed. 1864). After obtaining a judicial separation in a state court, the wife could establish a domicile independent from her husband for divorce or alimony purposes. Id.
In Barber v. Barber, 62 U.S. (21 How.) 582 (1858), the Supreme Court implicitly accepted a wife's judicial separation from her husband as sufficient to establish diverse citizenship. Id. at 584; see also supra notes 46-55 and accompanying text.

132 E.g., Spindel v. Spindel, 283 F.Supp. 797, 813 (E.D.N.Y. 1968) ("Whatever the ancient doctrine, a wife is capable of acquiring a domicile separate from that of her husband; at least to this extent legal equality of the sexes is embodied in the Fourteenth and Nineteenth Amendments.").

133 E.g., Campbell v. Oliva, 295 F.Supp. 616, 618 (E.D.Tenn. 1968).

134 Diversity cases now require an amount in controversy in excess of $50,000. 28 U.S.C. § 1332 (1988). Federal question cases have not required any pecuniary controversy since 1980. See Federal Question Jurisdictional Amendments Act, Pub.L. No. 96-486, 94 Stat. 2369 (1980) (codified at 28 U.S.C. § 1331 (1988)).

135 De La Rama v. De La Rama, 201 U.S. 303, 305 (1906).

136 Rapoport v. Rapoport, 416 F.2d 41, 43 (9th Cir.1969), cert. denied, 397 U.S. 915 (1970).

137 De Krafft v. Barney, 67 U.S. (2 Black) 704, 714 (1862); Barry v. Mercien, 46 U.S. (5 How.) 103, 120 (1847); Hernstadt v. Hernstadt, 373 F.2d 316, 318 (2d Cir.1967).

138 See Allan D. Vestal & David L. Foster, Implied Limitations on the Diversity Jurisdiction of Federal Courts, 41 Minn.L.Rev. 1, 28 (1956) ("As for the jurisdictional amount in divorce cases, certainly a persuasive argument can be made that a sufficient amount might be involved.").

139 E.g., Ahrenholz v. Hennepin County, 295 N.W.2d 645, 648 (Minn. 1980) ("parents may be compensated for loss of advice, comfort, assistance, and protection which they could reasonably have expected if the child had lived"); see Rush, supra note 45, at 12.

140 Vestal & Foster, supra note 138, at 28.

141 But see Barber v. Barber, 62 U.S. (21 How.) 582 (1858) (holding that overdue alimony may be enforced in federal courts).

142 E.g., Jagiella v. Jagiella, 647 F.2d 561, 564 n.11 (5th Cir.1981); Sutter v. Pitts, 639 F.2d 842, 843-44 (1st Cir.1981); Huynh Thi Anh v. Levi, 586 F.2d 625, 632 (6th Cir.1978).

143 Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 818 (1976).

144 Id. at 813.

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

146 401 U.S. 37 (1971).

147 319 U.S. 315 (1943).

148 The court in Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir.1978) stated:
While older cases indicate that federal courts are entirely without jurisdiction to grant divorces or award custody of children, more recent decisions hold that strong policies of federal-state comity and deference to state expertise in the area are the theoretical underpinnings of federal courts' refusal to consider such cases.
Id. at 632 (footnote omitted).

149 Although most courts still relied on the traditional jurisdictional rationale to dismiss the "core" areas of the exception, they also invoked abstention principles as the basis for dismissing cases that raise issues peripheral to such core areas. See, e.g., Csibi v. Fustos, 670 F.2d 134, 137 (9th Cir.1982); Bossom v. Bossom, 551 F.2d 474, 475-76 (2d Cir.1976).

150 For a general discussion of the abstention doctrines, see Rebecca E. Swenson, Note, Application of the Federal Abstention Doctrines to the Domestic Relations Exception to Federal Diversity Jurisdiction, 1983 Duke L.J. 1095.

151 Burford, 319 U.S. at 334. The Burford Court also considered the difficulty of the state law question presented to be a relevant factor. Id. at 331.

152 Id. at 316-17.

153 Id. at 331.

154 Id. at 321-22.

155 Id. at 332.

156 The paramount role of the state in domestic relations matters was well settled. See United States v. Yazell, 382 U.S. 341, 352 (1966).

157 E.g., Friends of Children, Inc. v. Matava, 766 F.2d 35, 36-37 (1st Cir.1985) (stating that abstention is appropriate when federal adjudication would disrupt state efforts to establish coherent state policy; abstention particularly appropriate since family law at issue).

158 See, e.g., Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509 (2d Cir.1973). State courts "have an especially strong interest and a well-developed competence" in domestic matters. Id. at 516 (quoting Charles A. Wright, Federal Courts § 25, at 84 (2d ed. 1970)).

159 See Moore v. Sims, 442 U.S. 415, 423 (1979). Though Younger specifically applied to state criminal proceedings, the Supreme Court has extended the Younger abstention doctrine to the civil context. Id.

160 Atwood, supra note 45, at 613 (describing Younger v. Harris, 401 U.S. 37, 49, 53 (1977)).

161 E.g., Huynh Thi Anh v. Levi, 586 F.2d 625, 633-34 (6th Cir.1978).

162 See id.

163 See, e.g., Williams v. Williams, 532 F.2d 120, 122 (8th Cir.1976) (per curiam) (denying request for declaratory and injunctive relief because it would nullify state adoption decree); Littleton v. Fisher, 530 F.2d 691, 693 (6th Cir.1976) (per curiam) (refusing to grant injunction in civil rights action with state custody proceeding pending).

164 See, e.g., Kovacs v. Brewer, 356 U.S. 604, 608 (1958) (New York custody decrees are modifiable by court when circumstances change and, thus, no res judicata effect).

165 E.g., Csibi v. Fustos, 670 F.2d 134, 136-37 (9th Cir.1982); Walker v. Walker, 509 F.Supp. 853, 855 (E.D.Va. 1981).

166 E.g., Firestone v. Cleveland Trust Co., 654 F.2d 1212, 1215 (6th Cir.1981).

167 Id.

168 Sutter v. Pitts, 639 F.2d 842, 844 (1st Cir.1981).

169 Id. at 843.

170 Cole v. Cole, 633 F.2d 1083, 1088 (4th Cir.1980).

171 See Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 514 (2d Cir.1973).

172 For a general discussion of the abstention doctrine, see Atwood, supra note 45.

173 See Thermtron Prods., Inc. v. Hermansdorfer, 423 U.S. 336, 342-44 (1976) (remand of case due to overcrowding was unauthorized under 28 U.S.C. § 1447(c) (1964)).

174 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 383-87 (1821) (holding that Supreme Court has duty to entertain cases within its jurisdiction regardless of its desire to avoid certain questions).

175 For a general discussion of these criticisms, see Poker, supra note 45, at 160-62.

176 304 U.S. 64 (1938).

177 Under the Rules of Decision Act, "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (1988).

178 See Markham v. Allen, 326 U.S. 490, 495 (1946) ("The mere fact that the district court, in the exercise of the jurisdiction which Congress has conferred upon it, is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner.") (citing Meredith v. Winter Haven, 320 U.S. 228 (1943)). See generally Martin H. Redish, Federal Jurisdiction: Tensions in the Allocation of Judicial Power 79-107 (1980).

179 See Ullman, supra note 45, at 1844.

180 Id. at 1846 n.137.

181 Id. (citing Victims of Child Abuse Act of 1990, Pub.L. No. 101-647, 104 Stat. 4792 (codified at 42 U.S.C. §§ 13001-13055 and other scattered sections (Supp. III 1991)); Family Violence Prevention and Services Act, Pub.L. No. 98-457, 98 Stat. 1757 (1984) (codified at 42 U.S.C. §§ 10401-10415 (1988)); Parental Kidnapping Prevention Act of 1980, Pub.L. No. 96-611, §§ 6-10, 94 Stat. 3568 (codified at 28 U.S.C. § 1738A (1988)).

182 E.g., Boom Co. v. Patterson, 98 U.S. 403 (1878) (upholding diversity jurisdiction in question of de novo value of land taken by the state government).

183 For a general discussion of the various approaches of the circuits, see Moore, supra note 45, at 853-71.

184 See, e.g., Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir.1982) (noting that "boundaries of the exception are uncertain").

185 Moore, supra note 45, at 855-56 (quoting Overman v. United States, 563 F.2d 1287, 1292 (8th Cir.1977)).

186 See Kilduff v. Kilduff, 473 F.Supp. 873, 875 (S.D.N.Y. 1979).

187 Gargallo v. Gargallo, 472 F.2d 1219 (6th Cir.) (per curiam) (involving father who sought injunctive relief for wife's illegal custody of three children), cert. denied, 414 U.S. 805 (1973).

188 Solomon v. Solomon, 516 F.2d 1018 (3d Cir.1975).

189 E.g., Robinson v. Robinson, 523 F.Supp. 96 (E.D.Pa. 1981).

190 Albanese v. Richter, 161 F.2d 688 (3d Cir.), cert. denied, 332 U.S. 782 (1947).

191 See Zak v. Pilla, 698 F.2d 800 (6th Cir.1982) (per curiam) (dismissing 42 U.S.C. § 1983 (1982) action by couple alleging adoption agency arbitrarily withheld approval of couple's adoption application).

192 633 F.2d 1083 (4th Cir.1980).

193 Id. at 1088.

194 Id.

195 Wasserman v. Wasserman, 671 F.2d 832, 834 (4th Cir.) (torts of child enticement and intentional infliction of emotional distress when former spouse abducted child), cert. denied, 459 U.S. 1014 (1982).

196 E.g., Lloyd v. Loeffler, 694 F.2d 489 (7th Cir.1982) (unlawful intentional interference with parents' rightful custody).

197 647 F.2d 561 (5th Cir.1981).

198 Id. at 562.

199 550 F.Supp. 136 (S.D.N.Y. 1982).

200 Id. at 138.

201 See Vestal & Foster, supra note 138, at 28-31; see also Atwood, supra note 45, at 592-603; Poker, supra note 45, at 150-53.

202 Buechold v. Ortiz, 401 F.2d 371, 372 (9th Cir.1968).

203 Carqueville v. Woodruff, 153 F.2d 1011 (6th Cir.1946).

204 In re Wilson, 314 F.Supp. 271 (E.D.Tenn. 1970).

205 In re Freiberg, 262 F.Supp. 482 (E.D.La. 1967).

206 E.g., Southard v. Southard, 305 F.2d 730, 731 (2d Cir.1962).

207 125 U.S. 190 (1888).

208 Id. at 206.

209 Poker, supra note 45, at 153 (citing Vestal & Foster, supra note 138, at 29).

210 For a general discussion of the modifiability test, see Poker, supra note 45, at 151-52.

211 Lee v. Hunt, 431 F.Supp. 371, 377 (W.D.La. 1977).

212 Morris v. Morris, 273 F.2d 678, 681-82 (7th Cir.1960) ("[Q]uestions which might arise as to the continuance of the obligation of defendant . . . would involve the district court in the administration of divorce law in a very real way.").

213 Lloyd v. Loeffler, 694 F.2d 489, 493 (7th Cir.1982).

214 Poker, supra note 45, at 152.

215 112 S.Ct. 2206 (1992).

216 For a further discussion of the Ankenbrandt rationale, see supra notes 22-38 and accompanying text.

217 For an argument supporting the abstention rationale, see Swenson, supra note 150.

218 Ankenbrandt, 112 S.Ct. at 2216.

219 For a general discussion of Ankenbrandt's ramifications on tort actions, see Robert G. Spector, Taking Your Marital Tort Diversity Case to Federal Court, Fairshare, Aug. 1992, at 9.

220 See Barber v. Barber, 62 U.S. (21 How.) 582 (1858).

221 62 U.S. (21 How.) 582 (1858). For a general discussion of Barber, see supra notes 46-55 and accompanying text.

222 Since the exception is rooted in the statutory construction of the diversity statute, there is no justification for dismissing a federal question case brought under 28 U.S.C. § 1331 (1988).

223 "The Barber Court thus did not intend to strip the federal courts of authority to hear cases arising from the domestic relations of persons unless they seek the granting or modification of a divorce or alimony decree." Ankenbrandt v. Richards, 112 S.Ct. 2206, 2214 (1992).

224 See Rush, supra note 45, at 10-12.

225 Federal courts routinely evaluate parent-child relationships in the context of loss of consortium claims in personal injury and wrongful death actions in which the depth and quality of the relationship must be examined. E.g., Crumpton v. Gates, 947 F.2d 1418, 1422 (9th Cir.1991).

226 See Ankenbrandt, 112 S.Ct. at 2215-17.

227 Id. at 2215 (citing Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976)).

228 E.g., Sutter v. Pitts, 639 F.2d 842, 843 (1st Cir.1981) (denying jurisdiction for tort action arising from series of disputes centering on the marital relationship); Wilkins v. Rogers, 581 F.2d 399, 403-04 (4th Cir.1978) (refusing to hear domestic relations case when only property rights involved); Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir.1973) (doubting that the Supreme Court would demand federal judges waste time exploring "thickets of state decisional law" such as domestic relations law).

229 401 U.S. 37 (1971).

230 Ankenbrandt, 112 S.Ct. at 2215-16.

231 Id. at 2216.

232 319 U.S. 315 (1943).

233 For a general discussion of the Burford doctrine, see supra notes 150-58 and accompanying text.

234 Ankenbrandt, 112 S.Ct. at 2216.

235 Id.

236 Id. at 2216 n.8 (citation omitted).

237 112 S.Ct. 2206 (1992).

238 62 U.S. (21 How.) 582 (1858).

239 For a further discussion of the Court's rationale, see supra notes 22-38 and accompanying text.

240 Ankenbrandt, 112 S.Ct. at 2212-13.

241 "The Barber majority itself did not expressly refer to the diversity statute's use of the limitation on 'suits of a civil nature at common law or in equity.'" Id. at 2212.

242 The Ankenbrandt Court noted:
Because the Barber Court did not disagree with this reason for accepting the jurisdictional limitation over the issuance of divorce and alimony decrees, it may be inferred fairly that the jurisdictional limitation recognized by the Court rested on this statutory basis and that the disagreement between the Court and the dissenters thus centered only on the extent of the limitation.
Id. at 2212-13.

243 201 U.S. 303 (1906).

244 For a discussion of De La Rama, see supra notes 69-73 and accompanying text.

245 In his concurrence, Justice Blackmun cited Simms v. Simms, 175 U.S. 162 (1899), as a case which contradicts the Ankenbrandt rationale. According to Justice Blackmun, "Today the Court infers an interpretation of Barber that the Court in Simms plainly rejected." Id. at 2218 (Blackmun, J., concurring).

246 See Ankenbrandt, 112 S.Ct. at 2213.

247 Id.

248 E.g., Huynh Thi Anh v. Levi, 586 F.2d 625 (6th Cir.1978). "While older cases indicate that federal courts are entirely without jurisdiction to grant divorces or award custody of children, more recent decisions hold that strong policies of federal-state comity and deference to state expertise . . . are the theoretical underpinnings of federal courts' refusal to consider [domestic relations] cases." Id. at 632.

249 Girouard v. United States, 328 U.S. 61, 69-70 (1946) (quoting Helvering v. Haltock, 309 U.S. 106, 119 (1970)).

250 28 U.S.C. § 1738A (1988).

251 H.R. 9913, 95th Cong., 1st Sess. (1977); see also H.R. 11,273, 95th Cong., 2d Sess. (1978).

252 The bill stated:
Each district court of the United States shall have jurisdiction under this section [28 U.S.C. § 1332 (1976)] of any civil action brought by a parent or legal guardian of a child for enforcement of a custody order against a parent

of the child who, in contravention of the terms of the custody order, has taken a child to a state other than the state in which the custody order was issued.
H.R. 9913, 95th Cong., 1st Sess. (1977); H.R. 11,273, 95th Cong., 2d Sess. (1978).

253 For a general discussion of the legislative history of the PKPA, see Michael Finch & Jerome Kasriel, Federal Court Correction of State Court Error: The Singular Case on Interstate Custody Disputes, 48 Ohio St. L.J. 927, 942-51 (1987).

254 112 S.Ct. 2206 (1992).

255 "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

256 "An examination of Article III . . . makes clear that the Constitution does not exclude domestic relations cases from the jurisdiction otherwise granted by statute to the federal courts." Ankenbrandt, 112 S.Ct. at 2210.

257 62 U.S. (21 How.) 582 (1859).

258 See Ankenbrandt, 112 S.Ct. at 2213.

259 E.g., Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir.1982) (criticizing the presumption that federal jurisdiction should be limited by the jurisdiction of England's eighteenth century ecclesiastical courts).

260 E.g., Magaziner v. Montemuro, 468 F.2d 782, 787 (3d Cir.1972) (noting that philosophical considerations which underpin the abstention doctrine are present in domestic relations cases).

261 Id.

262 280 U.S. 389 (1930).

263 For a general discussion of the Supreme Court cases, see supra notes 45-78 and accompanying text.

264 See, e.g., Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813 (1976).

265 For a general discussion of the abstention doctrine, see supra notes 142-64 and accompanying text.

266 E.g., Congleton v. Holy Cross Child Placement Agency, Inc., 919 F.2d 1077 (5th Cir.1991). "Abstention from the exercise of diversity jurisdiction in cases involving intrafamily relations is a policy of long standing in the federal courts." Id. at 1078 (citation omitted).

267 For a further discussion of the various approaches by the circuit courts, see supra notes 183-214 and accompanying text.

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

269 Id. at 2215.

270 Id.

271 Id. (citing Lloyd v. Loeffler, 694 F.2d 489, 492 (7th Cir.1982)).

272 Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87-88 (1809); Jack H. Friedenthal et al., Civil Procedure § 2.5, at 25 (1985).

273 For a general discussion of the fear of local bias rationale as it applies to the domestic relations exception, see Ullman, supra note 45, at 1842-43.

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