



**FAMILY LAW IS NOT “CIVIL”: THE FAULTY FOUNDATION OF THE
DOMESTIC RELATIONS EXCEPTION TO FEDERAL JURISDICTION**

Joseph Carroll

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I. Introduction

Courts and scholars often refer to family law¹ as a quintessentially and appropriately state-controlled and state-adjudicated area.² The United States Supreme Court has frequently emphasized that the federal government’s reach must be limited within the realm of family law because family law is appropriately reserved for the states.³ Accordingly, the Supreme Court has

¹ For the purposes of this essay, “family law” refers to the formation and dissolution of familial relationships, non-exhaustively including marriage, divorce, property distribution, alimony, paternity/maternity, custody, visitation, child support, adoption, and termination of parental rights. See Jill Elaine Hasday, *Federalism & the Family Reconstructed*, 45 UCLA L. REV. 1297, 1372–73 (1998) (providing a definition for “family law”). Family law addresses people’s rights and responsibilities that result from their familial relationships. *Id.* Additionally, this essay will use “domestic relations” and “family law” synonymously.

² See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12–14 (2004); *Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992) (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)); *Barber v. Barber*, 62 U.S. 582 (1858); Bradley G. Silverman, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L.J. 1364, 1391-95 (2016); Mark Strasser, *Congress, Federal Courts, and Domestic Relations Exceptionalism*, 12 CONN. PUB. INT. L.J. 193, 193 (2012); Hasday, *supra* note 1, at 1298 (“Throughout the debate on federalism, family law emerges as the one clear case in which federal involvement is inappropriate....”); Sharon Elizabeth Rush, *Domestic Relations Law: Federal Jurisdiction and State Sovereignty in Perspective*, 60 NOTRE DAME L. REV. 1, 8–9 (1984).

³ See *Elk Grove*, 542 U.S. at 12–14; *Ankenbrandt*, 504 U.S. at 692; *Mansell v. Mansell*, 490 U.S. 581, 587 (1989) (“[D]omestic relations are preeminently matters of state law.”); *Moore v. Sims*, 442 U.S. 415, 435 (1979) (“Family

long-recognized the “domestic relations exception” to federal subject matter jurisdiction to preserve family law issues for state courts.⁴ However, the legal foundation for the domestic relations exception and the exact parameters of the domestic relations exception have proven elusive and vexing for courts and litigants.⁵ Likely because the Supreme Court has failed to articulate a principled basis in either constitutional or statutory law for the domestic relations exception, federal courts’ definition and application of the domestic relations exception can, to quote Professor Michael Stein, “most charitably be described as chaotic.”⁶

The seemingly most definitive and authoritative pronouncement on the scope of the domestic relations exception came in *Ankenbrandt v. Richards*⁷ in 1992. In *Ankenbrandt*, the Supreme Court concluded, “[T]he domestic relations exception, as articulated by this Court in *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees.”⁸ Yet, despite this seemingly clear definition of the domestic relations exception, federal courts, both before and after *Ankenbrandt*, have applied the domestic relations exception to dismiss family law cases for lack of subject matter jurisdiction in many cases that do not involve the issuance of divorce, alimony, or child custody decrees.⁹ Furthermore, case law demonstrates inconsistency and confusion among federal courts as to whether the domestic

relations are a traditional area of state concern.”); *Burrus*, 136 U.S. at 593; (“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.”); *Barber*, 62 U.S. at 582.

⁴ See *Barber*, 62 U.S. at 584 (“We disclaim altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony....”); *Ankenbrandt*, 504 U.S. at 703.

⁵ See Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 134 (2009).

⁶ Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669, 679 (1995).

⁷ *Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992).

⁸ *Id.*

⁹ See *infra* note 10.

relations exception applies only in the context of diversity jurisdiction cases or whether it also applies to federal question jurisdiction cases.¹⁰

This essay leaves the narrower issue of whether the domestic relations exception should/does encompass federal question jurisdiction to numerous law review articles that have adeptly addressed the issue.¹¹ Instead, this essay explores the broader, threshold issue of the foundation—or lack thereof—for the domestic relations exception itself, primarily in the context of diversity jurisdiction. This essay will review the history and development of the domestic

¹⁰ Since the Supreme Court's decision in *Elk Grove Independent School District v. Newdow*, 542 U.S. 1 (2004), the breadth of the domestic relations exception has become further obscured. *See Harbach, supra* note 5, at 154–64. Some courts have expressly applied the domestic relations exception to federal question jurisdiction cases to dismiss them. *See, e.g., Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006) (Posner, J.); *Smith v. Huckabee*, 154 F. App'x 552, 555 (8th Cir. 2005); *Campbell v. Ligan*, 109 F. App'x 894, 895 (9th Cir. 2004); *Edland v. Edland*, No. C08-5222RBL, 2008 WL 2001813, at *1 (W.D. Wash. May 7, 2008); *Arroyo ex rel. Arroyo-Garcia v. County of Fresno*, No. CV F 07-1443 AWI SMS, 2008 WL 540653, at *4 (E.D. Cal. Feb. 25, 2008); *Whiteside v. Neb. State Health & Human Servs.*, No. 4:07CV3030, 2007 WL 2123754, at *2 (D. Neb. July 19, 2007); *Harden v. Harden*, No. 8:07CV68, 2007 WL 700982, at *2 (D. Neb. Feb. 28, 2007); *Puletti v. Patel*, No. 05 CV 2293(SJ), 2006 WL 2010809, at *4 (E.D.N.Y. July 14, 2006); *Gates v. County of Lake*, No. CIV. S-051374 DFL PAN PS, 2005 U.S. Dist. LEXIS 32182, at *1–2 (E.D. Cal. Dec. 12, 2005); *Rousay v. Mieseler*, No. CIV. S-05-1261 LKK PAN PS, 2005 U.S. Dist. LEXIS 27431, at *3 (E.D. Cal. Nov. 9, 2005); *Chase v. Czajka*, No. 04 Civ. 8228 (LAK) (AJP), 2005 U.S. Dist. LEXIS 8743, at *19–23 (S.D.N.Y. May 12, 2005); *Smith v. Oakland Cty. Cir. Ct.*, 344 F. Supp. 2d 1030, 1064–66 (E.D. Mich. 2004). Some courts have limited the domestic relations exception to diversity jurisdiction cases. *See, e.g., Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 947 (9th Cir. 2008); *Richardson v. Richardson*, No. 081671, 2008 WL 2355050, at *3 n.2 (E.D. La. June 5, 2008); *Colassi v. Looper*, No. 08-cv-115-JL, 2008 WL 2115160, at *2 n.2 (D.N.H. May 20, 2008); *Briggman v. Va. Dep't of Soc. Servs., Div. of Child Support Enforcement*, 526 F. Supp. 2d 590, 598 (W.D. Va. 2007); *Smith v. Smith*, No. 7:07CV00117, 2007 WL 3025097, at *3 n.2 (W.D. Va. Oct. 12, 2007); *Sheppard v. Welch*, No. 1:05CV0467DFHTAB, 2005 WL 1656873, at *2 (S.D. Ind. July 5, 2005); *Schottenstein v. Schottenstein*, No. 04 Civ. 5851 (SAS), 2004 WL 2534155, at *8 n.91 (S.D.N.Y. Nov. 8, 2004). Some courts have simply observed that the issue is unsettled and use an unclear combination of the domestic relations exception and abstention doctrines to dismiss family law cases. *See Tomas v. Gillespie*, 385 F. Supp. 2d 240, 243 n.2 (S.D.N.Y. 2005); *A.N. & D.N. v. Williams*, No. 8:05-CV-1929-T-27MSS, 2005 WL 3003730, at *2 (M.D. Fla. Nov. 9, 2005); *Fellows v. Kansas*, No. 04-4131-JAR, 2005 WL 752129, at *4 (D. Kan. Mar. 31, 2005); *Pettit v. New Mexico*, 375 F. Supp. 2d 1140, 1148-49, 1151 (D.N.M. 2004); *Rago v. Samaroo*, 344 F. Supp. 2d 309, 312, 314 (D. Mass. 2004); *Lopez-Rodriguez v. City of Levelland*, No. Civ.A. 5:02-CV-073-C, 2004 WL 1836729, at *1–2 (N.D. Tex. Aug. 16, 2004). However, even if the domestic relations exception applies to some federal question cases, it clearly cannot apply to all federal question family law cases. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (adjudicating the right to same-sex marriage); *Palmore v. Sidoti*, 466 U.S. 429, 434 (1984) (holding that the reality of societal racial biases is an impermissible consideration in modifying custody); *Zablocki v. Redhail*, 434 U.S. 374, 375–77 (1978) (holding that it is unconstitutional to prohibit marriage for those behind on child support obligations). Nevertheless, many of the foundational cases for the domestic relations exception arose and dismissed cases in the context of federal question jurisdiction. *See, e.g., Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 382 (1930); *Rama v. De La Rama*, 201 U.S. 303, 308 (1906); *Simms v. Simms*, 175 U.S. 162, 168–69 (1899); *Perrien v. Slack*, 164 U.S. 452, 453 (1896); *In re Burrus*, 136 U.S. 586, 596–97 (1890).

¹¹ *See, e.g., Strasser, supra* note 2; *Silverman, supra* note 2; *Harbach, supra* note 5.

relations exception and examine the inconsistent and confusing parameters and application of the domestic relations exception. Then, this essay will argue that the domestic relations exception is rooted in federal courts' determination of good policy, rather than in a principled statutory interpretation of 28 U.S.C. § 1332, as *Ankenbrandt* argues.¹² In essence, despite the *Ankenbrandt* Court's attempt to root the domestic relations exception in the language of 28 U.S.C. § 1332, the Court failed to articulate a principled basis in either constitutional or statutory law for the domestic relations exception.

This essay does not suggest that it is good policy for federal courts to hear most domestic relations cases; it merely argues that the accepted rationale for the domestic relations exception is based on a faulty statutory interpretation of 28 U.S.C. § 1332 and on *Barber's* inaccurate rendition of history. To resolve this questionable statutory interpretation, this essay proposes that Congress should amend Section 1332 to codify the domestic relations exception or, alternatively, that the domestic relations exception could be based on principles of federalism, the Tenth Amendment, abstention doctrines, or principles of justiciability.

II. The Recognition and Development of the Domestic Relations Exception

The United States Supreme Court first recognized the domestic relations exception to federal jurisdiction in *Barber v. Barber*¹³ in 1858.¹⁴ Factually, Mrs. Huldah Barber received a yearly alimony award of \$360 under a divorce decree issued by the New York Court of Chancery.¹⁵ However, because her former husband moved to Wisconsin and refused to comply with the alimony order, Mrs. Barber sued to enforce the order in the U.S. District Court for the

¹² *Ankenbrandt*, 504 U.S. at 700–01.

¹³ *Barber v. Barber*, 62 U.S. 582 (1858).

¹⁴ *Id.* at 583–84.

¹⁵ *Id.*

District of Wisconsin on the basis of diversity jurisdiction.¹⁶ Despite being oft-cited as the case that created the domestic relations exception to federal jurisdiction,¹⁷ *Barber* actually held that the federal district court possessed jurisdiction to hear Mrs. Barber’s case.¹⁸ The Court explained that jurisdiction was proper because Mrs. Barber sought “to prevent that decree from being defeated by fraud.”¹⁹ The Court continued by providing its oft-quoted dictum: “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....”²⁰

Thus, in regard to its precedential value, *Barber* only recognized an exception to federal jurisdiction for divorce and alimony, only recognized that jurisdiction in the context of diversity jurisdiction, and only recognized that exception in dictum.²¹ Furthermore, the Court provided absolutely no reasoning or authority to support its recognition of the domestic relations exception.²² However, offering some rationale for the exception, Justice Daniel’s dissenting opinion alleged that American courts possess only the jurisdiction held by the English courts of chancery, which did not extend to suits for divorce or alimony.²³

¹⁶ *Id.*

¹⁷ *See, e.g.*, *Marshall v. Marshall*, 547 U.S. 293, 305–06 (2006); *Ankenbrandt*, 504 U.S. at 693; *Tolekis Biin Tutora v. Dau Soukthavong*, No. 3:10-CV-0332 (TJM)(DEP), 2010 U.S. Dist. LEXIS 102998, at *8 (N.D.N.Y. Apr. 27, 2010); *Matusow v. Trans-Cty. Title Agency, LLC*, 545 F.3d 241, 245 (3d Cir. 2008).

¹⁸ *Barber*, 62 U.S. at 584.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See Ankenbrandt*, 504 U.S. at 694 (stating that *Barber*’s exception applied only to divorce and alimony and was “technically dicta”).

²² *Id.* (stating that *Barber* “cited no authority and did not discuss the foundation for its announcement.”).

²³ *Barber*, 62 U.S. at 605 (Daniel, J., dissenting) (“As the jurisdiction of the chancery in England does not extend to or embrace the subjects of divorce and alimony, and as the jurisdiction of the courts of the United States in chancery is bounded by that of the chancery in England, all power or cognizance with respect to those subjects by the courts of the United States in chancery is equally excluded.”).

Over three decades after *Barber*, the Court revisited the domestic relations exception and, at least on its face, drastically expanded the exception.²⁴ In *In re Burrus*,²⁵ a grandfather, who had previously been the primary custodian of his granddaughter, was imprisoned by a U.S. district court for contempt for taking custody of his granddaughter in violation of the U.S. district court's order of custody, via a writ of habeas corpus, in favor of the child's father.²⁶ The grandfather appealed his conviction, arguing that the district court lacked jurisdiction to grant the habeas petition and order custody.²⁷ With astonishing breadth, the Court stated, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to laws of the United States."²⁸ Following *Barber*'s lead, the *Burrus* Court also failed to provide rationale or authority for its now-broad rule.²⁹

Shortly after deciding *Burrus*, the Court muddied the domestic relations exception waters further by allowing federal circuit courts in the then-territory of Arizona and the Philippine Islands to exercise jurisdiction over cases involving divorce and alimony.³⁰ Causing even more confusion, rather than adhering to the rationale of Justice Daniel's dissent in *Barber*, now, the Court reasoned "that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues"³¹ and that "a suit for divorce in itself involves no pecuniary value."³² Likewise, in an 1896 case involving a habeas action brought by a mother to obtain custody of her children, the Supreme Court held that no federal jurisdiction existed because the

²⁴ See *In re Burrus*, 136 U.S. 586 (1890).

²⁵ *In re Burrus*, 136 U.S. 586 (1890).

²⁶ *Id.* at 588–89.

²⁷ *Id.* at 589.

²⁸ *Id.* at 593–94. The Court further stated that family law cases do not "justif[y] the exercise of federal authority." *Id.* at 591.

²⁹ The *Burrus* Court did not even cite to *Barber* in its opinion.

³⁰ *Simms v. Simms*, 175 U.S. 162, 167–68 (1899); *De La Rama v. De La Rama*, 201 U.S. 303, 308 (1906).

³¹ *De La Rama*, 201 U.S. at 307.

³² *Id.*

amount-in-controversy requirement was not satisfied.³³ If these rationales are accepted, then the domestic relations exception would consist of nothing more than the normal procedural hurdles required to obtain diversity jurisdiction under 28 U.S.C. § 1332—requirements that could easily be met in any diversity jurisdiction case where the pleaded value of property for distribution, alimony, or child support exceeds the amount-in-controversy requirement.³⁴

Nevertheless, in 1930, the Court returned to Justice Daniel’s view from *Barber’s* dissent.³⁵ In *Ohio ex rel. Popovic v. Agler*,³⁶ the wife of the Vice-Consul of Romania filed for divorce in a state court in Cleveland, Ohio.³⁷ The Vice-Consul argued that the Ohio state court lacked jurisdiction because Article III of the U.S. Constitution grants original jurisdiction over “all Cases affecting Ambassadors, other public Ministers and consuls” to the United States Supreme Court.³⁸ The Court acknowledged Article III and its “sweeping language,” but held that federal courts do not have jurisdiction over “divorces and alimony”³⁹ because those types of cases “had belonged to the ecclesiastical Courts” of England and federal courts sitting in equity can hear only those cases heard by the English courts of chancery.⁴⁰

After this flurry of cases, the domestic relations exception remained untouched by the Supreme Court until the Court heard *Ankenbrandt* 62 years later.⁴¹ Once again, the Court shunned all previous rationales for the domestic relations exception, opting to root the domestic relations exception in statutory interpretation.⁴² Despite nearly admitting that the prior case law

³³ *Perrine v. Slack*, 164 U.S. 452, 454 (1896) (citing *Barry v. Mercein*, 46 U.S. 103 (1847)).

³⁴ *See* 28 U.S.C. § 1332 (2012).

³⁵ *See Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930).

³⁶ *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930).

³⁷ *Id.* at 382.

³⁸ *Id.* (quoting U.S. CONST. art. III, § 2, cl. 2).

³⁹ *Id.* at 383.

⁴⁰ *Id.* at 384.

⁴¹ *Ankenbrandt v. Richards*, 504 U.S. 689, 692 (1992).

⁴² *Id.* at 699–700.

seemed to lack any solid reasoning for the recognition of the exception,⁴³ the Supreme Court asserted that Congress knew about these prior cases and, regardless of the soundness of the cases' reasoning, Congress had ratified the domestic relations exception when it revised the Judiciary Act of 1789 in 1948.⁴⁴ Even though Congress's 1948 revision replaced "all suits of civil nature at common law or in equity"⁴⁵ with "all civil actions,"⁴⁶ the Supreme Court concluded that Congress intended no change in meaning when it changed the language of the statute and that Congress ratified *Barber* and its progeny by failing to express a clear intent to overrule or deviate from them.⁴⁷ As mentioned above, *Ankenbrandt* indicated that the domestic relations exception removes only cases involving the "issuance of a divorce, alimony, or child custody decree" from federal jurisdiction,⁴⁸ but federal courts have often exceeded that narrow restatement of the exception,⁴⁹ in no small part due to the Supreme Court's own pronouncements in *Elk Grove Unified School District v. Newdow* in 2004.⁵⁰

In *Elk Grove*, Michael Newdow's former wife had been granted sole legal custody of their daughter.⁵¹ Newdow sued his daughter's school district, arguing that the Pledge of Allegiance's use of "under God" violated the Establishment Clause and the Free Exercise Clause.⁵² Notably, because Newdow was not his daughter's legal custodian, he lacked standing to sue on his daughter's behalf under state law.⁵³ Therefore, the Court focused its decision on

⁴³ See *id.* at 694 (conceding that *Barber* only applied to divorce and alimony, was "technically dicta," cited no authority, provided no rationale for the exception, and relied on debatable history).

⁴⁴ *Id.* at 699–700, 704.

⁴⁵ Judiciary Act of 1789, ch. 20 § 11, 1 Stat. 73, 78.

⁴⁶ 28 U.S.C. § 1332(a) (2012).

⁴⁷ *Ankenbrandt*, 504 U.S. at 700–01.

⁴⁸ *Id.* at 704.

⁴⁹ See *supra* note 10.

⁵⁰ *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12–14 (2004).

⁵¹ *Id.* at 9.

⁵² *Id.* at 5.

⁵³ *Id.* at 10.

the issue of standing and held that Newdow lacked “prudential standing” to sue on behalf of his daughter because “disputed family law rights are entwined inextricably with the threshold standing inquiry.”⁵⁴

The Supreme Court expressly declined to rest its holding on the domestic relations exception,⁵⁵ which, under the *Ankenbrandt* formulation of the exception, is the only reasonable conclusion because *Elk Grove* did not involve the issuance of a divorce, alimony, or child custody decree.⁵⁶ Nevertheless, in dicta, the Court utilized broad, sweeping language to describe the domestic relations exception, quoting and harkening back to *Burrus*’s formulation of the exception as an exclusion of all family law cases from federal court.⁵⁷ The Court emphasized that it “has customarily declined to intervene [in] the realm of domestic relations[,]”⁵⁸ that family law “belongs to the laws of the States and not to the laws of the United States[,]”⁵⁹ that “while rare instances arise in which it is necessary to answer a substantial federal question that transcends or exists apart from the family law issue, in general it is appropriate for the federal courts to leave delicate issues of domestic relations to the state courts.”⁶⁰ Many scholars have criticized *Elk Grove*’s reasoning⁶¹ and it has caused significant confusion for courts as to what constitutes a “delicate issue[] of domestic relations”⁶² and to what extent the domestic relations exception applies to questions of federal and constitutional law.⁶³

⁵⁴ *Id.* at 13.

⁵⁵ *Id.* at 13 n.5.

⁵⁶ *Id.* at 20–21 (Rehnquist, C.J., concurring).

⁵⁷ *Id.* at 12–13 (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)).

⁵⁸ *Id.* at 12.

⁵⁹ *Id.* (quoting *In re Burrus*, 136 U.S. 586, 593–94 (1890)).

⁶⁰ *Id.* at 13 (internal citations omitted).

⁶¹ *The Supreme Court, 2003 Term-Leading Cases*, 118 HARV. L. REV. 248, 432 (2004) (referring to *Elk Grove* as “opaque and sometimes contradictory” and “unnecessarily convoluted”); ERWIN CHEMERINSKY, FEDERAL JURISDICTION 89 (5th ed. 2007) (stating that *Elk Grove* is “difficult to fit...in the framework of traditional standing analysis” and suggesting that the Court dismissed *Elk Grove* to avoid a controversial political issue).

⁶² *Elk Grove*, 542 U.S. at 13. See also Lori A. Catalano, *Totalitarianism in Public Schools: Enforcing a Religious and Political Orthodoxy*, 34 CAP. U. L. REV. 601, 635 (2006).

⁶³ See *supra* note 10.

III. Assessing the Doctrinal and Policy Justifications

Having briefly summarized the history and development of the domestic relations exception, this essay will now delve deeper into the Supreme Courts' articulated bases for the domestic relations exception and address the potential flaws with the Courts' doctrinal and policy justifications for the domestic relations exception.

A. Faulty Statutory Interpretation

As explained above, the explicit rationale for *Ankenbrandt*'s recognition of the domestic relations exception rests on the Court's statutory interpretation of 28 U.S.C. § 1332⁶⁴—the statute that provides the basis for federal courts' diversity jurisdiction. Before it details the situations in which litigants qualify as being diverse,⁶⁵ the relevant text of 28 U.S.C. § 1332 provides: “The district courts shall have original jurisdiction of *all civil actions* where the matter in controversy exceeds the sum or value of \$75,000....”⁶⁶

Because the *Ankenbrandt* Court expressly relied on a statutory interpretation of 28 U.S.C. § 1332 to justify the recognition of the domestic relations exception, the Court's first analytical step should be an application of the accepted methodologies of statutory interpretation. Specifically, the Court should have first turned to the plain meaning rule of statutory interpretation for guidance.⁶⁷ The plain meaning rule is often cited as the hallmark of statutory interpretation that must be the first and last consideration of any court seeking to discern the meaning of a statute.⁶⁸ As the Supreme Court has recently stated, “If the statutory language is

⁶⁴ *Ankenbrandt*, 504 U.S. at 699–700.

⁶⁵ The most common method by which litigants qualify as being “diverse” is when all of the litigants are citizens of different states. *See* 28 U.S.C. § 1332(a) (2012); *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 67–68 (1996).

⁶⁶ 28 U.S.C. § 1332(a) (emphasis added).

⁶⁷ *See* *Immigration and Naturalization Serv. v. Phinpathya*, 464 U.S. 183, 189 (1984); *Am. Tobacco Co. v. Patterson*, 465 U.S. 63, 68 (1982); *United States v. Mo. Pac. R.R. Co.*, 278 U.S. 269, 278 (1929); *Caminetti v. United States*, 242 U.S. 470, 485 (1917).

⁶⁸ *See, e.g., Phinpathya*, 464 U.S. at 189; *Am. Tobacco*, 465 U.S. at 68; *Mo. Pac. R.R. Co.*, 278 U.S. at 278; *Caminetti*, 242 U.S. at 485.

plain, we must enforce it according to its terms.”⁶⁹ In all cases, courts should begin by analyzing the statutory language and “assum[ing] that the ordinary meaning of that language accurately expresses the legislative purpose.”⁷⁰ Additionally, the starting point in statutory interpretation is the existing statute, not any predecessor statutes.⁷¹ Consequently, an interpretation of 28 U.S.C. § 1332 should begin by following this universally-accepted methodology of statutory interpretation by use of the plain meaning of the statute itself, especially when the statute is unambiguous.⁷²

An application of this framework to 28 U.S.C. § 1332 reveals that the statute simply does not include an exception to federal jurisdiction for domestic relations cases. As long as the complete diversity and amount-in-controversy requirements are met, Section 1332 provides federal jurisdiction for “all civil actions.”⁷³ No ambiguity exists in recognizing the ordinary meaning of “all civil actions,” and family law is universally accepted and recognized as “civil.”⁷⁴ Therefore, the only interpretation of Section 1332 that applies the plain meaning method of statutory interpretation dictates that family law actions fall within “all civil actions.” In essence,

⁶⁹ King v. Burwell, 135 S. Ct. 2480, 2489 (2015) (citing *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010)). The Court also notes the importance of looking at surrounding provisions and the context of the law. *Id.*

⁷⁰ *Hardt*, 560 U.S. at 251 (quoting *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 175 (2009)).

⁷¹ *Lamie v. United States Trustee*, 540 U.S. 526, 534 (2004) (citing *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). An exception to the plain meaning rule is when the statutory language creates an absurd result. *Id.*

⁷² See *Alston v. Countrywide Fin. Corp.*, 585 F.3d 753, 759 (3d Cir. 2009); *Santiago v. GMAC Mortgage Group, Inc.*, 417 F.3d 384, 386 (3d Cir. 2005); *Rosenberg v. XM Ventures*, 274 F.3d 137, 141 (3d Cir. 2001).

⁷³ See 28 U.S.C. § 1332 (2012). Notably, in a family law diversity jurisdiction case, the amount-in-controversy could be met by a complaint seeking alimony, property, distribution, or support—three issues which can and sometimes must be adjudicated separately from the divorce itself under family law jurisdictional rules, such as the “divisible divorce” principle. See generally *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Sosna v. Iowa*, 419 U.S. 393 (1975); *Sherrer v. Sherrer*, 334 U.S. 343 (1943); *Garboursy v. Garboursy*, 988 A.2d 672 (Pa. Super. Ct. 2009).

⁷⁴ See *Family Law*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Domestic Relations*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Civil Law*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Civil*, BLACK’S LAW DICTIONARY (10th ed. 2014); *Action*, BLACK’S LAW DICTIONARY 10th ed. 2014); Carle E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985). See also Pa.R.C.P. No. 1915–31 (classifying family law as “civil” within the Pennsylvania Rules of Civil Procedure); *Types of Cases*, CAL. CTS.: THE JUDICIAL BRANCH OF CAL., <http://www.courts.ca.gov/1000.htm> (last visited Feb. 12, 2017) (specifically list family law cases as “civil cases”).

under the most fundamental and basic method of statutory interpretation, 28 U.S.C. § 1332 simply does not include a domestic relations exception to diversity jurisdiction.

However, *Ankenbrandt* never applies the plain meaning rule or even acknowledges the existence of this hallmark rule of statutory interpretation. Instead, *Ankenbrandt*'s interpretation of Section 1332 rests on the theory that Congress ratified *Barber* and its progeny's admittedly baseless⁷⁵ recognition of the domestic relations exception because Section 1332 does not expressly refute the domestic relations exception or otherwise clearly express an intent to deviate from *Barber* and its progeny.⁷⁶

Therefore, the validity of *Ankenbrandt*'s reasoning relies heavily on the notion that family law is not "civil" and that family law cases do not fall within the clear, statutory phrase "all civil actions." Furthermore, *Ankenbrandt*'s interpretation of 18 U.S.C. § 1332, if applied in other cases, permits potentially flawed and baseless decisions by courts to override the plain text of a statute based on nothing more than the failure of Congress to specifically and expressly disavow centuries' old precedent that likely had not entered Congress's decision-making process when the law was passed. Narrowing this abstract principle into actual application, through the use of dictum, a court in 1858 can create an exception to a federal statute that recognizes diversity jurisdiction without providing any reasoning, without basing its decision on the statute in question, and without referring to the Constitution.⁷⁷ Then, that 1858 court's admittedly baseless⁷⁸ exception to a duly enacted federal statute is affirmed in 1992 merely because Congress never explicitly rejected the 1858 court's holding. In sum, an admittedly groundless,

⁷⁵ *Ankenbrandt v. Richards*, 504 U.S. 689, 694 (1992) (admitting that *Barber* cited no authority, provided no rationale for the exception, and relied on a debatable rendition of history).

⁷⁶ *Id.*

⁷⁷ *Barber v. Barber*, 62 U.S. 582, 584 (1858).

⁷⁸ *Ankenbrandt*, 504 U.S. at 694 (admitting that *Barber* only applied to divorce and alimony, was "technically dicta," cited no authority, provided no rationale for the exception, and relied on debatable history).

judicially-created exception to a federal statute is stronger than the unambiguous, plain text of the statute itself. By this method of statutory interpretation, the indisputably civil law area of family law does not fall within the definition of “all civil actions” under 28 U.S.C. § 1332. Family law is not “civil.”

B. Faulty Understanding of History

Although the *Barber* majority failed to provide any rationale for its dictum recognizing the domestic relations exception, Justice Daniel’s dissent offered a historical basis for the exception⁷⁹ and two subsequent Supreme Court opinions accepted Justice Daniel’s historical account as a foundation for the exception.⁸⁰ As mentioned earlier, Justice Daniel argued that American courts’ jurisdiction is limited to the jurisdiction of the English courts of chancery.⁸¹ Because English ecclesiastical courts, rather than chancery courts, handled family law cases, Justice Daniel viewed American federal courts as being barred from hearing family law cases.⁸²

However, Justice Daniel’s understanding of the history of the American and English courts is, at the very least, oversimplified, if not wholly in error.⁸³ In their analysis of the history of English courts, the U.S. Court of Appeals for the Seventh Circuit and the U.S. District Court for the Eastern District of New York found *Barber* and subsequent courts’ view of history to be inaccurate and unhelpful.⁸⁴ While an in-depth historical analysis is beyond the scope of this essay, the Eastern District of New York’s decision in *Spindel v. Spindel* provides an impressive, highly detailed, and heavily-sourced refutation of the claim that only England’s ecclesiastical

⁷⁹ *Barber*, 62 U.S. at 605 (Daniel, J., dissenting).

⁸⁰ See *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930); *Simms v. Simms.*, 175 U.S. 162, 167 (1899).

⁸¹ *Barber*, 62 U.S. at 605 (Daniel, J. dissenting).

⁸² *Id.*

⁸³ See *Lloyd v. Loeffler*, 694 F.2d 489, 492 (7th Cir. 1982); *Spindel v. Spindel*, 283 F. Supp. 797, 806–09 (E.D.N.Y. 1968).

⁸⁴ *Lloyd*, 694 F.2d at 492; *Spindel*, 283 F. Supp. at 806–09.

courts heard family law cases.⁸⁵ *Spindel* also asserts that the alleged English practice of limiting family law jurisdiction to ecclesiastical courts, to any extent that it did exist, was not observed in the American colonies or in the early United States.⁸⁶ In sum, even if Justice Daniel’s contention that American federal courts’ jurisdiction is limited by the jurisdiction of English chancery courts is correct, English chancery courts often exercised jurisdiction over family law cases and, to any extent that English ecclesiastical courts exercised exclusive-like jurisdiction over family law matters, that practice did not continue in the court systems of the American colonies.⁸⁷

In fact, *Ankenbrandt* itself expressly chooses not to rest its decision on Justice Daniel’s understanding of history and carefully avoids “join[ing] the historical debate over whether the English court of chancery had jurisdiction to handle certain domestic relations matters.”⁸⁸ This refusal to consider the accuracy of Justice Daniel’s view of history is particularly alarming because this historical basis is the only basis that the Supreme Court has offered for the domestic relations exception beyond strictly policy-based arguments and *Ankenbrandt*’s argument that Congress implicitly adopted the domestic relations exception by not expressly including a provision within 28 U.S.C. § 1332 that denies the existence of the exception.⁸⁹

On an even more fundamental level, the relevance and usefulness of a historical debate surrounding the jurisdiction exercised by sixteenth, seventeenth, and eighteen century English ecclesiastical courts seems to bear minimal significance on the interpretation of an American

⁸⁵ *Spindel*, 283 F. Supp. at 806–09 (providing numerous citations to authority and a detailed historical account of the jurisdictional issues involving family law in England and early American courts).

⁸⁶ *Id.*

⁸⁷ *Lloyd*, 694 F.2d at 492; *Spindel*, 283 F. Supp. at 806–09.

⁸⁸ *Ankenbrandt v. Richards*, 504 U.S. 689, 699 (1992).

⁸⁹ *Id.* at 700–01, 703–04.

federal statute enacted in 1948.⁹⁰ As the Seventh Circuit highlights, “[*Barber*] assumes without discussion that the proper referent is English rather than American practice.”⁹¹

C. Faulty Policy Justifications

Despite the allegedly statutory basis for its decision, the *Ankenbrandt* Court appears to accidentally confess that the true basis for its decision is good public policy by dedicating an entire section of its opinion to policy arguments in favor of the domestic relations exception.⁹²

As an initial matter, a fundamental principle in American democracy is that duly elected legislatures make determinations of what constitutes good policy—not unelected federal judges.⁹³ Thus, *Ankenbrandt*’s consideration of policy, at best, constitutes dicta and may more plausibly be viewed as a subtle admission as to the true motivation for the *Ankenbrandt*’s recognition of the domestic relations exception.

Beyond the problematic nature of a federal courts’ consideration of good public policy when interpreting an unambiguous statute, *Ankenbrandt*’s failure to consider the negative effects of recognizing the domestic relations exception illustrates the one-sidedness of the Court’s consideration of good policy in regard to the domestic relations exception. The *Ankenbrandt* Court quite validly observes that the issuance of divorce, custody, and alimony decrees often necessitates the continued involvement of the court, the deployment of social workers, and monitoring.⁹⁴ The Court further suggests that judicial economy is furthered by state courts’ sole

⁹⁰ Notably, despite the discussion of history and policy in *Ankenbrandt*, the Court expressly based its decision only on statutory interpretation of 28 U.S.C. § 1332. *Id.* at 700–01.

⁹¹ *Lloyd*, 694 F.2d at 492.

⁹² *See id.* at 703–04.

⁹³ *See Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2579 (2012) (“Members of this Court are vested with the authority to interpret the law; we possess neither the expertise nor the prerogative to make policy judgments. Those decisions are entrusted to our Nation’s elected leaders, who can be thrown out of office if the people disagree with them. It is not our job to protect the people from the consequences of their political choices.”); *Ramos v. Baldor Specialty Foods, Inc.*, 687 F.3d 554, 564 (2d Cir. 2012); *Harris v. McRae*, 448 U.S. 297, 326 (1980); *Standard Oil Co. v. United States*, 221 U.S. 1, 87–88 (1911).

⁹⁴ *Ankenbrandt*, 504 U.S. at 703.

jurisdiction in family law cases because state courts closely associate with the state and local governmental entities that have heavy involvement in domestic relations issues.⁹⁵ Finally, the Court suggests that state courts have “judicial expertise” that federal courts lack in family law.⁹⁶

Overall, this essay does not deny the apparent legitimacy of these contentions. However, the concern of judicial expertise could equally apply to many diversity jurisdiction cases heard by federal courts.⁹⁷ Additionally, *Ankenbrandt*’s discussion of policy ignores the entire purpose behind the existence of diversity jurisdiction.⁹⁸ Diversity jurisdiction exists to provide out-of-state litigants with an unbiased and fair forum.⁹⁹ The Framers of the Constitution feared that state courts would discriminate against out-of-state litigants and favor home-state litigants; diversity jurisdiction seeks to avoid this home court advantage.¹⁰⁰ This rationale firmly applies in the family law context, especially in the context of custody relocation disputes, where it is reasonable to believe that a state court would favor its own state as the location that is in the child’s best interests.¹⁰¹ Furthermore, the importance of a federal forum cannot be overstated, especially in cases involving federal question jurisdiction.¹⁰²

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Harbach, *supra* note 5, at 180–82 (citing numerous sources and arguing that policy arguments in favor of the domestic relations exception based on judicial expertise and judicial economy are weak, overstated, and could equally apply to many other areas of the law beyond domestic relations).

⁹⁸ See *infra* notes 99–100.

⁹⁹ See *J.A. Olson Co. v. City of Winona*, 818 F.2d 401, 404 (5th Cir. 1987) (citing *Jerguson v. Blue Dot Inv., Co.*, 659 F.2d 31, 33 (5th Cir. 1981)) (noting that the purpose of diversity jurisdiction is to provide out-of-state litigants with a forum “free from prejudice in favor of a local litigant”).

¹⁰⁰ See WAYNE MCCORMACK, *FEDERAL COURTS* 153 (1984); Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 HARV. L. REV. 483, 495–98 (1928). See also *Defining A Corporation’s “Principal Place of Business”*: *The United States Supreme Court’s Decision in Hertz Corp. v. Friend*, 56 LOY. L. REV. 733, 737–39 (2010).

¹⁰¹ See, e.g., *Fredman v. Fredman*, 960 So. 2d 52 (Fla. Dist. Ct. App. 2007) (holding that mother, who was the primary physical custodian of two children, could not move from Florida to Texas with the children because remaining in Florida was in the child’s best interests).

¹⁰² As stated in the Introduction, this essay is not focusing on the unique problems with the domestic relations exception in the context of federal question jurisdiction, but scholars have amply addressed the importance of a federal forum for domestic relations cases in the federal question jurisdiction context. See Harbach, *supra* note 5, at 184–200; Silverman, *supra* note 2, at 1398–1426. In fairness to the *Ankenbrandt* Court, *Ankenbrandt* itself was a diversity jurisdiction case, see *Ankenbrandt v. Richards*, 504 U.S. 689, 691 (1992), so the Court did not need to

IV. Alternative Approaches and Solutions to the Faulty Basis for the Domestic Relations Exception

In order to resolve the currently confusing and inconsistent application of the domestic relations exception and in an effort to root the domestic relations exception in a firmer foundation than its current basis in highly questionable statutory interpretation and flawed history, this essay offers four potential alternatives to the current formulation and foundation of the domestic relations exception.

A. Amendment to 28 U.S.C. § 1332

The most obvious (but least likely) solution to both the lack of clarity surrounding the domestic relations exception and the lack of a principled legal foundation for the domestic relations exceptions is for Congress to amend 28 U.S.C. § 1332. Essentially, Congress would incorporate the actual language of a domestic relations exception within 28 U.S.C. § 1332.

Amending 28 U.S.C. § 1332 to include the domestic relations exception is the “best” solution because the amendment could provide clear, express guidance as to the scope of the exception, therein resolving the currently inconsistent application of the domestic relations exception by federal courts. Moreover, a statutory amendment would firmly root the domestic relations exception in a legislature’s policy judgment, rather than a court’s strained statutory interpretation that Congress silently affirmed *Barber*’s dictum by not expressly rejecting it.

B. Federalism

In lieu of a statutory amendment to 28 U.S.C. § 1332, courts could find a stronger and more principled basis for the domestic relations exception than the belabored statutory

consider the ramifications of excluding federal question jurisdiction from family law litigants. However, despite the fact that Court dedicated a section of its opinion to public policy, *see id.* at 703–04, the Court need not have considered policy at all, given its alleged statutory basis for its ruling and the debatable propriety of a court considering policy determinations at all in the light of an unambiguous statute. *See supra* note 93.

interpretation offered by *Ankenbrandt*. One potential alternative foundation is that general principles of federalism and, specifically, the Tenth Amendment¹⁰³ reserve the power to adjudicate domestic relations issues for the states.

While this essay will not engage in a thorough exploration of the potential federalism-based foundation for the domestic relations exception, the argument can be made that, by providing that powers not delegated to the United States, nor prohibited to the states, are “reserved respectively, or to the people,”¹⁰⁴ the Tenth Amendment requires that federal courts leave the adjudication of family law cases to state courts.¹⁰⁵ Thus, rather than relying on the current arguably baseless foundation for the domestic relations exception, courts could root the domestic relations exception in the express language of the Tenth Amendment and constitutional principles of federalism.

C. Abstention Doctrines

A potential alternative to an overarching, blanket domestic relations exception is for federal courts to use abstention doctrines to decline to exercise jurisdiction on a case-by-case basis.

Abstention doctrines allow federal courts to decline jurisdiction over cases despite the satisfaction of all jurisdictional and justiciability requirements.¹⁰⁶ The four general categories of abstention consist of (1) abstention to avoid duplicative litigation,¹⁰⁷ (2) abstention to avoid interfering with pending state proceedings,¹⁰⁸ (3) abstention to allow state courts to resolve

¹⁰³ U.S. CONST. amend. X.

¹⁰⁴ *Id.*

¹⁰⁵ See generally Linda A. Ouellette, *The Domestic Relations Exception to Diversity Jurisdiction*, 24 B.C. L. REV. 661 (1983).

¹⁰⁶ See Harbach, *supra* note 5, at 149.

¹⁰⁷ See *Colo. River Conservation Dist. v. Akin*, 424 U.S. 800, 817 (1976).

¹⁰⁸ See *Younger v. Harris*, 401 U.S. 37, 41 (1971).

unclear state law,¹⁰⁹ and (4) abstention from cases that amount to an appeal of a state court judgment.¹¹⁰

In fact, likely because of uncertainty regarding the scope of the domestic relations exception, many federal courts have already applied these abstention doctrines as the sole basis for dismissing family law cases, without relying on the domestic relations exception itself.¹¹¹

However, this abstention-based option does not resolve the most serious problems with the current state of the domestic relations exception. Sole reliance on abstention doctrines lends itself to even less clarity than the current domestic relations exception by creating a spotty, case-by-case approach to the determination of federal jurisdiction. This lack of clarity and minimal

¹⁰⁹ See *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 27–30 (1959) (abstaining to allow state court to interpret state statute of significant local importance); *Burford v. Sun Oil Co.*, 319 U.S. 315, 317–19 (1943) (abstaining from a particularly complex area of state law); *R.R. Comm’n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941) (abstaining to allow state court to rule on constitutionality of state laws).

¹¹⁰ See *D.C. Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415–16 (1923).

¹¹¹ For an example of a federal court applying *Colorado River* abstention to dismiss a family law case, see *Cerit v. Cerit*, 188 F. Supp. 2d 1239, 1248–49 (D. Haw. 2002) (dismissing father's petition for return of his child because state and federal proceedings could have differing results and were parallel). For examples of federal courts applying *Younger* abstention to dismiss family law cases, see *Moore v. Sims*, 442 U.S. 415, 423–35 (1979) (abstaining from ruling on challenge to the constitutionality of state child abuse statutes); *Chapman v. Oklahoma*, 472 F.3d 747, 749–50 (10th Cir. 2006) (abstaining from deciding plaintiff's allegations of a state family court system violating his constitutional rights); *Parejko v. Dunn County Circuit Court*, 209 F. App'x 545, 546–48 (7th Cir. 2006) (abstaining from case involving allegations that state divorce statutes violated due process); *Cormier v. Green*, 141 F. App'x 808, 812–15 (11th Cir. 2005) (per curiam) (abstaining from challenge to state alimony laws); *Mandel*, 326 F.3d at 273 (abstaining where plaintiff alleged violations of her constitutional rights when she was prosecuted for kidnapping her children and, subsequently, lost custody); *Meyers v. Franklin County Court of Common Pleas*, 23 F. App'x 201, 205–06 (6th Cir. 2001) (per curiam) (abstaining where parents alleged constitutional violation by state court for granting temporary custody to the county without an evidentiary hearing); *H.C. v. Koppel*, 203 F.3d 610, 613–14 (9th Cir. 2000) (abstaining where plaintiff sought to vacate child custody orders); *Kelm v. Hyatt*, 44 F.3d 415, 419–21 (6th Cir. 1995) (abstaining from divorce case because it involved “important state issues.”); *Malachowski v. City of Keene*, 787 F.2d 704, 708 (1st Cir. 1986) (per curiam) (abstaining from child custody case). For examples of federal courts applying *Pullman* abstention to dismiss family law cases, see *Belotti v. Baird*, 428 U.S. 132, 146–48 (1976) (holding that district court erred by not abstaining when state courts had not yet ruled on the constitutionality of a parental consent abortion statute); *Smelt v. County of Orange*, 447 F.3d 673, 678–82 (9th Cir. 2006) (abstaining from challenge to statutory prohibition of same-sex marriage); *Ziegler v. Ziegler*, 632 F.2d 535, 538–39 (5th Cir. 1980) (per curiam); *Magaziner v. Montemuro*, 468 F.2d 782, 786–87 (3d Cir. 1972). For a rare example of the application of *Burford* abstention to dismiss a family law case, see *Farkas v. D'Oca*, 857 F. Supp. 300, 303–04 (S.D.N.Y. 1994) (abstaining because resolution of federal RICO claim depended on determination of property ownership in state divorce proceeding). *But see Zablocki v. Redhail*, 434 U.S. 374, 379 n.5 (1978) (refusing to apply *Burford* abstention). For applications of the *Rooker-Feldman* doctrine in the context of family law, see *Mandel v. Town of Orleans*, 326 F.3d 267, 271 (1st Cir. 2003); *Newman v. State of Indiana*, 129 F.3d 937, 942 (7th Cir. 1997); *Anderson v. Colorado*, 793 F.2d 262, 263 (10th Cir. 1986).

guidance to litigants increases the likelihood that litigants will spend time, money, and emotional well-being to pursue cases that may be unexpectedly dismissed based on abstention. While abstention doctrines may provide a more principled foundation for the domestic relations exception than *Ankenbrandt*'s rationale, federal courts' sole reliance on abstention doctrines may actually exacerbate the current uncertain status of family law in the federal courts by causing more confusion, inconsistency, and unpredictability for litigants and attorneys.

D. Justiciability Doctrines

Similar to the abstention doctrines, justiciability doctrines could exempt family law cases from federal jurisdiction on a case-by-case basis.¹¹² In general, justiciability doctrines act as gatekeepers to assess whether a federal court can appropriately exercise jurisdiction over a case.¹¹³ Common examples of justiciability doctrines include the political question doctrine, ripeness, mootness, standing, and the prohibition on courts authoring advisory opinions.¹¹⁴

Beyond the case-by-case application of these justiciability doctrines, cases decided by the Supreme Court and the U.S. Court of Appeals for the Seventh Circuit suggest that the denial of review by a federal court based on standing and ripeness bear particular significance for family law.¹¹⁵

In regard to standing, as discussed above,¹¹⁶ in *Elk Grove*, the Supreme Court dismissed Michael Newdow's claim on the basis of "prudential standing."¹¹⁷ Standing has two distinct

¹¹² However, if Chief Judge Woods' ripeness suggestion were adopted, it would constitute a complete exclusion—not a case-by-case exclusion. See *infra* notes 126–29 and accompanying text.

¹¹³ CHEMERINSKY, *supra* note 61, at 44.

¹¹⁴ *Id.* at 44–45.

¹¹⁵ See *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 13 (2004); *Crowley v. McKinney*, 400 F.3d 965 (7th Cir. 2005).

¹¹⁶ See *supra* notes 50–63 and accompanying text.

¹¹⁷ *Elk Grove*, 542 U.S. at 12–13.

strands: (1) Article III, case-or-controversy standing¹¹⁸ and (2) prudential standing, which constitutes a “judicially self-imposed limit[] on the exercise of federal jurisdiction.”¹¹⁹

According to *Elk Grove*, the bounds of prudential standing “have not [been] exhaustively defined,”¹²⁰ but prudential standing encompasses “the general prohibition on a litigant’s raising another person’s legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff’s complaint fall within the zone of interests protected by the law invoked.”¹²¹ In dismissing *Elk Grove* for lack of prudential standing, the Court deemed it “prudent” to defer to state courts and state legislatures on “delicate issues of domestic relations.”¹²²

Yet, this concept of prudential standing, rather than resolving confusion, has caused even greater turmoil about the ability of federal courts to hear any family law cases.¹²³ Moreover, beyond critique by scholars,¹²⁴ the continued viability and scope of prudential standing has been questioned and limited to at least some extent by the Supreme Court in 2014.¹²⁵

In regard to ripeness, now-Chief Judge Diane P. Wood of the Seventh Circuit argued that the ripeness doctrine could also serve the goal of reserving domestic relations cases for state courts.¹²⁶ In her part-dissenting, part-concurring opinion, Chief Judge Wood wrote: “Given the primary responsibility that states have for the field of family law, perhaps the Supreme Court

¹¹⁸ *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–62 (1992)). Article III requires that a plaintiff’s allegations show that he suffered an “injury in fact” that a favorable judgment will redress. *Id.* (citing *Lujan*, 504 U.S. at 560–61).

¹¹⁹ *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984)).

¹²⁰ *Id.* at 12.

¹²¹ *Id.* (quoting *Allen*, 468 U.S. at 751).

¹²² *Id.* at 12–13.

¹²³ *See supra* note 10.

¹²⁴ *See supra* note 61.

¹²⁵ *See Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1388 (2014) (“Just as a court cannot apply its independent policy judgment to recognize a cause of action that Congress has decided, it cannot limit a cause of action that Congress has created merely because “prudence dictates.”) (internal citation omitted).

¹²⁶ *See Crowley v. McKinney*, 400 F.3d 965, 977 (7th Cir. 2005) (Wood, J., dissenting in part, concurring in part).

might hold some day that [a family law case] is not ripe until state remedies have been exhausted.”¹²⁷

Although Chief Judge Wood’s comment may amount to nothing more than a shot-in-the-dark prediction of the post-*Elk Grove* evolution of family law in the federal court system, her comment represents a significant expansion from prior notions of ripeness. Additionally, under Chief Judge Wood’s ripeness theory, the combination of the aforementioned abstention doctrines¹²⁸ and collateral estoppel¹²⁹ with this new requirement that state remedies must be exhausted before filing suit in federal court acts as a seemingly complete ban on federal jurisdiction over all family law-related issues.

Consequently, neither *Elk Grove*’s conception of prudential standing nor Chief Judge Woods’ state-remedy-exhaustion notion of ripeness offers an adequate solution to resolve the unclear scope or the faulty foundation of the domestic relations exception.

V. Conclusion

Many sensible and practical policy arguments support the existence of a domestic relations exception to federal court jurisdiction, ranging from favoring the judicial expertise of state courts in family law matters to lessening the caseload of federal courts to the proximity of state courts to the relevant domestic-relation-order enforcement agencies. However, in the face of an unambiguous federal statute like 28 U.S.C. § 1332, the judicial establishment of an exception to statutorily-created federal court jurisdiction improperly encroaches upon the policy-making role of the legislature. Furthermore, the flawed foundation of the domestic relations exception relies on inaccurate renditions of history and a method of statutory interpretation that

¹²⁷ *Id.* (internal citations omitted).

¹²⁸ *See supra* Part IV.C.

¹²⁹ *See Allen v. McCurry*, 449 U.S. 90, 103–05 (1980).

prioritizes implications from legislative silence over the plain meaning of the unambiguous language used by Congress in the statute.

The current formulation and application of the domestic relations exception poses serious problems. From a practical perspective, the domestic relations exception jurisprudence features contradiction, confusion, and inconsistency. From a policy perspective, the domestic relations exception risks foreclosing the invaluable federal forum to family law issues—even fundamental constitutional issues, as in *Elk Grove*. From the statutory interpretation perspective, the only current, expressly-accepted foundation for the domestic relations exception articulated by the Supreme Court requires people to accept the counterintuitive notion that the unambiguous breadth of the statutory phrase “all civil actions” should be superseded by Congress’s failure to explicitly reject dicta from an 1858 case that provided no reasoning or authority.

Unfortunately, resolving this quagmire likely requires congressional action. The use of justiciability doctrines and abstention doctrines as the basis for the domestic relations exception does little to resolve the confusion, inconsistency, and unpredictability of the application and scope of the domestic relations exception. Reforming the domestic relation exception’s foundation with federalism principles and the Tenth Amendment would provide a more satisfying historical basis for the exception and would replace a strained statutory interpretation with a strong constitutional framework. Yet, the federalism solution would require a revival of the Tenth Amendment from its current, nearly ornamental status—a revival that federal courts may be reluctant to endorse because of long-standing case law and the widespread applicability of a strong Tenth Amendment to challenge the authority of the federal government.¹³⁰

¹³⁰ For cases discussing the narrow applicability of the Tenth Amendment as an independent limit on the authority of the federal government, see generally *Reno v. Condon*, 528 U.S. 141 (2000); *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992); *South Dakota v. Dole*, 483 U.S. 203 (1987).

Therefore, a clear amendment to 28 U.S.C. § 1332 that statutorily creates the domestic relations exception and conclusively defines the parameters of the exception may be the only satisfactory solution to the flawed foundation and disjointed application of the domestic relations exception. Ultimately, to solve the domestic relations exception dilemma, either Congress or the federal courts must act to make family law “civil.”