

# A NON-CONTENTIOUS ACCOUNT OF ARTICLE III'S DOMESTIC RELATIONS EXCEPTION

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## ABSTRACT

*Scholars and jurists have long debated the origins and current scope of the so-called domestic relations exception to Article III. Rooted in the perception that certain family law matters lie beyond the power of the federal courts, the exception was first articulated in the nineteenth-century decisional law of the Supreme Court and has perplexed observers ever since. Scholarly debate continues, despite the Court's twentieth-century decision to place the exception firmly on statutory grounds in an effort to limit its potentially disruptive force.*

*This Article offers a novel, historically grounded account of the domestic relations exception, connecting its origins to the Article III distinction between "cases" and "controversies." Much domestic relations law fails to present a "controversy" within the meaning of Article III; the consensual nature of many status-altering acts (marriage, consensual divorce, adoption) forecloses a federal dispute-resolution role. But when federal courts hear "cases" arising under federal law, they have full power to exercise both contentious and (what Roman and civil lawyers refer to as) non-contentious jurisdiction. Our non-contentious account explains a range of puzzles, including why Article III courts can issue decrees at the core of the domestic relations exception when the matter at hand implicates federal law.*

## INTRODUCTION

Like the probate exception, a doctrinal twin separated at birth, the domestic relations exception to Article III has been the subject of frequent scholarly contestation.<sup>1</sup> No consensus account explains the exception's con-

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1 See, e.g., Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571 (1984); Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073 (1994); Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669 (1995); Allan D. Vestal & David L. Foster, *Implied Limitations on the Diversity*

stitutional and statutory origins or its scope in the present day. To be sure, the Supreme Court narrowed the domestic relations exception considerably in *Ankenbrandt v. Richards*,<sup>2</sup> holding that it was a restriction on the statutory power of the district courts to exercise diversity jurisdiction.<sup>3</sup> But Judge Richard Posner, among others, has observed that the same language that supposedly gave rise to the exception on the diversity side (a statutory grant of jurisdiction limited to matters of “common law or in equity” that omits claims before the ecclesiastical courts in England) also appears in the statutory grant of jurisdiction over cases (in law and equity) arising under the Constitution, laws, and treaties of the United States.<sup>4</sup> How then can the exception apply only to diversity matters and not also impose a limit on the power of the federal courts to entertain federal question cases that happen to arise in the context of domestic relations?

Other questions abound. The federal courts have long disclaimed jurisdiction as to matters related to divorce, alimony, and child custody, yet have demonstrated a willingness to exercise appellate jurisdiction over such matters arising in territorial courts.<sup>5</sup> Equally puzzling, the Court views the domestic relations exception as extending to matters of child custody though the only Supreme Court case addressing the matter arose in the context of a federal habeas corpus petition.<sup>6</sup> Further, while some have proposed to explain the domestic relations exception with a status-property distinction,<sup>7</sup> the courts have never wholeheartedly endorsed such a view.<sup>8</sup> And while the Court attempted to clarify the scope of the exception in *Ankenbrandt*, lower federal courts continue to apply the domestic relations exception in an apparently haphazard fashion.<sup>9</sup>

In this Article, we propose a new account of the domestic relations exception. We begin with the proposition that Article III extends the judicial power only to the “Cases” and “Controversies” that appear on the jurisdic-

*Jurisdiction of Federal Courts*, 41 MINN. L. REV. 1 (1956); Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824 (1983).

2 504 U.S. 689, 704 (1992) (reading the exception to block suits brought in diversity for divorce, alimony, and child support).

3 *Id.* at 700.

4 *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006) (citing Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73, 78 (1789)); see also *Ankenbrandt*, 504 U.S. at 715 n.8 (Blackmun, J., concurring) (noting that the federal-question grant of jurisdiction also limits the judicial power in federal question cases to cases in law and equity).

5 See *De La Rama v. De La Rama*, 201 U.S. 303 (1906) (exercising jurisdiction over a case arising in the territorial court of the Philippines); *Simms v. Simms*, 175 U.S. 162 (1899) (affirming a judgment for alimony in a divorce suit arising from a judgment of the Supreme Court of the Territory of Arizona).

6 *In re Burrus*, 136 U.S. 586, 595 (1890).

7 See *Vestal & Foster*, *supra* note 1, at 31.

8 See *Spindel v. Spindel*, 283 F. Supp. 797, 807 (E.D.N.Y. 1968) (noting that courts decided questions of status incidental to the exercise of their established jurisdiction).

9 See generally Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1455–56, 1461–66 (2006) (discussing lower courts’ conflicting applications of the exception post-*Ankenbrandt*).

tional menu.<sup>10</sup> While the term “cases” extends broadly enough to include both disputes over federal law between adverse parties and a range of ex parte or non-contentious federal matters (such as naturalization petitions, the administration of bankruptcy estates, and in rem proceedings in admiralty jurisdiction),<sup>11</sup> the idea of a “controversy” has a narrower scope. It encompasses only disputes between the opposing parties identified in Article III and forecloses the federal courts from entertaining administrative or ex parte proceedings based on state law.<sup>12</sup> We think the inability of federal courts to exercise non-contentious investitive jurisdiction over matters of state law helps to explain the domestic relations exception. Just as the ex parte character of much state probate law means that Article III courts cannot entertain such matters,<sup>13</sup> so too we find that the ex parte and investitive features of state family law place some aspects of domestic relations beyond the federal judicial power.

Domestic relations often begin with a marriage (but couples can certainly cohabit and start a family without one). Although sometimes characterized as a matter of contract, the recognition of a legally valid marriage works as a consensual change in the parties’ status.<sup>14</sup> The parties do not

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10 See U.S. CONST. art. III, § 2 (extending the judicial power of the United States to all “[c]ases, in [l]aw and [e]quity, arising under this Constitution, the Laws of the United States, and Treaties” and “to [c]ontroversies” to which the United States is a party, between two or more states, between a state and citizens of another state, and between citizens of another state or foreign state).

11 See James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1361, 1367–71, 1375 (2015) (listing naturalization proceedings, transfers of property, warrant applications, and uncontested bankruptcy proceedings, among others, as proceedings that lack adverse parties). *But cf.* Ann Woolhandler, *Adverse Interests and Article III* (Va. Pub. Law & Legal Theory, Working Paper No. 2016-41, 2016), <http://ssrn.com/abstract=2803279> (arguing that such proceedings often feature adverse interests, if not adverse parties).

12 See Pfander & Birk, *supra* note 11, at 1356–57 (explaining that “[c]ontroversies” arise between adverse parties and are subject to federal diversity jurisdiction whereas “[c]ases” include not only disputed adverse claims but also certain petitions brought on an ex parte basis (quoting U.S. CONST. art. III, § 2)).

13 For an account of the probate exception predicated on the inability of federal courts to entertain ex parte or uncontested proceedings on matters governed by state law, see James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533 (2014). The domestic relations exception shares something in common with the probate exception, which operates to foreclose federal jurisdiction over certain probate matters that would otherwise qualify for federal jurisdiction. See *Marshall v. Marshall*, 547 U.S. 293, 306–08 (2006) (“Like the domestic relations exception, the probate exception has been linked to language contained in the Judiciary Act of 1789.”). Both exceptions have been connected to the omission of traditional ecclesiastical matters from Article III. See *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930) (explaining that federal jurisdiction over vice consuls did not include suits for divorce or alimony because these matters “would have belonged to the ecclesiastical Courts” and were thus not included in Article III’s jurisdictional scope). We challenge this account in Section II.A.

14 Marriage was viewed as a “civil status, of one man and one woman united in law for life” but was, in legal writings, denominated as a contract though different than other

dispute a claim; they seek to secure the benefits (legal, religious, social) that come with the formal recognition of their union.<sup>15</sup> So long as the right to matrimony has been defined by state law,<sup>16</sup> federal courts as such have no role to play in the administration of that law. Federal judges do occasionally perform marriages, but do so by virtue of local law that confers power on them to preside over a marital ceremony.<sup>17</sup> Where, by contrast, Congress has adopted federal laws to govern aspects of domestic relations,<sup>18</sup> we have little doubt that the federal courts could perform the full panoply of administrative chores that today fall within the domestic relations exception. Such matters would constitute not controversies under state law, but cases under federal law as to which the adverse-party requirement does not apply in full.<sup>19</sup> Similarly, treaty-based claims in the domestic relations sphere arise

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contracts because of the personal nature of the subject. JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS 27–28 (Bos., Little, Brown & Co., 3d ed. 1859) (1852).

15 Once a marriage has been determined valid, either because a couple has produced a legally viable marriage certificate or is otherwise able to demonstrate a valid informal marriage, the spouses are able to secure the rights and privileges of marital status. See MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 64 (1985). Formal recognition counts for a lot. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (emphasizing the importance of the “symbolic recognition” and “material benefits” that society makes available to married couples).

16 See HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 12, 19–20 (2000) (“Many legal subjects were monopolies of the states. And one such subject was the law of marriage and divorce. Every state had a law of marriage. Every state had its legal peculiarities.”).

17 See, e.g., DEL. CODE ANN. tit. 13, § 106 (West 2016) (authorizing a federal judge or magistrate of the state to perform a marriage ceremony); IDAHO CODE ANN. § 32-303 (West 2016) (same); N.J. STAT. ANN. § 37:1-13 (West 2016) (same); TEX. FAM. CODE § 2.202 (2016) (same). Justice Ruth Bader Ginsburg presides over marriages in the District of Columbia and invokes the powers vested by the Constitution and laws of the United States in pronouncing the couple husband and wife. Maureen Dowd, *Presiding at Same-Sex Wedding, Ruth Bader Ginsburg Emphasizes the Word ‘Constitution,’* N.Y. TIMES (May 18, 2015), <http://www.nytimes.com/politics/first-draft/2015/05/18/presiding-at-same-sex-wedding-ruth-bader-ginsburg-emphasizes-a-key-word/>. This seems apt to the extent one regards the territorial laws of the District of Columbia as laws of the United States.

18 We take no position on Congress’s power to legislate a national code of family law. For doubts on the subject, see *United States v. Morrison*, 529 U.S. 598 (2000), striking down part of the Violence Against Women Act (VAWA) on federalism grounds. For a critique of the Court’s decision, see generally Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619 (2001) (arguing that family and criminal law issues, such as violence against women, have long been subjected to federal lawmaking and that the VAWA should not be treated differently).

19 See Pfander & Birk, *supra* note 11, at 1356–57 (distinguishing between “cases” arising under federal law in which federal courts may exercise non-contentious jurisdiction and “controversies” over state law in which the federal courts may adjudicate only disputes between opposing parties).

under federal law and thus do not implicate the limited power of federal courts over matters of state law.<sup>20</sup>

Courts have administered other features of domestic relations in the absence of a dispute between parties. For example, the English High Court of Equity took the lead in appointing guardians for children who had no parents to play that role.<sup>21</sup> No genuine dispute was required to bring this appointment power into play. Similarly, parties seeking (no-fault) divorce often do so today in the absence of any dispute,<sup>22</sup> just as in earlier times the parties to a nominally contested divorce might feign a dispute to secure a formal change in status that they both (devoutly) sought.<sup>23</sup> If one thinks of the family as a bundle of legal relations called into being through the performance of legally binding acts (marriage) and split asunder by other legally binding acts (divorce), one can easily see why the federal courts viewed themselves as lacking the power to perform any uncontested registration or certification role necessitated by the formalization of these state law status changes. They simply lacked power to administer state law in the absence of a dispute. But once a dispute arose between parties whose disparate citizenship satisfied the demands of federal jurisdiction, the federal courts were, if sometimes grudgingly, willing to entertain the matter as a part of their standing diversity jurisdiction.

One gets a sense of this grudging willingness from the Supreme Court's first attempt to explain the scope of federal judicial power in the domestic relations context. In *Barber v. Barber*,<sup>24</sup> the Court agreed to permit the lower federal courts to hear a dispute between former spouses that met the require-

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20 See, e.g., Hague Convention on the Civil Aspects of International Child Abduction, art. 1, Oct. 25, 1980, 80 Stat. 271, 1343 U.N.T.S. 98 (seeking to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and to "ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States").

21 The English king, in his position as *parens patriae*, was the legal guardian of minors and delegated the task of appointing a legal guardian to the lord chancellor. JOSEPH CHITTY, JR., A TREATISE ON THE LAW OF THE PREROGATIVES OF THE CROWN; AND THE RELATIVE DUTIES AND RIGHTS OF THE SUBJECT 155–58 (London, Joseph Butterworth & Son 1820). When the power was granted to the lord chancellor, it was not considered to form part of the chancellor's general jurisdiction but was "merely a power of administration." *Id.* at 158 (emphasis omitted).

22 Every American jurisdiction today allows no-fault divorces. See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79, 90 n.50 (1991) (stating that all jurisdictions but Arkansas, which now allows for a version of a no-fault divorce after non-cohabitation lasting at least eighteen months, have adopted explicit no-fault grounds for divorce).

23 Feigned disputes to obtain divorces, often called collusive divorces, were refused by a number of states when the parties' plans came to light. See CARROLL D. WRIGHT, A REPORT ON MARRIAGE AND DIVORCE IN THE UNITED STATES, 1867 TO 1886, at 118 (Wash., Gov't Printing Office 1891). Collusion was particularly problematic in late eighteenth-century England and may have existed from the beginning of divorce procedure dating back to 1700. See LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530–1987, at 208 (1990).

24 62 U.S. 582 (1858).

ments of diversity.<sup>25</sup> But, pressed by a dissenting opinion that argued for a broad exception, the Court explained that certain other questions of domestic relations lay outside the scope of federal judicial power: “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 *a vinculo*, or to one from bed and board.”<sup>26</sup> While one can certainly interpret this language more broadly, we think the majority may have been identifying situations in which the requisite elements of diversity of citizenship were likely unavailable. To the extent that the Court sought to define judicial power by reference to the elements of diversity, and said nothing to foreclose federal question jurisdiction, the decision identifies an important fracture line in Article III, although we have some tidying up to do around the edges.

In offering a novel view of the domestic relations exception, this Article begins in Part I with a critical overview of leading scholarly accounts. In Part II, the Article lays the groundwork for our non-contentious alternative, offering both a brief history of marriage and placing its many investitive features into the civil law context of non-contentious jurisdiction. Part III of the Article applies our theory to current issues in domestic relations law, including the Court’s decision in *Ankenbrandt* and the questions that have since arisen in the lower federal courts. We conclude that some issues in the current debate over family law limits on federal judicial power can best be resolved with a non-contentious view of the domestic relations exception.

## I. TRADITIONAL ACCOUNTS OF THE DOMESTIC RELATIONS EXCEPTION

In this Part, we offer a quick sketch of the widely ranging accounts of the domestic relations exception that have worked their way into the scholarly literature.<sup>27</sup> We begin by considering and rejecting one of the most frequently invoked theories of the exception, the claim that it derives from the inability of the federal courts to entertain matters that were grist for the ecclesiastical courts in England. We next consider a variety of allied accounts, all of which emphasize the traditional role of state law in defining domestic relations and the corresponding expertise of the state courts in such matters. Finally, we sketch two articles, the claims of which hint at relevant considerations.

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25 *Id.* at 592.

26 *Id.* at 584. For the cogent suggestion that *Barber* represents a canonical example of family law localism, primarily explicable through the logic of coverture, see JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 24–26 (2014).

27 The Supreme Court has not offered a definitive rationale for the domestic relations exception, though its decision in *Ankenbrandt* noted several proffered explanations. 13E CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3609.1 (3d ed., rev. 2016).

### A. Federal Courts and Ecclesiastical Jurisdiction

Scholars (and courts) have often suggested in one way or another that federal courts lack the power to entertain matters that were decided in England not by the courts of law or equity, but by the ecclesiastical courts.<sup>28</sup> This claim has a superficial plausibility. In England, the High Court of Chancery handled matters of equity jurisdiction, the Courts of Common Pleas and King's Bench entertained proceedings at law, and the court of admiralty managed matters that arose on salty water and on the "great" navigable streams of the country, such as the Thames River.<sup>29</sup> A separate set of English courts, the ecclesiastical courts, exercised a very different jurisdiction.<sup>30</sup> Church courts in England handled such secular matters as the admission of wills to probate, intestate succession,<sup>31</sup> bastardy,<sup>32</sup> defamation,<sup>33</sup> as well as more evidently religious matters, such as heresy and excommunication.<sup>34</sup>

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28 See, e.g., *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 383–84 (1930) (voicing the view that the ecclesiastical nature of domestic relations suits foreclosed federal courts of law and equity from entertaining such matters); *Barber*, 62 U.S. at 590–91 (discussing state court jurisdiction over matters given to the ecclesiastical court and the ability of courts of equity to interfere to compel payment of alimony once decreed by a court of competent jurisdiction). But see Bradley G. Silverman, Note, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L.J. 1364, 1399 (2016) (calling the claim that domestic relations cases fall beyond the scope of Article III jurisdiction because English law and equity courts could not hear these cases an oversimplification of "the jurisdictional complexities of English domestic-relations law" that "disregards colonial practice").

29 For an overview of the structure of English courts in the eighteenth century, see I W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 194–264, 446–76 (3d ed., rev. 1922).

30 *Id.* at 580–632; see also R. H. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* 171 (1987) ("Justice in England was not a unitary matter. Merchant courts, borough courts, and ecclesiastical courts all exercised jurisdiction over matters not covered, or only partially covered, by the royal courts.").

31 HOLDSWORTH, *supra* note 29, at 625 ("The ecclesiastical courts obtained jurisdiction over grants of Probate and Administration, and, to a certain degree, over the conduct of the executor and the administrator.").

32 I WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* \*428, \*442–47 (discussing the circumstances of bastardy and the role of parents and the law). Bastardy frequently arose in questions of divorce. In cases of total divorce, the marriage was declared null, as if never having been. "The issue of such marriage, as is thus entirely dissolved, are bastards." *Id.* at 428. The close relationship between marriage and bastardy elucidates the ecclesiastical jurisdiction over such matters.

33 In fact, until most of their powers were abolished or transferred to specialized courts in the mid-nineteenth century, the ecclesiastical courts in England "exercised a very extended jurisdiction, comprising not only what we should ordinarily call ecclesiastical causes, but matrimonial suits and divorces *a mensa et thoro*, all testamentary causes and suits, suits for church rates, and suits for defamation." *The English Law Courts, VI: The Ecclesiastical Courts*, 88 GREEN BAG 330, 330 (1896).

34 HOLDSWORTH, *supra* note 29, at 616–19, 630 (noting that heresy is the "most important" offense against religion and discussing the court's mode of enforcement of its decrees by way of excommunication).

They also handled a wide range of domestic relations matters, including marriage, divorce,<sup>35</sup> and some aspects of custody and support.<sup>36</sup>

Article III extends the judicial power to cases in law and equity, arising under the Constitution, laws, and treaties of the United States, and to cases of admiralty jurisdiction,<sup>37</sup> but it does not confer jurisdiction over ecclesiastical matters. One can argue from this omission that Article III excludes from federal judicial cognizance all matters that the English church courts handled at the time of the framing. By the same token, when Congress in 1789 conferred jurisdiction on the lower federal courts over disputes between citizens of different states, it expressly declared that the jurisdiction would extend only to suits in “law or in equity.”<sup>38</sup> Both the constitutional provision and the iconic early codification of the judicial power thus refrain from conferring ecclesiastical jurisdiction. Perhaps, then, the federal courts simply cannot hear ecclesiastical matters—a gap in federal judicial power that could explain the domestic relations exception. Indeed, when the Supreme Court gave voice to a limited modern version of the exception in *Ankenbrandt v. Richards*,<sup>39</sup> it relied on Congress’s longstanding grant of jurisdiction only in law and equity in concluding that domestic matters were excluded.<sup>40</sup>

For three reasons, however, we do not believe that the omission of ecclesiastical jurisdiction from Article III and the diversity statute can explain the domestic relations exception. First, as one of us has argued elsewhere, it would have been entirely incongruous for the framers of Article III to have extended federal judicial power to ecclesiastical matters.<sup>41</sup> Ecclesiastical courts arose in England to adjust relations between parishioners and the established church. If parishioners disobeyed church law, through fornica-

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35 *Id.* at 621–24 (stating that ecclesiastical courts had undisputed jurisdiction in matrimonial cases and complete control over divorce law until 1857); *see also* BLACKSTONE, *supra* note 32, at \*421 (“The holiness of the matrimonial state is left entirely to the ecclesiastical law. . .”).

36 Issues of custody and guardianship of minors were traditionally handled by the Court of Chancery by way of the King’s prerogative power. CHITTY, *supra* note 21, at 156 (characterizing the care of infants as “peculiarly a prerogative of the Crown”). Canon law, however, gave some jurisdiction to ecclesiastical courts to appoint guardians as protectors of the interests of children. HELMHOLZ, *supra* note 30, at 215. Ecclesiastical courts only regularly provided guardians for minors with potential rights to part of a decedent’s estate. Thus the limited reach of those courts was tied up in their exercise of probate jurisdiction. *Id.* at 243. Alimony or support payments were more closely tied to the power of the ecclesiastical courts to issue divorce decrees. Traditionally, after a wife was successful in a suit against her husband, the court awarded her permanent alimony as a continuation of the husband’s spousal duty. STONE, *supra* note 23, at 210. The formal relationship remained intact.

37 U.S. CONST. art. III, § 2.

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

39 504 U.S. 689 (1992).

40 *Id.* at 698–700.

41 Pfander & Downey, *supra* note 13, at 1544–46.



tion or blasphemy, say, they were subject to sanctions.<sup>42</sup> The ultimate sanction, excommunication, severed the tie between communicant and church, threatening the soul of the outcast parishioner. Even more mundane disputes, such as those over probate or intestate succession, depended on the threat of excommunication to give teeth to church court orders, although secular courts would lend a hand.<sup>43</sup> One can easily see why the framers of the Constitution, which after all creates a secular government with no established church and rules out religious tests for office, would have omitted such a judicial authority.<sup>44</sup> If no federal court was thought to have had any business issuing an excommunication decree, the omission of ecclesiastical jurisdiction from Article III offers little assistance in defining the scope of the judicial power.

Second, it would be extremely odd to conclude that all subjects handled by the church courts in England have been placed off limits to the federal judiciary. To be sure, some subjects of ecclesiastical competence (probate and domestic relations) have been understood to fall primarily within the competence of the state courts<sup>45</sup> (even there, states established probate and orphans' courts, rather than church courts, to handle the business).<sup>46</sup> But many matters once handled by the church courts now appear regularly on federal dockets. Consider usury claims, a frequent topic of ecclesiastical

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42 The severity of sanctions depended largely on the seriousness of the crime. A lesser offense might warrant a "monition," a judicial warning, while a more serious offense would merit a penance. See R.B. OUTHWAITE, *THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS, 1500–1860*, at 10 (2006).

43 Ecclesiastical courts enforced their decrees through excommunication. However, "[i]f the excommunicate did not submit within forty days, the ecclesiastical court signified this to the crown, and thereon a writ de excommunicato capiendo issued to the sheriff. He took the offender and kept him in prison till he submitted." See HOLDSWORTH, *supra* note 29, at 630–31; see also R. H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW 358-60* (1996) (detailing how secular courts provided the means necessary for ecclesiastical courts seeking to enforce their excommunication decrees).

44 The records of the federal convention do not show even a proposal to confer ecclesiastical jurisdiction on federal courts. See 1 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 125 (Max Farrand ed., 1910) (omitting any reference to ecclesiastical courts from the index of the constitutional debates).

45 See GROSSBERG, *supra* note 15, at 238 (noting the primacy of the state judiciary in devising and applying the basic principles of nineteenth-century family law); HARTOG, *supra* note 16, at 12–20 ("States were the powerful legal institutions in the government of marriage. They were where marriages were constituted legally."); Pfander & Downey, *supra* note 13, at 1550 ("At the time of the [f]raming, state court systems handled probate matters, and few would have anticipated the wholesale transfer of probate proceedings from state to federal court."); see also *Glidden Co. v. Zdanok*, 370 U.S. 530, 581 n.54 (1962) (describing both probate and domestic relations proceedings as those "traditionally within the domain of the States").

46 The first family law courts developed in the early twentieth century and today most state court systems have family courts. See Cahn, *supra* note 1, at 1091. Probate courts developed even earlier, dating back to the colonial era. See John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 *PROB. L.J.* 77, 91 (1997) (describing the varied powers of the colonial probate courts).

investigation.<sup>47</sup> Today, a federal statute<sup>48</sup> regulates the usury claims that individuals can mount against nationally chartered banks and no one argues that the absence of ecclesiastical power debars the federal courts from entertaining the claims.<sup>49</sup> Similarly, federal courts often hear defamation claims, either in the exercise of their diversity jurisdiction,<sup>50</sup> or on review of the state courts' rejection of a constitutional defense.<sup>51</sup> The usury and defamation examples underscore an important truth: the power of the federal courts extends to all matters of federal law. The principle of co-extensivity holds that the federal courts have power to adjudicate federal questions that arise from any lawful federal statute or from claims that state action violates the Constitution.<sup>52</sup>

Third, with the growing importance of federal and international law in matters relating to child custody and support, one can scarcely imagine a world in which all domestic relations matters lie beyond the reach of the federal judiciary.<sup>53</sup> Congress has adopted the Parental Kidnapping Prevention Act, a federal law that aims to strengthen the interstate enforcement of child custody decrees.<sup>54</sup> To address the same group of issues at the international level, the United States has ratified an international treaty to secure

47 Canon 109 of the ecclesiastical canons of 1604 listed usury as an offense that required the churchwardens to present the offender "to the intent that they, and every of them, may be punished by the severity of the laws, according to their deserts . . . ." 6 CHURCH OF ENGLAND RECORD SOCIETY: THE ANGLICAN CANONS 1529-1947, at 409 (Gerald Bray ed., 1998).

48 12 U.S.C. §§ 85-86 (2012).

49 See *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 9-11 (2003) (concluding that federal law entirely preempts the application of state usury laws to national banks, thus transforming all such usury claims into federal rights of action).

50 See, e.g., *Biospherics, Inc. v. Forbes, Inc.*, 151 F.3d 180 (4th Cir. 1998) (applying state defamation law in the context of diversity jurisdiction); *Caster v. Hennessey*, 781 F.2d 1569, 1570 (11th Cir. 1986) (reversing the district court's dismissal of a state defamation claim brought under the court's diversity jurisdiction).

51 See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (holding on appeal from state court that the First Amendment protected the newspaper from liability for defamation of a public figure).

52 See, e.g., *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 809 (1824) (explaining that the great object of the judiciary article in extending jurisdiction over all cases was to "make it co-extensive with the power of legislation"); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 384 (1821) (offering as a political axiom that "the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws").

53 For a critique of the overriding concern with localism in family law despite creeping federal involvement, see Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. 623, 629 (2014) (noting that even though scholars have recognized the involvement of federal law in domestic relations matters, a continued belief in the exclusive role of the states persists); see also HASDAY, *supra* note 26, at 17-66.

54 Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A (2012); see *Thompson v. Thompson*, 48 U.S. 174, 187 (1988) (holding that the "context, language, and history of the PKPA together make out a conclusive case against inferring a cause of action in federal court to determine which of two conflicting state custody decrees is valid").

the child custody rights of non-resident parents.<sup>55</sup> Implementing legislation assigns these disputes to the federal courts,<sup>56</sup> and one such dispute recently made its way to the Supreme Court.<sup>57</sup> A full-throated domestic relations exception would threaten not only the coherence and uniformity of federal law but also the power of Congress to rely on the federal courts to implement the nation's international obligations.

No wonder, then, that in defining the modern limits of the domestic relations exception, the Supreme Court restricted the exception to the diversity jurisdiction of the lower federal courts. In *Ankenbrandt*, the Court treated the diversity statute as if it incorporated the historic law-and-equity limits and thus excluded matters involving domestic relations.<sup>58</sup> Congress had, by reenacting the provision without change, incorporated the Court's own domestic relations gloss into the statute.<sup>59</sup> Such a strategy works to cabin the exception, leaving the federal question jurisdiction of the lower federal courts intact, and preserving the Court's own power to review state court decisions for compliance with federal law. But the Court's dodge came at the cost of clarity and consistency. Hence, Justice Blackmun's caustic observation that the same law-and-equity limits apparently applied to other historic statutory grants of subject matter jurisdiction (and also perhaps to those in Article III).<sup>60</sup> Nonetheless, one can argue that, by glossing a statute, *Ankenbrandt* at least tied the exception down to a specific text and gave Congress (rather

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55 Hague Convention on the Civil Aspects of International Child Abduction art. 1, Oct. 25, 1980, 80 Stat. 271, 1343 U.N.T.S. 98, 98 (seeking to "secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "[t]o ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States").

56 International Child Abduction Remedies Act, Pub. L. No. 100-300, 102 Stat. 437 (codified at 22 U.S.C. §§ 9001-08, 9010-11, and 42 U.S.C. § 663); see generally *Abbott v. Abbott*, 560 U.S. 1 (2010) (interpreting the International Child Abduction Remedies Act).

57 *Chafin v. Chafin*, 133 S. Ct. 1017 (2013) (holding that, after a child is returned to his or her country of habitual residence pursuant to a court order, any appeal of such an order is not moot).

58 *Ankenbrandt v. Richards*, 504 U.S. 689, 698 (1992) (discussing the Judiciary Act of 1789 and "[t]he defining phrase [that] 'all suits of a civil nature[,] at common law or in equity'" demarcated the terms of diversity jurisdiction, thereby excluding domestic relations matters (quoting 1948 Judicial Code and Judiciary Act, 28 U.S.C. § 1332)).

59 *Id.* at 700 ("We thus are content to rest our conclusion that a domestic relations exception exists 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, when the statute limited jurisdiction to 'suits of a civil nature[,] at common law or in equity.'" (quoting 1948 Judicial Code and Judiciary Act, 28 U.S.C. § 1332)).

60 *Id.* at 715 n.8 (Blackmun, J., concurring) (noting that the federal question grant of jurisdiction also limits the judicial power in federal question cases to cases in law and equity).

than new historical research) primary responsibility for shaping the exception's future direction.<sup>61</sup>

*Ankenbrandt* suffers from another defect, one anticipated in Judge Weinstein's opinion in *Spindel v. Spindel*.<sup>62</sup> There, Weinstein observed that Article III's law-and-equity limits apply only to cases arising under the Constitution, laws, and treaties of the United States.<sup>63</sup> A similar law-and-equity limit does not apply to the extension of judicial power to controversies between citizens of different states.<sup>64</sup> Weinstein drew the obvious conclusion: while the law-and-equity limits might constrain to some extent the power of the federal courts in federal question cases, the limits do not evidently apply to controversies between parties whose alignment satisfies the jurisdictional requirements of Article III.<sup>65</sup> Weinstein's point, though not particularly useful in the wake of *Ankenbrandt's* restriction on the *statutory* power of the federal courts in diversity suits, will prove helpful later in the Article when we attempt to reconstruct the Article III origins of the domestic relations exception.

### B. Traditional State Control of Domestic Relations

Before the Constitution's framing, states (and before them, colonies) exercised control over matters of domestic relations.<sup>66</sup> For the most part, as the Court observed in *In re Burrus*,<sup>67</sup> this tradition of state control has shaped conceptions of the proper allocation of lawmaking authority between the states and the federal government. Observers commonly note that the states have traditionally controlled the content of domestic relations law<sup>68</sup> and have, in the process, gained significant expertise in the resolution of domes-

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61 See Cahn, *supra* note 1, at 1083 (noting that "*Ankenbrandt* does not preclude Congress from enacting legislation to change the parameters of the Exception to allow federal courts to hear [domestic relations] cases").

62 283 F. Supp. 797, 800–01 (E.D.N.Y. 1968).

63 *Id.*

64 *Id.*

65 *Id.*

66 Cf. Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297, 1322–23 (1998) (noting that the Founders contemplated exclusive localism in family law but failed to discuss a number of topics, including administrative law and economic regulation, now within federal jurisdiction).

67 136 U.S. 586, 593–94 (1890).

68 But see Kristin A. Collins, *Federalism's Fallacy: The Early Tradition of Federal Family Law and the Invention of States' Rights*, 26 CARDOZO L. REV. 1761, 1767 (2005) (taking the position that the standard view of federal non-involvement in domestic relations law and policy is historically unfounded as "during the pre-Civil War era all three branches of the federal government were actively engaged in creating and enforcing laws and policies that bore directly on families"). Historical evidence may suggest that "contrary to modern-day federalists' contention that domestic relations has traditionally been a sacrosanct domain of the states, federal power did not historically yield to the states" and evidence of federal involvement in family law matters is well-documented. *Id.* at 1804; see also HASDAY, *supra* note 26, at 21–38 (tracing the presumption of family law localism as reflected in the law of federalism and jurisdiction).

tic relations matters.<sup>69</sup> Perceptions of state primacy in lawmaking and adjudication fuel a variety of different arguments about the need for and scope of the domestic relations exception. Scholars thus observe that the involvement of the federal courts could create a risk of conflicting or duplicative judicial decrees,<sup>70</sup> could insinuate federal courts into a body of law primarily of the state's own making,<sup>71</sup> and could interfere with the rightful primacy of state institutions in the crafting of domestic relations law.<sup>72</sup>

Justice Blackmun's concurrence in *Ankenbrandt* gave voice to these concerns. Although he vehemently disagreed with the Court's decision to treat the domestic relations exception as a gloss on the language of the diversity statute, he agreed that the Court was right to recognize a domestic relations exception in some circumstances.<sup>73</sup> Instead of treating the matter as one of

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69 See, e.g., *Struck v. Cook Cty. Pub. Guardian*, 508 F.3d 858, 860 (7th Cir. 2007) ("State courts . . . are assumed to have developed a proficiency in core probate and domestic-relations matters and to have evolved procedures tailored to them . . ."); *Solomon v. Solomon*, 516 F.2d 1018, 1025 (3d Cir. 1975) (explaining that state courts have developed a "well-known expertise in [domestic relations] cases and a strong interest in disposing of them"); *Buechold v. Ortiz*, 401 F.2d 371 (9th Cir. 1968) (same); see also *Atwood*, *supra* note 1, at 604 (arguing that state courts have developed a specialized expertise and are able to provide additional services such as counseling that a federal court lacks). But see *Joslin*, *supra* note 53, at 629 (questioning the viability of the state court expertise argument in the domestic relations realm).

70 See Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 149–52 (2009) (discussing the concern of duplicative proceedings as a typically proffered reason for abstention by federal courts); see also *Crouch v. Crouch*, 566 F.2d 486, 487 (5th Cir. 1978) ("The reasons for federal abstention in [domestic relations] cases are apparent: the strong state interest in domestic relations matters, the competence of state courts in settling family disputes, the possibility of incompatible federal and state court decrees in cases of continuing judicial supervision by the state, and the problem of congested dockets in federal courts.").

71 See GROSSBERG, *supra* note 15, at 17 ("[O]nly the newly created republican state had the authority and legitimacy to oversee domestic relations. . . . The federal government played a minor role in answering [how to renovate the domestic relations law]."); HARTOG, *supra* note 16.

72 *Mojica v. Noguerras-Cartagena*, 573 F. Supp. 2d 520, 522 (D.P.R. 2008) ("[S]tate 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 issues that arise out of conflicts over divorce, alimony, and child custody decrees." (quoting *Ankenbrandt v. Richards*, 504 U.S. 689, 704 (1992))). But see *Collins*, *supra* note 68, at 1792, 1802 (listing federal involvement in such matters touching upon domestic relations as widow war pensions that required the widow to provide Congress with adequate documentation to prove marriage and noting that opponents of the widow pension did not raise the issue that the federal government was meddling in matters traditionally reserved to the states).

73 *Ankenbrandt*, 504 U.S. at 707 (Blackmun, J., concurring) (agreeing that federal courts should not hear cases involving claims for divorce, alimony, and child custody); see also *Atwood*, *supra* note 1, at 575 (arguing that in "carefully defined circumstances the various abstention doctrines provide a principled basis for dismissing certain kinds of domestic relations claims" and that such use of abstention "would result in a principled approach to and closer analysis of domestic relations suits").

statutory interpretation, Blackmun would have recognized the statutory power of the federal courts to hear disputes in the domestic relations field but would have required them to abstain in favor of state court primacy in many contexts.<sup>74</sup> Invoking the doctrine of *Burford* abstention,<sup>75</sup> where the federal courts refrain from entertaining claims within an area of predominant state control, Blackmun urged the application of a similar regime to domestic relations matters.<sup>76</sup>

But the abstention alternative presents problems of its own. For starters, the Court has recently turned against discretionary abstention doctrines, viewing them as judge-made departures from statutory grants of jurisdiction that have no greater claim to legitimacy than judge-made rights of action.<sup>77</sup> The Court views both forms of judicial discretion as inconsistent with Congress's power to define the jurisdiction of the federal courts. Thus, the Court recently retired the doctrine of prudential standing,<sup>78</sup> eliminating the prospect that judges may avoid matters otherwise within their jurisdiction. Taking a page from the same playbook, Justice Scalia (the author of *Lexmark*) gave voice to an extremely narrow vision of *Burford* abstention, preferring a world with clear rules defining access to federal court.<sup>79</sup> In short, the time for expansion of *Burford* abstention into the field of domestic relations may have passed.

Discretionary doctrines of avoidance prove controversial from another vantage point. Critics have observed that domestic relations cases do not necessarily present questions that are more difficult or controversial or divisive than other matters of state law that fetch up on federal dockets.<sup>80</sup> Critics also

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74 *Ankenbrandt*, 504 U.S. at 707 (Blackmun, J., concurring) (“In my view, the long-standing, unbroken practice of the federal courts in refusing to hear domestic relations cases is precedent at most for continued discretionary abstention rather than mandatory limits on federal jurisdiction.”).

75 *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).

76 *Ankenbrandt*, 504 U.S. at 713–16 (Blackmun, J., concurring).

77 *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386–88 (2014) (discussing prudential standing and stating that a court may not limit a cause of action that Congress has created because “‘prudence’ dictates”).

78 *Id.* at 1387–88 nn.3–4 (noting that the “zone-of-interests test” is properly considered a question of statutory, not prudential, standing).

79 *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 362 (1989) (noting that although *Burford* abstention is concerned with “protecting complex state administrative processes from undue federal interference, it does not require abstention whenever there exists such a process”).

80 The law of eminent domain, for example, often produces disputes over the nature of the state's interest as diverse as issues of domestic relations. Yet neither the complexity of, nor the magnitude of, the state interest in these proceedings precludes these suits from adjudication in federal court. *See* *Cty. of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 191–92 (1959) (holding that abstention by the district court sitting in diversity was not justified just because the suit involved questions of state sovereignty).

observe that the *Erie*<sup>81</sup> doctrine applies with as much force to matters within the domestic relations field as to other matters of state law.<sup>82</sup> With *Erie* in place, the prospect of federal adjudication presents fewer risks that federal tribunals will ignore controlling state law.<sup>83</sup> To be sure, in fields where the law changes rapidly, any federal involvement may confront federal judges with questions of state law that the states themselves have yet to resolve. But existing law in many states empowers federal courts to certify such questions to state supreme courts for resolution, thus lessening the risk of improvident federal lawmaking.<sup>84</sup>

Pointing to the many ways in which domestic relations cases resemble other matters on the federal docket, some critics worry that judges may respond to these cases with more than their usual desire to steer clear of a complex body of state law.<sup>85</sup> For these critics, federal courts have “naturally” come to avoid domestic relations matters because they regard such issues of

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81 *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that a federal court sitting in diversity must apply the substantive law of the state as “declared by its Legislature in a statute or by its highest court in a decision”).

82 See Cahn, *supra* note 1, at 1116 (noting that the only difference between domestic relations cases and other diversity cases is the judicial reluctance to hear the former).

83 See, e.g., Barbara Freedman Wand, *A Call for the Repudiation of the Domestic Relations Exception to Federal Jurisdiction*, 30 VILL. L. REV. 307, 359 n.272 (1985) (noting that the Supreme Court made clear in *Erie* that section 34 of the Federal Judiciary Act of 1789 requires federal courts in diversity to apply state substantive law); Comment, *Domestic Relations—Federal Courts Held to Have Jurisdiction to Declare Divorce Invalid*, 44 N.Y.U. L. REV. 612, 636 (1969) (same); Ullman, *supra* note 1, at 1844 (*Erie*’s holding “that federal diversity courts must apply the substantive law of the state in which they sit eliminated the concern, evident” in prior domestic relations cases “that federal law should not apply to such quintessential state concerns as the regulation of the family”).

84 See, e.g., D.C. CODE ANN. § 11-723 (West 2016) (stating that a certification must set forth the question of law to be answered and “a statement of all facts relevant to the questions certified and the nature of the controversy in which the questions arose”); FLA. STAT. ANN. § 25.031 (West 2016) (authorizing the Supreme Court of Florida to answer, by written opinion, unclear questions of law certified by federal appellate courts); WASH. REV. CODE ANN. § 2.60.020 (West 2016) (allowing certification when “in the opinion of any federal court before whom a proceeding is pending, it is necessary to ascertain the local law of this state . . . and the local law has not been clearly determined” at which point the state “supreme court shall render its opinion in answer thereto”). For a discussion of the role of certification in the federal system and the potential for problems to arise in such a system, see Jonathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672 (2003).

85 See, e.g., Atwood, *supra* note 1, at 627 (concluding that the domestic relations exception saves the courts “from a distasteful category of litigation”); Cahn, *supra* note 1, at 1116 (noting federal courts’ reluctance to hear domestic relations cases); Stein, *supra* note 1, at 708-13 (discussing the judiciary’s bias against family law issues for being considered “beneath” the proper scope of the federal courts’ jurisdiction); Wand, *supra* note 83, at 385 (“Although not expressly articulated in federal court opinions, there is a persistent undercurrent in many cases involving the domestic relations exception: federal courts have a distaste for domestic relations disputes.”).

hearth and home as unfit for federal adjudication.<sup>86</sup> In this telling, federal judges come to the bench with a preconception of the disputes that belong in the federal courts. Complex commercial disputes and disputes over federal law certainly qualify, but the tendency of federal judges to shy away from domestic relations work signals to some a subtle form of gender bias. Critics thus suggest that the predominantly male members of the federal judiciary have consigned the gender-intensive issues that arise in family law to a separate domain.<sup>87</sup>

### C. *Technical Explanations*

One final set of arguments proposes to explain the domestic relations exception by reference to one or more technical features of the laws that confer jurisdiction. Tracking similar provisions in Article III, the diversity statute requires the presence of a dispute between citizens of different states.<sup>88</sup> At one time, the common law more or less presumed that spouses share a common domicile, thus negating federal jurisdiction over many intra-family disputes.<sup>89</sup> Yet, interestingly, the *Barber* Court moderated that view as early as 1859, observing that domicile was really a question of fact to be determined by reference to the intent and residence of the parties.<sup>90</sup> In what remains a leading domestic relations exception case, therefore, the *Barber* Court actually agreed to entertain a dispute between former spouses on the ground that they had established separate domiciles. A second technical

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86 See Judith Resnik, “Naturally” Without Gender: Women, Jurisdiction, and the Federal Courts, 66 N.Y.U. L. REV. 1682, 1682, 1739–50 (1991) (arguing that, despite clear federal involvement in family law issues, “when possible, federal courts divest themselves of ‘family issues’”).

87 *Id.* at 1698–99 (arguing that the absence of family law issues in federal court relegates those suits most closely associated with women to state courts, thus ignoring “the wealth of federal law that implicitly and explicitly regulates many aspects of family life”). Because the federal courts are “understood as the place in which the national agenda is debated and enforced,” excluding family law issues, and thereby, women, from the work of the federal judiciary labels both women and family law issues as undeserving of a place in public debate. *Id.*

88 28 U.S.C. § 1332 (2012) (giving district courts original jurisdiction to hear all civil actions that exceed the \$75,000 amount in controversy and arise between citizens of different states).

89 The long established view in England was that the domicile of the wife was always that of the husband. See Erwin N. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 65 HARV. L. REV. 193, 196 (1951). It was early accepted in the United States, however, that a wife may have a domicile separate from her husband. *Id.* at 208. But see *De La Rama v. De La Rama*, 201 U.S. 303, 307 (1906) (noting that, though relaxed in recent years, “husband and wife cannot usually be citizens of different states, so long as the marriage relation continues”).

90 *Barber v. Barber*, 62 U.S. 582, 595–98 (1858) (citing authority and case law to demonstrate that “whatever may have been the doubts in an earlier day, [the cases previously cited are sufficient to show] that a wife under a judicial sentence of separation from bed and board is entitled to make a domicile for herself, different from that of her husband”).



argument rests on diversity's amount in controversy requirement. While it was satisfied in *Barber*, a dispute over support that exceeded the then-applicable threshold, many family law issues present no obvious price tag. Courts have observed, for example, that disputes over custody and guardianship, at least those that take place in the absence of any child support issues, do not necessarily entail a value in controversy.<sup>91</sup> Statutory limitations thus restrict access to federal courts to a rather significant degree.

Two other technical arguments offer hints that require further consideration. In a paper from the 1950s, Vestal and Foster argued that many domestic relations cases present issues of status or property that do not necessarily map readily onto the traditional work of the federal courts.<sup>92</sup> Others have noted that the Court's recent pronouncements in *Ankenbrandt*<sup>93</sup> and *Marshall*<sup>94</sup> are consistent with the view that the domestic relations exception relates not to the subject of domestic relations, "but to particular status-related functions that fall within state power and competence."<sup>95</sup> We believe, as we develop at greater length in the next Part, that the investitive and status-altering nature of many matters of domestic relations law has a measure of explanatory power.

A suggestive student note from the early 1980s identifies two somewhat related factors that may inform the power of federal courts to entertain domestic relations matters.<sup>96</sup> This commentator observes that state courts sometimes act as "third parties" in passing on certain features of domestic relations, and questions the federal courts' power to play such a role.<sup>97</sup> Sec-

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91 See, e.g., *In re Burrus*, 136 U.S. 586, 595 (1890) (noting that "the matter in dispute" was "incapable of being reduced to any standard of pecuniary value"); *Barry v. Mercein*, 46 U.S. 103, 106 (1847) (observing in a habeas corpus action to regain custody that "[t]here is no pecuniary value to the subject in controversy, nor any way in which pecuniary value can be ascertained").

92 Vestal & Foster, *supra* note 1, at 23–31. After discussing the seminal domestic relations cases and dismissing traditionally proffered rationales for the exception, Vestal and Foster state "federal courts will not exercise jurisdiction where a determination of status is involved." *Id.* at 28. They argue that if the action is one purely concerning a right to recover "because of some contractual, quasi-contractual or tortious wrong that has been committed," federal courts should exercise jurisdiction. *Id.* at 31. Federal courts should refuse to exercise jurisdiction in domestic relations cases only "where a problem of status arises." *Id.* If only property rights are concerned, jurisdiction should be exercised. *Id.*

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

94 *Marshall v. Marshall*, 547 U.S. 293 (2006).

95 WRIGHT ET AL., *supra* note 27, § 3609.1; see also *Catz v. Chalker*, 142 F.3d 279, 291 (6th Cir. 1998) (finding support in *Ankenbrandt* to differentiate between those "core" domestic relations cases involving "declaration of marital or parental status" and those "constitutional claim[s] in which it is incidental that the underlying dispute involves a divorce").

96 See generally Ullman, *supra* note 1.

97 *Id.* at 1854–56 (arguing that when state law conforms to a traditional third-party model of divorce, such that the judge does not sit as an impartial arbiter but instead serves to further the state's interest in preserving marriage, federal "diversity jurisdiction should be declined").

ond, the commentator invokes the case-or-controversy requirement, suggesting that the federal courts may be foreclosed from doing investigative work that does not entail the resolution of disputes between adversaries.<sup>98</sup> While we believe that the federal courts can exercise inquisitorial or “third-party” powers, they can do so only in connection with the administration of *federal* law. We argue in the next Part that this limited federal judicial power over state-law controversies both explains (and helps to confine) the domestic relations exception.

## II. THE NON-CONTENTIOUS CORE OF DOMESTIC RELATIONS LAW

In this Part, we develop our theory that the non-contentious and investigative nature of much judicial administration of domestic relations law explains why federal courts do not perform marriages or enter other consensual decrees, at least when state law governs those matters. After offering a brief history of marriage and its legal incidents, we sketch the law of non-contentious jurisdiction, a mode frequently employed by British ecclesiastical courts as well as courts of equity and admiralty. We contrast these non-contentious modes of procedure, commonly invoked when one or more parties seek to alter their jural relations,<sup>99</sup> with the more familiar contentious forms that parties use to resolve disputes over an existing relationship. We conclude this Part by showing that much domestic relations law calls for the issuance of non-contentious, investitive decrees<sup>100</sup> that do not fit well with the federal courts’ limited authority to resolve “controversies” between citizens of different states.

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98 *Id.* at 1856–58 (“[F]ederal courts lack jurisdiction to decide uncontested divorces since they do not constitute cases or controversies.”).

99 For a discussion on the effect of judgments with regards to parties’ jural relations, see Edwin M. Borchard, *The Declaratory Judgment—A Needed Procedural Reform*, 28 YALE L.J. 1, 4 (1918) (stating that “all judgments of courts declare jural relations” but most are “followed by further relief in the form of a judgment for the payment of damages or a decree for an injunction”). Divorce and other declarations of status stand in contrast to those judgments that are followed by a decree ordering specific performance or payment of damages. *Id.* Judgments of divorce, as well as appointments of guardians, admissions of wills to probate, and others, involve only a judgment that effects a change in status, thus merely creating a “source of new jural relations.” *Id.*

100 The class of judgments that encapsulates divorce decrees involves only a change in one’s status and has been labeled constitutive or investitive. *Id.* at 4–5; see also LORD WOOLF & JEREMY WOOLF, *THE DECLARATORY JUDGMENT* 2 (3d ed. 2002) (distinguishing between declarative judgments that can be enforced coercively and “constitutive-investitive” or “divestitive” judgments that create a new legal relationship). While divorce decrees fall within the class of investitive judgments, some have stated a better term would be “divestitive” because the judgment terminates an existing, as well as creates a new, status. Edwin M. Borchard, *Judicial Relief for Peril and Insecurity*, 45 HARV. L. REV. 793, 800 n.17 (1932) (“Perhaps a more accurate nomenclature might use the term ‘divestitive’ for those judgments, like the annulment of a voidable marriage or dissolution of partnership, which merely terminate an existing status.”).

A. *A Brief History of Anglo-American Family Law*

While the institution of marriage performs a range of functions in society, we focus here on the fundamental change in legal status that occurs when two people make a voluntary decision to enter into what has come to be known as the marital estate.<sup>101</sup> Common law rules defined the power of a married couple to own, acquire, and dispose of property;<sup>102</sup> common law defined the obligations that a married woman owed to her husband and the duties of support that her husband owed her in return.<sup>103</sup> The children of the marriage were assigned correlative rights and obligations, enjoying (at least in theory) a right to financial support<sup>104</sup> and owing services to their parents until they reached majority.<sup>105</sup> Law answered a range of related questions: it defined the (limited) rights of illegitimate children,<sup>106</sup> specified how the couple's property was to be distributed on the occasion of their death,<sup>107</sup> and called for the appointment of guardians to manage the property of children who lacked any other legal guardian.<sup>108</sup>

No wonder, then, that the formalities of lawful marriage were, as a matter of history, most closely attended to by those with property. In medieval England, it was primarily the relatively well-to-do who sought to ensure that their marriages were legally binding; only those with landed property would concern themselves with securing the legal clarity that came with lawful mar-

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101 Although the word "marriage" has many definitions, our focus is on the status of marriage "imposed on the parties by the law as the consequence of their agreement of present marriage . . ." 1 JOEL PRENTISS BISHOP, *NEW COMMENTARIES ON MARRIAGE, DIVORCE, AND SEPARATION AS TO THE LAW, EVIDENCE, PLEADING, PRACTICE, FORMS AND THE EVIDENCE OF MARRIAGE IN ALL ISSUES ON A NEW SYSTEM OF LEGAL EXPOSITION* § 9 (Chi., T.H. Flood & Co. 1891) [hereinafter 1 BISHOP, *NEW COMMENTARIES*] (discussing the meanings of marriage). For recognition of the estate-like quality of domestic relations, see *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006) (likening disputes over the marital estate to an in rem proceeding).

102 1 BISHOP, *NEW COMMENTARIES*, *supra* note 101, §§ 15–16 (discussing the effect of marital status on property rights).

103 *Id.* § 1184 (explaining that by the rules of common law, "marriage confers on the husband the right to the companionship and services of the wife, and compels him to protect and support her"); *id.* § 1195 (describing the husband as "the head of the family"); *see also* NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 11 (2000) (the obligations owed to each spouse were set by the common law); HARTOG, *supra* note 16, at 136 ("Being a husband meant that one possessed, one represented, one governed, one cared for.").

104 BISHOP, *supra* note 14, § 39 ("The husband is under obligation to support his wife; so is he to support his children.").

105 *See* GROSSBERG, *supra* note 15, at 234 (discussing the role of a parent to control the minor in the child custody context).

106 *Id.* at 197–201 (noting the evolution of bastard rights through post-Revolutionary America).

107 1 BISHOP, *NEW COMMENTARIES*, *supra* note 101, at § 16.

108 *See generally* HELMHOLZ, *supra* note 30, at 243.

riage.<sup>109</sup> For many of the rest, customary forms of cohabitation were the norm. During the eleventh century, historians tell us, casual polygamy and unregulated divorce were quite widespread and church weddings quite unusual.<sup>110</sup> By the thirteenth century, the Church had come to exercise greater control of marriage law, in part because the local church courts played an important recordkeeping function.<sup>111</sup> Local parishes tried to keep track of births, deaths, and marriages; local ecclesiastical courts were called upon to sort out the complex questions of probate and intestate succession that arose at death.<sup>112</sup> One can thus see England's marriage law of 1753<sup>113</sup> as an attempt to improve local marriage records by encouraging the celebration of church weddings.<sup>114</sup>

If entry into the marital estate was accomplished through the voluntary and public exchange of vows,<sup>115</sup> then the alteration or termination of the estate was a much more complicated business. The common law took seriously the admonition that marriage contracts were meant to last a lifetime.<sup>116</sup> As a result, legal forms of divorce were for the most part unavailable. True, the ecclesiastical courts had the power to grant a limited form of divorce, known as separation from bed and board,<sup>117</sup> but the marriage continued in

109 See LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND 1500–1800*, at 30–31 (1977) (describing marriage as concerning a property exchange among the wealthy and as a private contract between those without property); see also MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 104–05 (1981) (the presence of an official at the marriage was important only to those who had property so as to be certain of the status change that ultimately affected the division of property as a result of death or divorce); SCOT PETERSON & IAIN McLEAN, *LEGALLY MARRIED: LOVE AND LAW IN THE UK AND THE US* 61 (2013) (the formal steps of marriage were not common among the poor “who had little need for the formalities that governed the succession of titles and property”).

110 STONE, *supra* note 109, at 30 (“Up to the eleventh century, casual polygamy seems to have been general, with easy divorce and much concubinage.”).

111 *Id.* at 30; see also OUTHWAITE, *supra* note 42, at 8–9 (noting that court officials derived income from the issuance of licenses and that, after the Reformation, a major source of income came from the issuance of marriage licenses in particular).

112 The introduction of marriage, birth, and death records was evidence of a tightening of clerical controls over matters that most often ended up in ecclesiastical courts. See STONE, *supra* note 23, at 383.

113 An Act for the Better Preventing of Clandestine Marriages 1753, 26 Geo. 2 c. 33 (Eng.) (also called Lord Hardwicke's Marriage Act).

114 For a discussion of Lord Hardwicke's Marriage Act, see Hazel D. Lord, *Husband and Wife: English Marriage Law from 1750: A Bibliographical Essay*, 11 S. CAL. REV. L. & WOMEN'S STUD. 1, 6–11 (2001).

115 In the central Middle Ages, it was established that consent created a marriage between two people. See CONOR MCCARTHY, *MARRIAGE IN MEDIEVAL ENGLAND: LAW, LITERATURE AND PRACTICE* 19 (2004). A priest, however, was taught not to marry persons without making a public announcement of the marriage, i.e., banns. *Id.* at 27.

116 See, e.g., 1 BISHOP, *NEW COMMENTARIES*, *supra* note 101, at § 40 (describing marriage under common law as “a union for life”).

117 Ecclesiastical jurisdiction allowed those courts to proclaim a marriage void *ab initio* and to grant a divorce *a mensa et thoro* (from bed and board). See HOLDSWORTH, *supra* note 29, at 622–23.

force and duties of support and dower rights survived such decrees.<sup>118</sup> In addition, certain marriages were terminated as nullities, either because the parties were too closely related or because they could not consummate the marriage.<sup>119</sup> Such absolute divorces dissolved the marriage and left the parties free to remarry. Outside these circumstances, only Parliament had the power to grant an absolute divorce.<sup>120</sup> Yet securing a private legislative divorce bill was a time-consuming and expensive endeavor practically available only to the aristocracy and to those with substantial means.<sup>121</sup>

Questions concerning the custody and guardianship of children arose as incidents to marriage, divorce, and death. The parents of a child were considered lawful guardians,<sup>122</sup> but the parents' death (or incompetence) would necessitate the appointment of a substitute. The task of appointing guardians in England fell to the High Court of Chancery, exercising the prerogative powers of the Crown.<sup>123</sup> Custody was a different matter. English law naturally assigned custody to the child's parents;<sup>124</sup> custody arose as an issue in ecclesiastical courts only in those instances when the minor asserted rights, or potential rights, to part of a decedent's estate.<sup>125</sup> Thus the reach of ecclesiastical courts over minors was tied up in their exercise of probate jurisdiction. Property settlements, alimony, and other support obligations were

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118 Alimony awarded by ecclesiastical courts after a divorce from bed and board "merely constituted a recognition and enforcement of the husband's duty to support the wife which continued after the judicial separation." HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 619 (2d ed. 1987).

119 1 BISHOP, *NEW COMMENTARIES*, *supra* note 101, at §§ 472, 473 (defining nullity of a marriage); *see also* TAPPING REEVE, *THE LAW OF BARON AND FEMME* 316–20 (Albany, William Gould 3d ed. 1862) (1816) (discussing the Levitical degrees of marriage and divorce *ab initio*).

120 *See* HOLDSWORTH, *supra* note 29, at 623 (discussing the introduction of divorce by private act of Parliament arising at the end of the seventeenth century, and the steps necessary to obtain such a divorce); STONE, *supra* note 23, at 141 (describing two roads to divorce, the first by suing for separation in ecclesiastical court and the second by act of Parliament).

121 Because of the expense, parliamentary divorce was rare, with only 131 such acts passed between 1670 and 1799. STONE, *supra* note 23, at 34.

122 In England, the father was considered the common law guardian of his minor children. 1 BISHOP, *NEW COMMENTARIES*, *supra* note 101, § 1152. The mother obtained guardianship only upon the father's death and did so "not to its full extent." *Id.* § 1153.

123 *See* CHITTY, *supra* note 21, at 155–56. The king, in his position as *parens patriae*, was the legal guardian of his people. His power over infants was delegated to the lord chancellor who then was able to appoint guardians through exercising the prerogatives of the king. *Id.*

124 Custody was historically granted first to the father and then the mother. In either instance, parents could not "by any contract not expressly authorized by law cast off permanently, whatever temporary arrangements they may make, the personal duty and correlate right of [the child's] custody and support." 1 BISHOP, *NEW COMMENTARIES*, *supra* note 101, § 1169 (footnote omitted).

125 *See* HELMHOLZ, *supra* note 30, at 243.

adjusted to take account of the cost of raising children.<sup>126</sup> Absolute divorce was thought to terminate the marital estate<sup>127</sup> and had far-reaching consequences for the children of the severed union. The common law treated such children as illegitimate and deemed them incapable of inheriting the landed property of their parents.<sup>128</sup>

The American colonies adapted these English institutions as best they could to a world where church courts were virtually nonexistent.<sup>129</sup> The colonies established a variety of specialized tribunals—probate courts, orphan’s courts, and the like—to administer the law of marriage, divorce, custody, and guardianship and to sort out competing property claims at death.<sup>130</sup> Church weddings were common and legally effective, but marriage remained an estate that was available to those who voluntarily exchanged public vows.<sup>131</sup> Divorce was similarly constrained; colonial courts would grant a divorce from bed and board but would typically refrain from entering an absolute divorce decree.<sup>132</sup> As did the Parliament in England, some colonial legislatures viewed themselves as authorized to grant an absolute divorce through private bill.<sup>133</sup> Recordkeeping remained a problem; state legislatures did not adopt

126 Although ecclesiastical courts were without jurisdiction to determine custody in divorce suits, they were able to adjust alimony awards with the custody of the child in mind. I BISHOP, *NEW COMMENTARIES*, *supra* note 101, § 1185.

127 *Id.* § 1623. An absolute divorce makes both spouses “single, freeing them as effectually from the marriage bond as does the sentence of nullity.” *Id.*

128 *See id.* §§ 1601, 1602 (naming as legitimate only those children born in wedlock including those begotten prior to wedlock and born after the marriage is dissolved but stating that no others are legitimate; children of a divorce decreed null are “conclusively illegitimate”).

129 For a discussion of church-state relations in colonial America, see Elizabeth B. Clark, *Church-State Relations in the Constitution-Making Period*, in *CHURCH AND STATE IN AMERICA: A BIBLIOGRAPHICAL GUIDE* 151 (John F. Wilson ed., 1986).

130 *See* Erwin C. Surrency, *The Evolution of an Urban Judicial System: The Philadelphia Story, 1683 to 1968*, 18 *AM. J. LEGAL HIST.* 95, 97 (1974) (“An orphan’s court had earlier been established in each colony to safeguard the estates of orphans and to supervise their welfare . . .”); Winkler, *supra* note 46, at 91 (describing the varied powers of the colonial probate courts).

131 *See* COTT, *supra* note 103, at 39 (noting that proper marriage ceremonies were more common after 1750 but that judges were inclined to find informal marriages valid so long as the consent of the parties was clearly demonstrated); GROSSBERG, *supra* note 15, at 64–69 (although “[c]ouples who observed nuptial formalities assured themselves of all the rights and privileges of matrimonial status,” many early marriages did not take place in a church or were otherwise recorded).

132 *See* HARTOG, *supra* note 16, at 70 (stating that “[p]rior to the American Revolution, absolute divorces . . . had been available only in the New England colonies”).

133 Absolute divorce by way of a special act of the legislature was prominent as late as the mid-nineteenth century. *See* WRIGHT, *supra* note 23, at 77 (describing the methods of divorce in the states); *see also* COTT, *supra* note 103, at 50–51 (explaining that early in the nineteenth century nearly all state legislatures entertained petitions for divorce).

marriage licensure requirements until the mid-nineteenth century.<sup>134</sup> Geographic mobility and the prospect of new land ownership (and a new life) on the frontier loosened the bonds of many marriages that were never formally dissolved.<sup>135</sup>

### B. *The Limited Non-Contentious Power of Federal Courts*

We now shift gears, slightly, from the history of marriage to the almost equally ancient history of non-contentious jurisdiction. Though likely unfamiliar to modern Americans steeped in the adversarial tradition,<sup>136</sup> non-contentious jurisdiction arose in Roman law as a mode of procedure by which courts would register a claim or certify a change in legal status on an uncontested basis. Instead of resolving a dispute (as they did in the exercise of their contentious jurisdiction), Roman tribunals and the European courts that received Roman law into their procedural codes acted in non-contentious jurisdiction to provide official recognition and approval of a desired change in status.<sup>137</sup> Thus, issues of adoption, manumission, and emancipation were all handled in Roman law on a non-contentious basis.<sup>138</sup> Courts bore responsibility for conducting their own investigation into the facts and for issuing a decree that would provide an official record of the desired change in status. The task at hand was fundamentally administrative and investitive as the courts' decree altered the jural relations of the party or parties applying for the order.<sup>139</sup> In proceeding on a non-contentious basis, the courts did not view themselves as resolving a dispute between the parties over an existing status or state of affairs. Instead, the courts were effecting a change in status or certifying the validity of a claim of right under applicable

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134 WRIGHT, *supra* note 23, at 46; *see also* GROSSBERG, *supra* note 15, at 77–78 (discussing the emergence of marriage licenses in the nineteenth century as a method of public surveillance).

135 *See* COTT, *supra* note 103, at 48 (noting that the prevalence of informal marriage led to “self-divorce” among those with no record of their marriage).

136 The Supreme Court has long held that federal courts may only hear concrete controversies that involve “the legal relations of parties having adverse legal interests.” *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240–41 (1937); *see also* *Bond v. United States*, 564 U.S. 211, 217 (2011) (stating that one who seeks to bring a proceeding in federal court must demonstrate an interest in the suit “on the part of the opposing party that is sufficient to establish ‘concrete adverseness’” (quoting *Camreta v. Greene*, 563 U.S. 692, 701 (2011))).

137 Roman law appears to have divided judicial actions into *iurisdictio contentiosa* and *iurisdictio voluntaria*, i.e., contentious and voluntary jurisdiction. ADOLF BERGER, *TRANSACTIONS OF THE AMERICAN PHILOSOPHICAL SOCIETY* 524 (1953). Matters within *iurisdictio voluntaria* arose from the desire of the parties to secure legal recognition of their status. *Id.*

138 For a more detailed discussion on the invocation of non-contentious jurisdiction in Roman law, *see* Pfander & Birk, *supra* note 11, at 1403–06.

139 *See supra* notes 94–95 and accompanying text.

law,<sup>140</sup> much the way an administrative agency today might pass on an application for social security benefits.

Despite its roots in the non-adversarial European practice of inquisitorial judging, in which the courts bore responsibility for factual investigation and adversary assumptions did not apply, the tradition of non-contentious jurisdiction made its way to the new world and onto the dockets of the federal courts created under Article III. As one of us has explained elsewhere, the early Congresses assigned lower federal courts a broad collection of non-contentious work.<sup>141</sup> Thus, Congress directed aliens seeking naturalized citizenship to file *ex parte* petitions with the federal courts, together with materials showing they were qualified for naturalization under the terms of federal law.<sup>142</sup> If they found it appropriate based on the submission and their own investigation, federal courts were expected to issue orders of record that would provide official evidence of the naturalized alien's new status as a citizen.<sup>143</sup> Similarly non-contentious proceedings unfolded in federal courts when veterans pursued pension claims, when government officials sought a warrant to search specified premises, and when private sailors, known as privateers, brought admiralty proceedings to register their legal claim to an enemy vessel captured as a prize in the course of seagoing warfare with another country. Other examples abound.<sup>144</sup>

While the federal courts were quite willing to entertain uncontested applications to register claims of right or changes in status under federal law, they displayed a very different attitude towards investitive applications grounded in state law. Consider, for example, the so-called probate exception, under which federal courts decline to hear certain matters relating to

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140 Courts working such a change in status performed this function "not by coercive decrees, but in removing uncertainty by establishing and confirming existing rights without necessarily attributing a wrong to anybody." See Borchard, *supra* note 100, at 796. The resulting litigation is "a mere declaration of the rights of the parties." *Id.*

141 See Pfander & Birk, *supra* note 11, at 1359–67 (listing government benefits, naturalization proceedings, and Revolutionary War pension claims, among others, as non-contentious work assigned to lower federal courts).

142 The first naturalization act provided for an applicant to submit a petition to "any common law court of record." Act of March 26, 1790, ch. 3, § 1, 1 Stat. 103 (repealed 1795). The subsequent naturalization act explicitly conferred concurrent authority on state and lower federal courts to hear naturalization petitions. See An Act to Establish a Uniform Rule of Naturalization; and to Repeal the Act Heretofore Passed on that Subject, ch. 20, § 1, 1 Stat. 414 (1795) (repealed 1802).

143 After concluding that the applicant for naturalization made the proper showing, the Act called upon the court to administer an oath after which the clerk was to record the application and proceedings so as to memorialize the court's conclusion. Act of March 26, 1790, ch. 3, 1 Stat. 103 (repealed 1795).

144 Thus, Congress provided for pension benefit claimants to file *ex parte* applications in the federal courts, called upon revenue officials to seek by *ex parte* petition a warrant to search premises suspected to be harboring tax evading distilleries, and authorized federal courts to issue decrees of good prize in uncontested applications. See generally Pfander & Birk, *supra* note 11, at 1364–65, 1368, 1377.



the probate of wills and decedent's estates.<sup>145</sup> While commentators have put forward a variety of theories to explain why the federal courts came to recognize a "probate exception" to federal judicial power,<sup>146</sup> we think the answer lies in the non-contentious or investitive character of many features of probate law. As one of us explained in greater detail in a recent paper, many so-called "common form" probate matters begin with an uncontested petition for the proof or probate of the will.<sup>147</sup> If the court agrees that the will meets the basic formalities required by law, the court admits the will to probate and appoints an administrator to manage the estate. This decree effectively invests the administrator with new powers to manage the estate, to distribute the assets in accordance with the terms of the will, and to secure a measure of protection from liability based on actions taken in the course of administration.

Article III makes no provision for the federal courts to decree as to matters of state law in uncontested proceedings, an omission that we think explains (a narrow version of) both the probate and domestic relations exceptions. To be sure, Article III extends the judicial power to "[c]ases" arising under the Constitution, laws, and treaties of the United States, and "[c]ases" of admiralty and maritime jurisdiction,<sup>148</sup> and thus provides ample authority for the federal courts to entertain uncontested or non-contentious applications that seek to register a claim of right under federal law. Thus, Congress can freely assign the federal courts power over uncontested naturalization petitions, pension applications, prize claims, and other matters of federal law. But it takes a "controversy" between adverse parties, aligned as specified in Article III, to ground the jurisdiction of the federal courts over matters of state law. Just as an uncontested application for the admission of a will to probate does not present a "controversy,"<sup>149</sup> so too do many of the investitive features of domestic relations law fail to satisfy the controversy requirement of Article III.

The suggestion that Article III "cases" embrace original applications for the exercise of non-contentious jurisdiction in matters governed by federal law and that "controversies" encompass only genuine disputes between prop-

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145 For the Court's latest treatment of the probate exception, see *Marshall v. Marshall*, 547 U.S. 293 (2006) (limiting the probate exception to the admissions of wills to probate, and the administration of probate estates).

146 See, e.g., *id.* at 306–08 (linking the probate exception to the Judiciary Act of 1789); *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962) (offering a federalism-based limitation on the exercise of jurisdiction over probate issues); Winkler, *supra* note 46, at 78 (arguing that the probate exception is "a myth of federal law" and that limits that "apply generally to federal jurisdiction" will often "restrict such actions").

147 Pfander & Downey, *supra* note 13, at 1553.

148 U.S. CONST. art. III, § 2.

149 The Supreme Court has noted that the absence of adverse parties in a probate proceeding may prevent the federal courts from entertaining such a suit. See *Ellis v. Davis*, 109 U.S. 485, 497 (1883) (noting that jurisdiction as to wills cannot be exercised by federal courts until "its exercise becomes necessary to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties").

erly aligned adversaries enjoys surprisingly strong support in the decisional law of the nineteenth century. Consider first Chief Justice Marshall's iconic account in *Osborn v. Bank of the United States* of the meaning of the term "cases" arising under federal law in Article III:

[Article III's grant of jurisdiction over federal question cases] enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law.<sup>150</sup>

Here, Marshall phrases the definition of cases in terms of a claim of right submitted in the form prescribed by law (much the same definition that Brandeis was to put forward a century later in defending the judicial power over uncontested naturalization petitions).<sup>151</sup> Unlike the modern Supreme Court, Marshall did not limit the exercise of judicial power to parties who have suffered an injury in fact<sup>152</sup> and he did not specify the need for the joinder of an adverse party.<sup>153</sup> Marshall had, after all, presided over challenges to naturalization decrees himself, ruling that such judgments were binding adjudications of a claim of right and were not subject to collateral attack.<sup>154</sup>

On the other hand, the Court was unwilling to entertain original non-contentious matters rooted in state law. (To be sure, ancillary non-contentious proceedings governed by state law often take place in the shadow of an adverse party dispute.) Consider the explanation of the probate exception in *Gaines v. Fuentes*,<sup>155</sup> which arose from the attempted removal to federal court

150 *Osborn v. Bank of the U.S.*, 22 U.S. (9 Wheat.) 738, 819 (1824). Chief Justice Marshall's definitions of a "suit" in *Weston v. City Council of Charleston*, 27 U.S. (2 Pet.) 449, 464 (1829) ("any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice, which the law affords him"), and in *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 408 (1821) ("all cases were [sic] the party suing claims to obtain something to which he has a right"), echo these elements. Story's *Commentaries on the Constitution* adopts the same formulation: "A case, then, in the sense of this clause of the Constitution, arises when some subject touching the Constitution, laws, or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 452 (Bos., Little, Brown & Co. 5th ed. 1891) (1833).

151 See *Tutun v. United States*, 270 U.S. 568 (1926).

152 See, e.g., *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (stating that the "constitutional minimum of standing" requires, among other elements, an "injury in fact").

153 See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 348 (1980) (describing the "continuing controversy between adverse parties" as a constitutional limitation in order to confer standing on appeal).

154 See, e.g., *Spratt v. Spratt*, 29 U.S. (4 Pet.) 393, 408 (1830) (treating the naturalization record of James Spratt as conclusive); see also *Stark v. Chesapeake Ins. Co.*, 11 U.S. (7 Cranch) 420 (1813) (viewing the judgment of naturalization by the court of record as conclusive); *Campbell v. Gordon*, 10 U.S. (6 Cranch) 176 (1810) (same); *McCarthy v. Marsh*, 5 N.Y. 263 (1851) (same).

155 92 U.S. 10 (1875).

of a state suit concerning the validity of a Louisiana landowner's will. In upholding removal, the Court explained that:

The Constitution imposes no limitation upon the class of cases involving controversies between citizens of different States, to which the judicial power of the United States may be extended; and Congress may, therefore, lawfully provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary. . . .

. . . .

There are, it is true, in several decisions of this court, expressions of opinion that the Federal courts have no probate jurisdiction, referring particularly to the establishment of wills; and such is undoubtedly the case under the existing legislation of Congress. The reason lies in the nature of the proceeding to probate a will as one *in rem*, which does not necessarily involve any controversy between parties: indeed, in the majority of instances, no such controversy exists. . . . [B]ut whenever a controversy in a suit between such parties arises respecting the validity or construction of a will, or the enforcement of a decree admitting it to probate, there is no more reason why the Federal courts should not take jurisdiction of the case than there is that they should not take jurisdiction of any other controversy between the parties.<sup>156</sup>

Other cases from the period echo this idea that it takes a controversy to ground federal jurisdiction over matters rooted in state probate law.<sup>157</sup>

It thus appears that nineteenth-century jurists distinguished between “cases” in Article III (those arising under the Constitution, laws, and treaties of the United States and those of admiralty and maritime jurisdiction) and “controversies” between parties specified in Article III. As for cases, nineteenth-century opinion held that a simple application to a federal court to assert a federal claim of right in the forms prescribed by law was all that was required. This formulation was broad enough to encompass both disputes between opposing parties (contentious jurisdiction) and original applications for non-contentious relief, such as petitions for naturalization. Parties invoking federal judicial power over “controversies,” by contrast, were seemingly required to present the court with a claim against one of the opposing parties specified in Article III. Federal courts could not, in short, exercise investitive non-contentious jurisdiction over matters rooted in state law. We think, as the next Section explains, that the core features of the domestic relations exception can be explained by reference to the non-contentious nature of the judicial power that such matters call upon the courts to exercise. Article III power over controversies was not understood to extend to such matters.

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<sup>156</sup> *Id.* at 18, 21–22.

<sup>157</sup> See *Ellis v. Davis*, 109 U.S. 485, 497 (1883) (linking “[j]urisdiction as to wills, and their probate as such . . . [to the necessity] to settle a controversy of which a court of the United States may take cognizance by reason of the citizenship of the parties”).

C. *The Investitive Character of Domestic Relations Law*

Forms of proceeding commonly deployed in connection with the construction and legal administration of family relations in the eighteenth and nineteenth centuries display a non-contentious investitive quality. Entry into marriage, a matter of contract<sup>158</sup> that became legally effective when the parties publicly exchanged vows and observed other solemnities, principally operated to change the parties' legal status.<sup>159</sup> A legal marriage, as we have seen, vested the husband with control of property and imposed correlative duties of support that ran in favor of the husband's dependents.<sup>160</sup> Marriage was not viewed as an inherently judicial act; parties were free to celebrate marriage in churches and in other less formal settings.<sup>161</sup> But justices of the peace were frequently called upon to perform marriage ceremonies and state courts and their delegates continue to preside over such ceremonies today. Whatever one might say about those ceremonies (and the drama that sometimes surrounds them), they do not present litigable controversies between parties from different states and do not obviously fall within the scope of federal diversity jurisdiction as defined in Article III or in the Judiciary Act of 1789. Marriage thus surely represents a non-contentious act<sup>162</sup> to which the federal judicial power over "controversies" does not extend.

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158 Though marriage was sometimes described as a private civil contract, it was "something more than a mere contract." See GROSSBERG, *supra* note 15, at 21 (quoting JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS 170 n.3 (London, A. Maxwell 2d ed. 1841) (1834)).

159 See BISHOP, *supra* note 14, § 29 (noting that though marriage is denominated a contract in legal writings, it is viewed primarily as a change in status).

160 See *supra* notes 89–92 and accompanying text.

161 Although marriage law in England changed with the passage of Lord Hardwicke's Marriage Act in 1753, up through that point a marriage union "could be created solely by the consent of the two parties expressed in words of the present tense." MARTIN INGRAM, CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570–1640, at 132 (1987). Solemnisation in church or the use of specific words or oaths was not required to create a legally viable marriage. *Id.* Marital practices were equally as varied among Americans in the Revolutionary era. While state legislatures often sought to dictate the marital relationship, informal marriages in the states were common. See COTT, *supra* note 103, at 24–31. The acceptance, by both the community as well as the judiciary, of these informal marriages "testified to the widespread belief that the parties' consent to marry each other, not the words said by a minister or magistrate, mattered most." *Id.* at 31.

162 One scholar divided the jurisdiction of the ecclesiastical courts into three categories: instance, office or record, and non-contentious business. See INGRAM, *supra* note 161, at 43. The issuance of marriage licenses, as well as probates and administrations, were "administrative business in quasi-judicial guise: it requires little explanatory comment, though it formed an extremely important part of the church courts' work." *Id.* The categories of "[i]nstance" and "office" jurisdiction, however, may be roughly equated with work one would categorize as civil and criminal. *Id.* Instance causes were disputes that arose between parties who believed they had been wronged whereas office cases were disciplinary actions having to do with a party's moral health. *Id.* Issuance of marriage licenses, then, stands apart as a function of the ecclesiastical court's non-contentious work.

Contested divorce presents a different situation, needless to say. Here, the parties may disagree both as to whether grounds for divorce exist and as to whether they wish to redefine or terminate their marital status. But, as others have noticed, in a nineteenth-century world that more or less automatically assigned husband and wife a common domicile and state of citizenship,<sup>163</sup> it would be quite unusual for the parties to satisfy Article III's provision for jurisdiction over controversies between citizens of different states. Shared marital domicile at the time divorce proceedings arose would foreclose, in almost every instance, any possibility of predicating federal jurisdiction on disparate state citizenship.<sup>164</sup> What's more, the codification of diversity in the Judiciary Act imposed an amount in controversy requirement that some divorce contests might not satisfy.<sup>165</sup> While divorce proceedings might otherwise satisfy the "controversy" requirement of Article III, in short, we think it would be a most unusual dispute indeed that would satisfy the diversity requirement. Still, we would not rule out the exercise of diversity jurisdiction over a divorce proceeding, if the other elements of jurisdiction were satisfied (just as we would not rule out federal power over a will contest that satisfied the requisites of diversity).

Courts make a number of incidental decisions in the course of divorce proceedings: they divide marital property, make child custody determinations, impose alimony and child support obligations, and otherwise administer and unwind the marital and familial relationships.<sup>166</sup> We think the federal courts could constitutionally exercise these incidental powers, assuming that they enjoyed jurisdiction over the divorce controversy itself. Federal courts play a variety of non-contentious roles in the context of diversity litigation, when the presence of a dispute between citizens of different states grounds federal jurisdiction and brings into play the power of the federal

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163 See BLACKSTONE, *supra* note 32, at \*430, \*442–45 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated or consolidated into that of the husband: under whose wing [and] protection . . . she performs every thing . . ." (footnote omitted)).

164 Justice Daniel, dissenting in *Barber v. Barber*, noted that the condition of marriage itself whereby man and woman become a single legal entity, did not allow for separate domiciles and so diversity jurisdiction could not exist. 62 U.S. 582, 600–01 (1858) (Daniel, J., dissenting).

165 See *De La Rama v. De La Rama*, 201 U.S. 303, 307 (1906) (noting that federal courts lack jurisdiction for divorce suits both by reason 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").

166 A typical divorce proceeding may include the divorce decree itself, issuance of alimony, child support, and a custody decree. See, e.g., *Wilbanks v. Wilbanks*, 234 S.E.2d 915 (Ga. 1977) (upholding a trial court order in a divorce action granting the wife temporary alimony, child custody, and child support). Some state courts, however, may bifurcate proceedings involving divorce and child custody. See James Burd, Note, *Splitting the Marriage in More Ways Than One: Bifurcation of Divorce Proceedings*, 30 J. FAM. L. 903 (1992) (outlining the availability of bifurcation in different states). The decision to bifurcate remains in the discretion of the court in most jurisdictions. *Id.* at 904.

courts to conduct proceedings ancillary to the resolution of that dispute.<sup>167</sup> Thus, federal courts in the nineteenth century frequently exercised jurisdiction over equity receiverships, and thus played an important role in administering the assets of insolvent firms.<sup>168</sup> But the exercise of such jurisdiction depended on the presence of a controversy between a creditor and debtor from different states. As with equitable receiverships, then, the ancillary federal power to administer a marital estate would depend, in our view, on the existence of a cognizable dispute between the parties that would ground the federal court's jurisdiction in the first instance.

In most cases, however, the absence of diversity will foreclose the federal courts from hearing the divorce and will disable the courts from entertaining the matters of administration that arise as incidents to the divorce. For two reasons, we do not think the federal courts can take up these matters of administration without jurisdiction over the divorce itself. First, and somewhat abstractly, we think many of these matters represent issues of non-contentious investitive jurisdiction that proceed in the absence of contestation and seek to effect a change in status or obligation.<sup>169</sup> Without a controversy to ground federal power, non-contentious incidents lie beyond federal cognizance. Second, and more concretely, we think the mind of the nineteenth-century jurist adhered rather tenaciously to a conception of equitable priority in which the first court vested with jurisdiction over a dispute that entailed forms of equitable administration was viewed as empowered to adjust all matters, to the exclusion of the duplicative claims of an alternative judiciary.<sup>170</sup>

One can see these ideas of equitable priority reflected in the wholly commonplace nineteenth-century idea that the first court to secure in rem jurisdiction over a specific estate or form of property was entitled to maintain its jurisdiction to the exclusion of other tribunals.<sup>171</sup> This power to maintain priority and jurisdiction can be seen as nicely illustrated by the in rem/in personam distinction that the Court drew upon in *Kline v. Burke Construction*

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167 For a discussion of federal courts' original and ancillary non-contentious jurisdiction, see Pfander & Birk, *supra* note 11, at 1440–41.

168 See *id.* at 1371–73, 1386 (discussing the federal courts' administration of equity receiverships).

169 Non-contentious or collusive divorces were an arrangement by which parties mutually agreed to a divorce but, because of the mandate of the times, were not able to legally obtain a no-fault divorce. Thus, the husband and wife worked together to prepare the ground for a divorce. See STONE, *supra* note 23, at 183. Even in those instances where a collusive divorce was not sought, the granting of a divorce can be considered as no more than a change in the parties' legal status. So far as a judgment declares a marriage null at the request of a party, it may be considered investitive or constitutive, i.e., a change in status, and no more, has been effected. See Borchard, *supra* note 99, at 4–5.

170 For an account of equitable priority in the context of the Anti-Injunction Act, see James E. Pfander & Nassim Nazemi, *The Anti-Injunction Act and the Problem of Federal-State Jurisdictional Overlap*, 92 TEX. L. REV. 1 (2013).

171 See *id.* at 28–31 (discussing the res exception to the Anti-Injunction Act as operating to ensure equitable priority such that when a “court of equity has been properly empowered to take control of property, broadly defined, the state court cannot interfere” and vice versa).

Co.<sup>172</sup> There, a federal plaintiff sought to enjoin a duplicative state court proceeding on the ground that the state judgment could claim-preclude further federal litigation.<sup>173</sup> The Supreme Court refused to allow an injunction against state proceedings, emphasizing that the dueling lawsuits were in the nature of in personam proceedings as to which no equitable priority arose.<sup>174</sup> The Court quite deliberately distinguished in rem proceedings, where one court first obtains jurisdiction over a res and proceeds to resolve conflicting claims to that res free from the interference of other courts. Injunctions might issue to defend equitable priority over property (such as the priority a court might secure as the forum for an action to impose an equity receivership on defendant's property) but were generally unavailable to defend first-to-file priority in in personam actions.<sup>175</sup>

Nineteenth-century wisdom held that the marital estate constituted a bundle of property rights<sup>176</sup> to which the rules of equitable priority applied. Thus, nineteenth-century treatises on the law of conflicts and jurisdiction characterized the marital relationship as a form of status and treated divorce suits to alter that status as in rem or quasi in rem in nature.<sup>177</sup> In keeping with the territoriality of the age, jurists naturally assumed that judicial power over divorce proceedings fell to the courts of the state in which the marital domicile of the parties was located.<sup>178</sup> Thus, the Court in *Pennoyer v. Neff* explained that every state court enjoys jurisdiction (regardless of personal service) "to determine the civil status and capacities of all its inhabitants" and may prescribe conditions "on which proceedings affecting them may be commenced" within its territory.<sup>179</sup> This conception of divorce as an in rem proceeding on an issue of status enabled the Court to recognize the continuing

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172 260 U.S. 226 (1922).

173 *Id.* at 228.

174 *Id.* at 230.

175 *Id.* The Court noted that a mere controversy "is not a thing, and a controversy over a mere question of personal liability does not involve the possession or control of a thing, and an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending." *Id.*

176 See, e.g., GROSSBERG, *supra* note 15, at 235 (discussing children born in a marriage as "subordinate beings, assets of estates in which fathers had a vested right").

177 See 2 JOSEPH H. BEALE, A TREATISE ON THE CONFLICT OF LAWS § 119.1 (1935) (defining status as "a personal quality or relationship, not temporary in its nature nor terminable at the mere will of the parties, with which third persons and the state are concerned" and citing marriage as an example of such status); see also RALEIGH C. MINOR, CONFLICT OF LAWS; OR, PRIVATE INTERNATIONAL LAW § 84 (1901) (distinguishing between in personam and in rem proceedings and classifying divorce as in rem). A proceeding in rem is aimed at an individual's property or some other *thing* within the power and jurisdiction of the court. Because the subject matter of divorce suits is the marriage status itself, it is thus properly characterized as an in rem proceeding. *Id.*

178 See Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813, 815-16 (discussing the history of state court jurisdiction over status determinations).

179 95 U.S. 714, 734 (1877) (emphasis omitted).

power of the courts of the marital domicile to decree a divorce even after one party to the marital relationship had left the territory.<sup>180</sup>

Understanding the marital estate as a *res* and the divorce proceeding as quasi in rem, we can better understand why nineteenth-century jurists did not see a role for inter partes actions brought in federal diversity jurisdiction. The separation of the spouses' marital domiciles typically took place *after* the divorce was completed and the parties established separate households. Once the divorce was underway in state courts, moreover, the federal judiciary may have viewed the matter as one of equitable priority in which matters of custody, alimony, and support were viewed as incidental to the divorce decree. Standard rules of deference would have cautioned the federal courts to refrain from entertaining a proceeding that could threaten the state court's control of these necessarily related matters. Thus, the court's determination of fault in the divorce proceeding could influence its child custody decision and those decisions in turn could influence the judicial determination of alimony and child support obligations. Administration of the marital estate thus seems to have entailed unitary adjudication of the range of issues that arose in the context of a divorce.<sup>181</sup>

Once the divorce was completed and separate households were established across state lines, the parties could prosecute their disputes within federal diversity jurisdiction. Indeed, the leading nineteenth-century case on the scope of the domestic relations exception arose from just such a post-divorce dispute. In *Barber v. Barber*,<sup>182</sup> the New York state courts granted the wife a divorce and imposed an alimony duty on the husband, who later left to establish a new home in Wisconsin.<sup>183</sup> When he failed to pay, the wife brought suit in diversity in Wisconsin, seeking to enforce the alimony obligation. After reviewing the authorities, the Supreme Court allowed the action to proceed on the basis that husband and wife now had separate domiciles

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180 *Id.* (stating that a person domiciled in a state could seek a divorce from an absent spouse because of the state's power to determine the civil status of its inhabitants).

181 A parallel may be drawn to federal deference in probate proceedings. In *Byers v. McAuley*, for example, the Court overturned the lower federal court's decision to impose equitable administration on the estate of a decedent. 149 U.S. 608 (1893). The Court stated that, in an equity receivership "[p]ossession of the *res* draws to the court having possession all controversies concerning the *res*." *Id.* at 619. Because the Court viewed the power to administer the decedent's estate as arising from the power to appoint the administrator in the initial proceeding to admit the will to probate, the federal courts could not take over the resulting administrative duties from the state courts. If, however, the federal courts were given original jurisdiction over the initial probate application, the court would be empowered to "draw to itself all controversies affecting that the estate." *Id.* In the absence of such original jurisdiction, the Court found that the rules of equitable priority required deference to the state court; *see also* Pfander & Downey, *supra* note 13, at 1568–72 (discussing the probate exception in the nineteenth century).

182 62 U.S. 582 (1858).

183 *Id.* at 584.



and states of citizenship and could satisfy the requirements of diversity.<sup>184</sup> But the Court cautioned that the jurisdiction of the lower federal courts did not extend to such investitive or status-related matters as the divorce proceeding itself, or the order granting alimony.<sup>185</sup>

In summary, then, our non-contentious account of the domestic relations exception rests on the idea that the federal courts lack the power to administer state law in original non-contentious investitive proceedings. Just as a party seeking probate in the common form under state law must apply to a state tribunal for the decree admitting the will to probate and investing the administrator with formal power,<sup>186</sup> so too must parties seeking consensual investitive decrees in the state family law context pursue those matters before state tribunals. On the other hand, once the parties to a dispute over issues of state family law satisfy the requisites for diversity jurisdiction, a federal court has full power to adjudicate that dispute and to address any related ancillary matters. Historically speaking, the inability of the federal courts to entertain non-contentious proceedings based on state law and the inability of the members of a family to meet the requirements of diversity prevented many family law matters from entering federal court.<sup>187</sup> But as in *Barber*, where a dispute arose between diverse citizens, Article III poses no obstacle to federal adjudication.<sup>188</sup> Similarly, when disputes over marriage, divorce, or custody present federal questions, the federal courts may entertain them as cases arising under federal law. And if Congress were to federalize the law of domestic relations, either by statute or treaty, the federal courts could administer the law in non-contentious “cases” within the scope of Article III.

### III. APPLYING THE NON-CONTENTIOUS ACCOUNT TO CURRENT PUZZLES

So far, we have tried to show that the non-contentious account helps to explain the origin of the domestic relations exception and helps to make sense of the otherwise curious disparity in the way the exception applies to cases under federal law and controversies over state law. In this Part, we briefly summarize a variety of puzzles and anomalies in current scholarship

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184 *Id.* at 597–98 (stating that sufficient authority had been cited to show “that a wife under a judicial sentence of separation from bed and board is entitled to make a domicile for herself, different from that of her husband”).

185 *Id.* 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, either as an original proceeding in chancery or as an incident to divorce *a vinculo*, or to one from bed and board.”). The Court was careful to note at the outset of its opinion that the suit before it was not asking for the allowance of alimony but the enforcement of an alimony decree granted by a court of competent jurisdiction, a state court in New York. *Id.*

186 *See supra* note 178 and accompanying text.

187 *See, e.g., De La Rama v. De La Rama*, 201 U.S. 303, 307 (1906) (noting that divorces involve no pecuniary value and husband and wife cannot usually be citizens of a different state).

188 62 U.S. 582 (1858).

and explain how our non-contentious approach to the exception would help to clarify and rationalize the law.

#### A. *Ankenbrandt v. Richards*

The Supreme Court's attempt to clarify the scope of and rationale for the domestic relations exception arose in the context of a tort suit brought by a mother on behalf of her children against their father for alleged physical and sexual abuse.<sup>189</sup> The parties were diverse (having separated) and the claim for damages easily met the amount in controversy.<sup>190</sup> After both the district and appellate courts dismissed the case, holding that it fell within the domestic relations exception, the Court granted review to consider whether a domestic relations exception existed and, if it did, to define its scope.<sup>191</sup> After considering the history and concluding that the domestic relations exception was best understood as a gloss on the statutory grant of diversity jurisdiction, the Court held that the exception encompassed only those suits seeking a decree of divorce, alimony, or child custody.<sup>192</sup> Because the case at hand did not implicate those matters, the Court upheld jurisdiction.<sup>193</sup>

Although one can quibble with its approach to statutory interpretation,<sup>194</sup> *Ankenbrandt* achieved some notable goals. First, by basing the domestic relations exception squarely on the diversity statute, the Court freed Congress to assign the federal courts a role in any domestic relations issues that implicate federal law.<sup>195</sup> Second, by rejecting arguments that posited a constitutional foundation for the exception, the Court eliminated the possibility that the limits of Article III would deprive the federal courts of power to take up matters that Congress had chosen to assign to them. As we have seen, treaties address the problem of child custody across international borders; Congress may implement such a treaty by assigning custody issues to the federal courts.<sup>196</sup> Third, by emphasizing that only the issuance of decrees of divorce, alimony, and custody lie beyond the diversity jurisdiction of the lower federal courts, the Court has reaffirmed the lesson of *Barber v. Barber*: former spouses with separate domiciles may invoke diversity to settle a dispute over the terms of their former relationship.

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189 *Ankenbrandt v. Richards*, 504 U.S. 689, 691 (1992).

190 *Id.* at 707.

191 *Id.* at 691–92.

192 *Id.* at 706.

193 *Id.*

194 Many commentators have noted the Court's "shaky foundation" for the domestic relations exception. See, e.g., Cahn, *supra* note 1, at 1085 (noting the Court's "questionable reasoning" in relying on the diversity statute for the exception); Sack, *supra* note 9, at 1451, 1453 (calling the Court's statutory basis for the exception "strained" and resting on a "shaky foundation").

195 *Ankenbrandt*, 504 U.S. at 697–701; see also Cahn, *supra* note 1, at 1083 (stating that *Ankenbrandt* "does not preclude Congress from enacting legislation to change the parameters of the Exception to allow federal courts to hear these [domestic relations] cases").

196 See *supra* notes 55–56 and accompanying text.

Our non-contentious account of the domestic relations exception would achieve some of the same goals, but would come at the problem from a different angle. In contrast to the Court, we view the exception as constitutionally grounded in the federal courts' inability to administer the state law of domestic relations except in the context of a controversy between citizens of different states. That interpretation of Article III's reference to "controversies" means that the federal courts lack the power to exercise non-contentious jurisdiction over many current domestic relations matters, including marriage, consensual separation and divorce, adoption, and surrogacy proceedings. (We explore these non-contentious proceedings in a bit greater detail below.) At the same time, we regard the federal courts as enjoying full authority to conduct such non-contentious proceedings when they implicate federal law and arrive on the docket as federal question "cases." Like *Ankenbrandt*, then, our approach achieves the goal of co-extensivity<sup>197</sup> by assuring that the federal courts can hear all domestic relations questions that arise under federal law.

We have no quibble with the Court's narrow interpretation of the diversity statute, we agree with its holding as to the existence of jurisdiction over the tort claims of the former spouse, and we certainly do not advocate for an expansion of that statutory source of federal judicial authority. Nonetheless, we would observe that our approach would leave Congress free to expand diversity if it chose to do so. In particular, we see nothing in Article III that would prevent the federal courts from entertaining a contested state-law divorce proceeding, so long as it arose between citizens of different states. Nor do we regard the incidental issues that might arise in connection with such a proceeding, including alimony and child custody, as necessarily lying beyond federal power. In general, federal courts that obtain jurisdiction on the basis of diversity can entertain the whole case, including such incidental questions.<sup>198</sup> It is not obvious that the *Ankenbrandt* Court would disagree; having disavowed any constitutional underpinning, the Court recognized broad power in Congress to manage the scope of diversity jurisdiction. In the end, the Court was content (as are we) to allow Congress to decide whether to expand the role of federal courts, sitting in diversity, over disputes arising in the family law realm.<sup>199</sup>

Having thus explained our understanding of *Ankenbrandt* and having highlighted our points of agreement and disagreement with the Court's approach, we now consider a range of issues that our non-contentious account can help to clarify. We focus primarily on debates that have arisen in the scholarly literature, although we do offer some thoughts on recent devel-

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197 See *supra* note 52 and accompanying text (discussing the Court's pronouncements on the goal of co-extensivity).

198 See, e.g., 28 U.S.C. § 1367 (2012) (defining federal courts' supplemental jurisdiction).

199 *Ankenbrandt*, 504 U.S. at 700 (stating that "Congress remains free to alter what [the Court] ha[s] done" (quoting *Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (internal quotation marks omitted))).

opments in the lower courts, where old questions continue to puzzle and confuse.

### B. *Domestic Relations in Federal Territories*

The non-contentious approach helps to explain the otherwise curious willingness of the Supreme Court to exercise appellate jurisdiction over divorce proceedings conducted in the territorial courts.<sup>200</sup> Commentators have highlighted the perceived anomalies of such territorial power by pointing to the Court's decision in *Simms v. Simms*.<sup>201</sup> There, a wife who had won a favorable alimony decree in the Arizona territorial court moved on the strength of the domestic relations exception to dismiss her husband's appeal to the Supreme Court. The Court denied the motion, contrasting the breadth of federal legislative and judicial power in the territories with the situation in the states, where the "whole subject" of husband and wife and parent and child belongs to the laws of the states and not to the laws of the United States.<sup>202</sup> Barbara Atwood treats this distinction as inaptly suggesting that "because state law controls in the domestic relations area, the federal courts are without power to entertain [such] cases."<sup>203</sup> Atwood argues that such a view would prove too much in that it would invalidate all jurisdiction based on diversity of citizenship.<sup>204</sup>

While Atwood correctly observes that virtually all disputes within federal diversity jurisdiction involve issues of non-federal law, we do not regard the *Simms* account as necessarily anomalous. In our view, when federal law defines the rights and liabilities of the parties, the federal courts have power to exercise the full panoply of contentious and non-contentious jurisdiction. In theory, then, were Congress to adopt a federal statute regulating marriage and divorce, alimony and custody, we think the federal courts could exercise full authority over the issues of status such legislation would bring to the courts. That was precisely the situation presented in *Simms*.<sup>205</sup> Territorial law can be best understood as a species of federal law (although some cutting

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200 See, e.g., *De La Rama v. De La Rama*, 201 U.S. 303, 307–08 (1906) (holding that the general 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" has "no application to the jurisdiction of the territorial courts"); *Simms v. Simms*, 175 U.S. 162 (1899) (affirming a judgment for alimony in a suit for divorce arising from a judgment of the Supreme Court of the Territory of Arizona).

201 175 U.S. 162 (1899).

202 *Id.* at 167–68.

203 Atwood, *supra* note 1, at 581.

204 *Id.*

205 The Court found that, in the territories of the United States, Congress "has full legislative power over all subjects upon which the legislature of a State might legislate within the State; and may, at its discretion, intrust that power to the legislative assembly of a Territory." *Simms*, 175 U.S. at 168. This power covers domestic relations and "all other matters which, within the limits of a State, are regulated by the laws of the State only." *Id.*

and pasting may be required to account for the federal judicial role).<sup>206</sup> *Simms* can thus be read as distinguishing the broad non-contentious power of federal courts in matters governed by federal law and the far more constrained federal judicial power in matters governed by state law. The extension of judicial power to “cases” in Article III authorizes federal courts to exercise non-contentious jurisdiction, including power to adjust issues of status governed by federal law. The judicial power over diverse-party “controversies,” by contrast, entails the resolution of disputes. It follows, then, that federal courts in the states, called upon to apply state law in diversity proceedings, cannot exercise the forms of non-contentious jurisdiction implicated in many matters of domestic relations law. *Simms* illustrates the important point that Article III permits the federal courts to administer federal law but confers no similar power with respect to state law.<sup>207</sup>

Atwood draws a second conclusion from the territorial cases with which we disagree. In the course of criticizing the historical rationale for the domestic relations exception, a rationale that links the exception to the historic role of the ecclesiastical courts in England,<sup>208</sup> Atwood draws a seemingly logical conclusion. She concludes that, because the Supreme Court asserted jurisdiction over domestic relations disputes arising in the territories, the “domestic relations limitation cannot be of constitutional dimension.”<sup>209</sup> But that conclusion assumes that the domestic relations exception applies with equal force to “cases” and “controversies”; the conclusion rests on the unspoken premise that the federal judicial power extends in precisely the same way to all matters within Article III. We agree with Atwood that the Supreme Court’s recent tradition of conflating the terms “cases” and “controversies”<sup>210</sup> lends support to the premise of her argument. At least since the late nineteenth century, the Court has linked the two terms in speaking of the Article III case-or-controversy requirement.<sup>211</sup> But we disagree that the terms mean the same thing and impose equivalent limits on federal judicial power. Instead, we argue that federal courts can exercise broader non-contentious authority in administering claims and matters of status that consti-

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206 On the role of federal courts in the territories, see generally James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004).

207 Thus, federal courts in the District of Columbia have exercised original jurisdiction in matters of divorce with the Supreme Court’s approval. See *Glidden Co. v. Zdanok*, 370 U.S. 530, 581 n.54 (1962) (upholding the exercise of original jurisdiction by federal courts in the District of Columbia to decide divorce actions).

208 See *supra* Section II.A.

209 Atwood, *supra* note 1, at 587.

210 See *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013) (discussing the “necessity of a ‘case or controversy’ to satisfy Article III” adverseness (quoting *INS v. Chadha*, 462 U.S. 919, 939 (1983))).

211 See, e.g., *Plaquemines Tropical Fruit Co. v. Henderson*, 170 U.S. 511, 517 (1898) (discussing states’ concurrent jurisdiction to hear issues arising under federal law and stating that “[n]othing more was done by the Constitution than to extend the judicial power of the United States to specified cases and controversies”).

tute “cases” under federal law. In contrast to *Atwood*, then, we believe that the domestic relations exception is “of constitutional dimension” in that it grows out of the constitutional distinction between cases and controversies. Federal courts can certainly hear cases like *Simms*, but they cannot constitutionally entertain matters governed by state law without a controversy between diverse citizens or a federal question claim that would anchor supplemental jurisdiction.

### C. *Child Custody, Guardianship, and the Parens Patriae Power*

The domestic relations bar to the assertion of federal jurisdiction over matters of child custody traces its complicated origins to guardianship practice in England. Often characterized as part of the Crown’s prerogative or *parens patriae* powers,<sup>212</sup> these guardianship duties were said to fall to the chancellor as the ministerial, rather than judicial, delegate of the Crown.<sup>213</sup> In the nineteenth century, federal courts in the United States drew on this characterization of guardianship as a matter of prerogative in disclaiming federal jurisdiction over custody matters that arose in the context of domestic relations disputes.<sup>214</sup> Scholars in turn have offered varying accounts of those nineteenth-century pronouncements and of their continuing relevance today. Some have ascribed constitutional significance to this barrier to federal engagement;<sup>215</sup> others have shrugged off the whole business.<sup>216</sup>

For our purposes, the story begins with *In re Burrus*.<sup>217</sup> There, a father sought custody of his child who had been placed with grandparents while the child’s mother was ill.<sup>218</sup> After the mother died and the father remarried, he sought to regain custody.<sup>219</sup> The father proceeded by a petition for a writ of habeas corpus in the federal district court, demanding that the grandparents turn over custody of the child.<sup>220</sup> The district court awarded custody to the father, but the grandparents subsequently reclaimed the child by force. Held in contempt, the grandfather sought review in the Supreme Court. The

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212 The Latin phrase “*parens patriae*” refers to the Crown’s authority to act on behalf of children and the disabled as the “parent of her country.”

213 See CHITTY, *supra* note 21, at 156 (detailing the prerogatives of the Crown).

214 See, e.g., *Fontain v. Ravenel*, 58 U.S. 369, 384 (1854) (“Powers not judicial, exercised by the chancellor merely as the representative of the sovereign, and by virtue of the king’s prerogative as *parens patriae*, are not possessed by the circuit courts.”); *In re Barry*, 42 F. 113, 134 (S.D.N.Y. 1844) (holding that the circuit court “cannot exercise the common-law function of *parens patriae*, and has no common-law jurisdiction over the matter [of child custody]”).

215 Vestal & Foster, *supra* note 1, at 36 (noting that if the states alone have the power to act as *parens patriae*, the problem may be of constitutional origin).

216 See *Atwood*, *supra* note 1, at 595–98 (dismissing the Court’s use of *parens patriae* and suggesting the better approach is “to focus on whether federal court resolution of particular categories of cases threatens interference with important state policies”).

217 136 U.S. 586 (1890).

218 *Id.* at 587.

219 *Id.*

220 *Id.*

Court ultimately held that the district court had no jurisdiction to order the grandfather to deliver up custody of the child (and hence no authority to punish his disobedience), reasoning 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.”<sup>221</sup> In justifying its conclusion,<sup>222</sup> the Court incorporated an entire circuit court decision, *In re Barry*,<sup>223</sup> into its opinion. In the *Barry* decision, also dealing with a child custody dispute in the context of a habeas petition, Judge Betts disclaimed federal jurisdiction over matters involving the exercise of *parens patriae* powers, finding that there was “no sure foundation for the assumption that the federal government possesses common-law prerogatives, inherent in the sovereign, which can be exercised without authority of positive law.”<sup>224</sup>

Although commentators agree that both the *Burrus* and *Barry* cases arose in the context of a habeas corpus petition,<sup>225</sup> they agree on little else. Vestal and Foster treat the Court’s incorporation of the *In re Barry* decision as an adoption of the circuit court’s underlying reasoning;<sup>226</sup> they therefore conclude that the Court’s disclaimer of federal judicial power over child custody rests on the Constitution’s failure to confer a federal *parens patriae* power on which to predicate a federal custody decree.<sup>227</sup> A second commentator proposes a somewhat related understanding. Drilling down into the nature of the chancellor’s *parens patriae* power, a student note argues that guardianship and custody decisions were seen as non-judicial or ministerial acts.<sup>228</sup> Observing that the federal courts enjoy power only to decide genuine cases and controversies, the student note suggests that the federal courts may lack the power to take on the function of a “third-party sovereign” in deciding

221 *Id.* at 593–94.

222 While the *Burrus* Court assumed with little discussion that domestic relations were solely within the province of the states, scholars have since argued this was not necessarily so. See generally Hasday, *supra* note 66, at 1322–23 (discussing a broader understanding of family law and the federal government’s involvement in such matters).

223 42 F. 113 (S.D.N.Y. 1844).

224 *Id.* at 119.

225 See Atwood, *supra* note 1, at 595 (stating that *Burrus* and the relevant custody decisions of the Court “establish only that child custody disputes are not within the scope of the habeas corpus statute”).

226 See Vestal & Foster, *supra* note 1, at 33.

227 *Id.* at 36.

228 Ullman, *supra* note 1, at 1859–60. In *Fontain v. Ravenel*, Chief Justice Taney explained the exception in the following terms:

The [ ] words [of Article III, § 2] obviously confer judicial power, and nothing more; and cannot, upon any fair construction, be held to embrace the prerogative powers, which the king, as *parens patriae*, in England, exercised through the courts. And the chancery jurisdiction of the courts of the United States, as granted by the [C]onstitution, extends only to cases over which the court of chancery had jurisdiction, in its judicial character as a court of equity. The wide discretionary power which the chancellor of England exercises over infants, lunatics, or idiots, and charities, has not been conferred.

58 U.S. 369, 393 (1854).

custody matters.<sup>229</sup> The note combines history with a suggestion that the “best interests” determinations on which custody decrees now typically turn call for a quasi-administrative, rather than a strictly judicial, decision.<sup>230</sup>

With its distinction between federal law cases and state law controversies, our non-contentious account clears up some of the confusion that surrounds the custody exception to federal judicial power. The federal habeas statute in place at the time of *Burrus* permitted federal district courts to entertain only habeas claims that challenged custody on the basis of federal law.<sup>231</sup> The *Burrus* Court’s indication that the powers over child custody were matters of state prerogative served to establish that the father’s right to custody lacked the federal law predicate necessary to warrant the exercise of federal habeas power under applicable jurisdictional statutes.<sup>232</sup> In one sense, then, *Burrus* simply confirms our view that most issues within the domestic relations exception arise under state law and qualify for federal jurisdiction, if at all, on the basis of diversity of citizenship. Proceedings based on state law mostly lie outside the federal judicial power, absent diversity and an amount in controversy.

When one turns from the question of jurisdiction to a consideration of the nature of the judicial role in custody proceedings, matters grow a bit more complicated. Certain matters associated with the *parens patriae* power of the English chancellor were regarded as ministerial. Thus, the chancellor was expected to administer the affairs of “ideots and lunatics,” even in the absence of any bill brought in equity to institute contested legal proceedings regarding their affairs.<sup>233</sup> We regard these administrative duties as a classic example of the exercise of non-contentious investitive jurisdiction; the chancellor was called upon to conduct inquisitorial (rather than adversarial) proceedings and to make findings that would establish a new protected status for

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229 See Ullman, *supra* note 1, at 1859 (contrasting those instances where a court sits impartially and decides disputes on the basis of arguments and those, as with child custody, where a judge assumes the role of an active third party).

230 *Id.*

231 Although the Judiciary Act of 1789 extended habeas corpus review only to matters of federal custody, see Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81 (repealed 1948), the Reconstruction Congress broadened the reach of the great writ to encompass both state and federal custody in violation of federal law. See Stephanie Dest, Comment, *Federal Habeas Corpus and State Procedural Default: An Abstention-Based Interest Analysis*, 56 U. CHI. L. REV. 263, 263 (1989) (noting extension of the writ to state petitioners by the Habeas Corpus Act of 1867). The federal courts have never been given jurisdiction to conduct habeas review of detention in violation of state law.

232 See Atwood, *supra* note 1, at 595; Cahn, *supra* note 1, at 1085 (noting that drawing the child custody exception from *Burrus* is a “dubious enterprise” as it was not a diversity case).

233 See 1 A. HIGHMORE, A TREATISE ON THE LAW OF IDIOCY AND LUNACY 11–15 (Exeter, N.H., G. Lamson 1822) (describing the Crown’s prerogative power to act as “trustee of the persons and fortunes of ideots and lunatics” but distinguishing the Crown’s power over infants as “by no means similar”).



the individuals in question.<sup>234</sup> Guardianships for infants may have been slightly different; Justice Story reported in his treatise on equity that such proceedings began with the (often fictional) submission of a bill in equity alleging that the infant owned property claimed by another.<sup>235</sup> But whether the guardianship proceeding began as an original application for non-contentious relief or as a feigned dispute aimed at securing the appointment of a guardian, the protection of infants was a matter within the non-contentious jurisdiction of the chancellor. It would follow that federal courts lack power to hear such matters, as such, so long as they remain the subject of state law. This, we think, explains why the federal courts came to regard themselves as lacking the power to issue original or freestanding custody and guardianship decrees.

Here, we emphasize the distinction between *original* petitions for custody or guardianship and *ancillary* applications for custody that arise in connection with or accompany disputes that otherwise satisfy the jurisdictional requirements of the federal courts. Federal courts clearly have the power to entertain *original* applications for non-contentious relief on matters of federal law; thus, the federal courts may entertain debtors' uncontested bankruptcy petitions, even though they seek less to resolve a dispute than to secure the legal rights (discharge of debts and a fresh start) to which federal bankruptcy law entitles the debtor.<sup>236</sup> Because family law (unlike bankruptcy) remains largely a matter of state law, federal courts lack such original authority as to guardianship and custody issues. Nonetheless, we see no constitutional barrier to *ancillary* jurisdiction over custody questions.

To illustrate the point, consider that when federal courts obtain diversity jurisdiction over a dispute between creditors and a debtor, they have the power to administer an equitable receivership and to appoint a supervising

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<sup>234</sup> The exercise of *parens patriae* power delegated to the lord chancellor by the king "confer [red] no *jurisdiction*, but merely a power of *administration*." CHITTY, *supra* note 21, at 158.

<sup>235</sup> Joseph Story explained:

It often occurs that a Bill is filed for the sole purpose of making an infant a ward of Chancery; but in such a case, the Bill always states, however untruly, that the infant has property within the jurisdiction, and the Bill is brought against the person in whose supposed custody or power the property is.

<sup>2</sup> JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, ADMINISTERED IN ENGLAND AND AMERICA § 1351 n.1, at 813 (Bos., Little, Brown & Co. 6th ed. 1853) (1836) ("Why such a mere fiction should be resorted to, has never, as it seems to me, been satisfactorily explained; and why the Lord Chancellor, exercising the prerogative of the Crown as *parens patriae*, might not in his discretion appoint a guardian to an infant, having no other guardian, without any Bill being filed, seems difficult to understand upon principle."). Notably, the chancellor's power to appoint conservators of the estates of "idiots and lunatics" derived from the Crown's prerogative and authorized appointment without any need to invoke a fictional dispute. Story's account thus differs from Justice Taney's in declining to lump infants together with idiots and lunatics as part of the chancellor's non-judicial *parens patriae* power. See *Fontain v. Ravenel*, 58 U.S. 369, 393 (1854).

<sup>236</sup> See 28 U.S.C. § 157 (2012) (bankruptcy law); see also Pfander & Birk, *supra* note 11, at 1444 (discussing the foundation of positive law in bankruptcy proceedings).

receiver.<sup>237</sup> The administrative process comes into play in connection with the court's resolution of the dispute that conferred diversity jurisdiction on the federal court. Applying these lessons to the domestic relations context, it would seem to follow that the federal courts can make custody determinations either where the law of custody has been federalized or where the issue arises alongside a state-law dispute that would otherwise qualify for federal jurisdiction. Thus, if Congress were to broaden the diversity statute to encompass contested divorces, as we think Article III allows, such disputes might carry into federal court ancillary issues of custody and support. As Atwood notes, in arguing against the recognition of a broad custody exception to federal judicial power, "the federal courts do not possess a general *parens patriae* power as representative of the sovereign" but may properly hear those matters "falling within their assigned jurisdiction."<sup>238</sup>

#### D. *The Adjudication of Marital Status*

The non-contentious approach may also help to clarify the nature of federal judicial power over questions of marital status, a frequent site of contestation for courts and commentators. As commentators have noted, the Court's apparent reluctance to decide issues of marital status<sup>239</sup> arose well before its comparatively recent decision in *Ankenbrandt* disclaiming diversity jurisdiction over the issuance of divorce and alimony decrees.<sup>240</sup> But some federal courts have tested the boundaries of these limits, taking up disputes that implicate the parties' marital status and alimony payments.<sup>241</sup> Thus, federal courts have been willing to exercise jurisdiction over disputes that implicate an executed divorce but have refused jurisdiction over parties seeking a divorce.<sup>242</sup> Commentators have debated the nature of federal power over

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237 Thus, the Supreme Court has appointed special masters to develop the factual record in matters within its original jurisdiction. See Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 627 (2002) (noting that appointment of special masters is "not uncommon for the Court in exercising its original jurisdiction"). Further, the Supreme Court has long upheld the power of the lower federal courts to appoint equitable receivers, masters, and other officers to perform similar roles in connection with the adjudication of claims within their jurisdiction. See, e.g., *Hook v. Arizona*, 120 F.3d 921, 926 (9th Cir. 1997) (holding that the district court's appointment of special master was not abuse of discretion); *In re U.S. Dep't of Def.*, 848 F.2d 232, 235 (D.C. Cir. 1988) (same).

238 Atwood, *supra* note 1, at 596.

239 See, e.g., *Vestal & Foster*, *supra* note 1, at 28 (analyzing the leading domestic relations cases and concluding that it "seems to be that the federal courts will not exercise jurisdiction where a determination of status is involved").

240 See generally *Ankenbrandt v. Richards*, 504 U.S. 689 (1992); see also *WRIGHT ET AL.*, *supra* note 27, § 3609.1.

241 See, e.g., *Friedlander v. Friedlander*, 149 F.3d 739 (7th Cir. 1998) (reversing the district court's dismissal of a suit for intentional infliction of emotional distress related to unpaid alimony as such a case did not implicate the domestic relations exception).

242 See *Spindel v. Spindel*, 283 F. Supp. 797, 799 (E.D.N.Y. 1968) (discussing Supreme Court precedent involving requests for divorce as inapplicable to the case before it, which

these status questions.<sup>243</sup> Vestal and Foster have proposed a “status-property distinction” to explain the courts’ decisions to hear property disputes that turn on marital status and to refuse others that seemingly implicate status alone. In general, Vestal and Foster recommend that federal courts should decline jurisdiction in domestic relations suits when issues of status arise.<sup>244</sup> Naomi Cahn disagrees, arguing that the status-property distinction has proven difficult to apply and lacks any conceptual support that would justify federal courts in declining to adjudicate status issues.<sup>245</sup>

By highlighting the investitive (and divestitive)<sup>246</sup> nature of certain legal proceedings, our non-contentious account can help to clarify the scope and limits of federal power over issues of status. Federal courts cannot perform the non-contentious act of officially proclaiming the marriage of two consenting adults; by conferring a new status under state law, such proclamations represent a classic example of the kind of investitive decree<sup>247</sup> on a matter of state law that lies beyond the federal cognizance of “controversies.” Similarly, when parties agree to a divorce or separation governed by state law, any decree a court might make in connection with the resulting change in status would lie beyond federal judicial power.<sup>248</sup> Contested divorces present a different sort of issue; at least in theory, such contests could qualify for the exercise of federal diversity jurisdiction as a controversy between citizens of different states (although as we have seen, few such disputes would meet the diversity test and the diversity statute has been definitively construed in

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involved a determination of the invalidity of a divorce). A similar distinction, regarding the issuance of alimony, was recognized in the Court’s first domestic relations case. *Barber v. Barber*, 62 U.S. 582 (1858). There, the Court disclaimed jurisdiction for the issuance of alimony but was careful to note that the parties before it were not seeking a decree but asking that the already executed decree not be defeated by fraud. *Id.* at 584 (“Our first remark is—and we wish it to be remembered—that this is not a suit asking the court for the allowance of alimony. That has been done by a court of competent jurisdiction.”). The *Barber* Court went on to indicate that it would be willing to pass on the legality of an already decreed divorce. *Id.* at 588 (“It is not necessary for us to pass any opinion upon the legality of the decree, or upon its operation there or elsewhere to dissolve the *vinculum* of the marriage between the defendant and Mrs. Barber.”); *see also* *Atwood*, *supra* note 1, at 594 (noting the Court’s apparent willingness to pass on the executed divorce decree).

243 *See, e.g.*, Vestal & Foster, *supra* note 1, at 31.

244 *Id.*

245 *See* Cahn, *supra* note 1, at 1093–94.

246 *See supra* note 100 and accompanying text (discussing the investitive, or divestitive, nature of divorce proceedings).

247 An “investitive” decree is best understood as a judgment that “effect[s] a change of status and [is] primarily a source of new jural relations . . . .” Borchard, *supra* note 99, at 4–5 (footnote omitted). Such investitive judgments stand in contrast to “executory” judgments that require a defendant to do something. *Id.* at 4. The decree of a marriage merely declares the existence of a jural relation and “cannot be executed, as they order nothing to be done.” *Id.* at 5.

248 A divorce may be similarly characterized as “investitive” as it works a change in status. Some have used the term divestitive for divorce decrees, however, as the change in status is to divest one of the marital status. *See id.* at 32.

*Ankenbrandt* to rule out such contests). We think the construct of the investitive non-contentious decree has much to offer in sorting out the proper scope of federal judicial power.

Consider, for illustrative purposes, Judge Weinstein's incisive decision in *Spindel v. Spindel*.<sup>249</sup> There, the plaintiff brought suit alleging that her former husband fraudulently induced her to marry him and then fraudulently procured a Mexican divorce. Having established a separate home, she brought suit in diversity to nullify the divorce and obtain a substantial property settlement. As Judge Weinstein emphasized, the plaintiff did not apply to federal court either for a marriage or for a divorce; rather, the plaintiff asked that a fraudulent divorce be invalidated.<sup>250</sup> While the action, if successful, would change the plaintiff's legal status from divorced under Mexican law to that of married under New York law, the suit was not brought to secure an investitive (or divestitive) decree. Rather, the point of the litigation was to test the validity of a legally significant act that had been performed under the laws of Mexico. The parties, in short, sought to litigate their jural relationship, which was contested, rather than to alter those relations through an investitive act. Judge Weinstein accordingly agreed to hear the case, noting that while *Barber* and related cases barred the federal courts from *issuing* a divorce decree,<sup>251</sup> it left them free to hear a dispute over the *validity* of a decree issued by another tribunal. For Weinstein, then, despite "occasional extravagant disclaimers" to the contrary, "it has long been recognized that the federal courts are competent to determine matters involving some aspects of marital status, either directly or indirectly."<sup>252</sup>

We think Weinstein correctly identified the distinction between an investitive decree that seeks to alter jural relations (marriage, divorce)<sup>253</sup> and a dispute over the current status of the parties' jural relations that may result in a decree that alters that status. What's more, Weinstein showed that the English Court of Chancery observed this distinction in the course of determining what sorts of status-clarifying claims it could hear as inter partes disputes and what sorts of status-altering matters were properly left to the ecclesiastical courts. Although the ecclesiastical courts were the proper forum in which to pursue divorce decrees, temporal courts often stepped in to enforce such decrees or otherwise to decide questions of marital status incidental to their jurisdiction. Because temporal courts had exclusive juris-

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249 283 F. Supp. 797 (E.D.N.Y. 1968).

250 *Id.* at 799 (stating that certain domestic relations precedents "are not applicable to the instant case which involves, not a request for a divorce, but a determination of the invalidity of a divorce").

251 *See Barber v. Barber*, 62 U.S. 582, 584 (1858) (distinguishing between the request for the issuance of a divorce or alimony decree and a judgment preventing such a decree from being defeated by fraud).

252 *Spindel*, 283 F. Supp. at 810.

253 *See Borchard*, *supra* note 99, at 4-5 (discussing the investitive nature of divorce decrees).

diction over matters of property,<sup>254</sup> they were often called upon to address issues of marital status in the course of their usual run of litigation. Chancery courts also agreed to enforce separation agreements and to decree maintenance for separated spouses.<sup>255</sup> It was thus not unusual for a temporal court to decide the legality of claims involving marital status when they arose as incidents to the rightful exercise of their jurisdiction.<sup>256</sup>

The distinction between investitive decrees and disputes that arise over existing relations or status should help the lower courts to maintain a properly narrow view of the scope of the domestic relations exception after *Ankenbrandt*. In *Kahn v. Kahn*,<sup>257</sup> the Eighth Circuit failed to honor this distinction in the course of concluding that the domestic relations exception applied to a tort action alleging breach of fiduciary duty, conversion, and fraud. There, after the plaintiff had obtained a divorce and a state court had divided marital property, she sued her ex-husband in federal court for wrongful conduct that had taken place during the couple's marriage.<sup>258</sup> Finding that these issues had already been adjudicated as part of the state court's divorce proceeding, the district court dismissed the action as barred by the doctrine of claim preclusion.<sup>259</sup> The Eighth Circuit declined to reach preclusion on appeal, ruling instead that the district court lacked jurisdiction over issues "so inextricably intertwined with the prior property settlement incident to the divorce proceeding" that the domestic relations exception was implicated.<sup>260</sup> The conclusion seems clearly inconsistent with *Ankenbrandt* and with the recognition that federal courts may hear disputes that call marital status into question or seek to contest the legality of events that occurred during marriage.

#### E. Adoption and Surrogacy in the Lower Federal Courts

Our non-contentious account of the domestic relations exception can also help to clarify some of the issues that may confuse the lower federal courts in the wake of *Ankenbrandt*. With the rise of surrogacy agreements,

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254 LEONARD SHELFORD, A PRACTICAL TREATISE OF THE LAW OF MARRIAGE AND DIVORCE 260 (Philadelphia, John S. Littell 1841) ("The temporal courts have the sole cognizance of examining and deciding directly upon all the temporal rights of property; and so far as such rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage.").

255 See R.J. Peaslee, *Separation Agreements Under the English Law*, 15 HARV. L. REV. 638, 639-40 (1902) (detailing early English cases wherein the Chancery court assumed the power to decree support to the wife when the husband had not fulfilled his spousal duty or a separation had already been decreed by an ecclesiastical court).

256 *Id.* at 640.

257 21 F.3d 859 (8th Cir. 1994).

258 *Id.* at 860-61.

259 *Id.* at 861.

260 *Id.* at 861-62 (also noting that the plaintiff's tort claims would require the district court to "inquire into matters directly relating to the marital relationship").

adoptions, and related paternity and custody litigation,<sup>261</sup> lower federal courts must sometimes consider whether these tangled issues belong on their dockets.<sup>262</sup> Although *Ankenbrandt* does not address these matters directly, our non-contentious account may point the way. Consider a case like *Berwick v. Wagner*,<sup>263</sup> which grew out of the parties' agreed-upon use of new reproduction technology. There, two same-sex members of a California domestic partnership, while living in Texas, arranged a surrogacy contract calling for an unrelated third party to deliver a child through in vitro implantation.<sup>264</sup> Detailed contracts set forth the duties involved, and called for the issuance of a California birth certificate naming the two same-sex partners as parents of the child. Following birth of the child, a California decree was duly entered at the parties' request, upholding paternity as reflected in the birth certificate.<sup>265</sup> Later, in Texas, a dispute arose over custody following the dissolution of their same-sex marriage.

In assessing what role a federal court could play in the resulting litigation, the combined lessons of *Ankenbrandt* and non-contentious jurisdiction lend some clarity. *Ankenbrandt* forecloses a direct federal judicial role in custody battles.<sup>266</sup> But it says nothing about the enforcement of surrogacy contracts or about the litigation that may arise from them. Here, the fact that surrogacy agreements arise through the consent of the parties would tend to reveal a non-contentious foundation to the surrogacy relationship. Similarly, the agreed-upon paternity judgment and decree as to the content of the birth certificate would likely evade federal judicial power on the ground that there is no dispute or controversy within the meaning of the federal diversity statute. Only after the legal steps have been taken, creating a new set of legal relationships (parent, child, birth parent) can the federal courts get involved and then only to resolve disputes between diverse citizens as to the legality of the new relationships.

For much the same reason, federal courts cannot preside over an adoption and decree its effectiveness, but they could conceivably hear a dispute over the legal effect of an adoption.<sup>267</sup> Such an issue arose in *Johnson v.*

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261 For a discussion of the rise in surrogacy agreements and the related legal complications, see Carol Sanger, *Developing Markets in Baby-Making: In the Matter of Baby M*, 30 HARV. J.L. & GENDER 67 (2007) (discussing the rise of surrogacy and the current state of the law in the context of *In re Baby M*, 537 A.2d 1227 (N.J. 1988)).

262 See, e.g., *Newman v. Indiana*, 129 F.3d 937, 939 (7th Cir. 1997) (citing *Ankenbrandt* for the proposition that "domestic relations, including adoptions, is the primary responsibility of the state courts, administering state law, rather than of the federal courts").

263 No. 01-12-00872-CV, 2014 WL 4493470 (Tex. App. Sept. 11, 2014).

264 *Id.* at \*1.

265 *Id.*

266 *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992) (holding that "the domestic relations exception, as articulated by this Court since *Barber*, divests the federal courts of power to issue divorce, alimony, and child custody decrees").

267 In Illinois, the process of changing one's name has been structured as a non-contentious mode. See 735 ILL. COMP. STAT. ANN. 5/21-101 (West 2007) ("Proceedings; parties. If any person who is a resident of this State and has resided in this State for 6 months desires

*Rodriguez (Orozco)*.<sup>268</sup> There, the biological father of an adopted child sought relief in federal district court asking that custody of the child be assigned to him and arguing that Utah's adoption statute was unconstitutional.<sup>269</sup> On appeal, the Tenth Circuit found that the domestic relations exception barred the court from vitiating the adoption and assigning custody to the father. It nonetheless allowed the constitutional challenge,<sup>270</sup> ruling that it "[did] not require the district court to make a child custody determination."<sup>271</sup> The decision blends two features of the domestic relations exception: federal courts should not exercise jurisdiction over an adoption agreement entered into on a non-contentious basis.<sup>272</sup> But after an adoption decree has been rendered, thus working a change in the child's status, a federal court might be called upon to resolve disputes that implicate either their federal question or diversity jurisdiction. So long as the federal court can grant relief without issuing a custody order that would run afoul of *Ankenbrandt*, the domestic relations exception should pose no bar.

### CONCLUSION

In offering a novel non-contentious view of the domestic relations exception, this Article builds on a suggested distinction between the Article III references to "cases" and "controversies." While scholars and jurists, operating in the shadow of the Supreme Court's standing decisions, understandably proceed on the assumption that the judicial power means precisely the same thing in both settings, we believe that the nature of the judicial power differs in "cases" and "controversies." When the federal courts entertain "cases" arising under federal law, they enjoy full power to administer the law by hearing

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to change his or her name and to assume another name by which to be afterwards called and known, the person may file a petition in the circuit court of the county wherein he or she resides praying for that relief. If it appears to the court that the conditions hereinafter mentioned have been complied with and that there is no reason why the prayer should not be granted, the court, by an order to be entered of record, may direct and provide that the name of that person be changed in accordance with the prayer in the petition.").

268 226 F.3d 1103 (10th Cir. 2000).

269 *Id.* at 1105–07. The case was characterized as arising under both 28 U.S.C. § 1331 (2012) (federal question) and 28 U.S.C. § 1332 (federal diversity) jurisdiction. *Johnson*, 226 F.3d at 1105.

270 *Johnson*, 226 F.3d at 1111–12 (holding that the "domestic relations exception plainly bar[red] the district court from granting [the issuance of an injunction as to the adoption order] in exercising diversity jurisdiction" but that the plaintiff's constitutional challenge "d[id] not fall within the domestic relations exception").

271 *Id.* at 1111. *Johnson* illustrates an important point: that even though issues of state law might come to federal court as part of one constitutional "case" based on the presence of a federal claim that supplies the basis for an exercise of supplemental jurisdiction, the domestic relations exception should govern such issues.

272 Adoption has historically fallen within the sphere of state regulation and thus, in the absence of a controversy, a federal court may not hear a claim over an adoption agreement. For a history of adoption in the United States, see Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077 (2003).

both contentious and non-contentious matters. When, by contrast, they sit to resolve “controversies” over state law, they perform only a dispute-resolution role. To the extent that the law of domestic relations implicates supreme federal law, federal courts may naturally exercise broader authority. But so long as state law furnishes the rule of decision, federal courts must play a more circumspect role. In particular, as we have argued, the federal courts should refrain from entertaining original applications for the entry of non-contentious investitive decrees, such as marriages, consensual separations and divorces, adoptions, and other matters in which the parties voluntarily agree to a change in their legal status.

While our proposed account focuses in the main on constitutional meaning and does not contest the holding in *Ankenbrandt*, the Court’s latest word on the interpretation of the diversity statute, we nonetheless believe that a non-contentious understanding contributes something important to the law. For starters, we think the non-contentious account helps to explain, as a historical matter, how the domestic relations exception arose in the decisional law of the nineteenth century. Many of the Court’s most confusing pronouncements were simple declarations about the state-law origins of much domestic relations law.<sup>273</sup> While controversies over state law flow freely onto federal diversity dockets, the absence of a controversy between diverse citizens would foreclose a federal judicial role. Our approach also explains the Court’s willingness to authorize federal judicial engagement with domestic relations issues when they implicate federal law. Federal courts have a broader role to play in administering federal law than they do when the subject at hand rests on the laws of the states; issues of divorce and alimony, if creatures of federal law, do not lie beyond federal judicial power as the Court confirmed in *Simms v. Simms*.<sup>274</sup> Far from anomalous, the willingness of the federal courts to administer federal domestic relations law in the territories confirms the explanatory power of our proposed case-controversy distinction.

By securing the principle of co-extensivity, our approach clarifies that federal courts have full power to engage with any subjects of family law that come to be seen as governed by federal law. Many observers believe that, as our society becomes more mobile, questions of family law will demand greater attention from Congress and from those who negotiate international treaties.<sup>275</sup> Our approach provides a straightforward account of congress-

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273 See, e.g., *In re Burrus*, 136 U.S. 586, 594 (1890) (finding that the whole subject of the “domestic relations of husband and wife, parent and child, belongs to the laws of the States”); *Fontain v. Ravenel*, 58 U.S. 369, 393 (1854) (discussing states’ power over “minors, idiots, and lunatics, or charities”); *Barry v. Mercein*, 46 U.S. 103, 115 (1847) (stating that all questions relating to domestic relations “are peculiarly and appropriately within the province of the State governments”).

274 175 U.S. 162 (1899); see also *De La Rama v. De La Rama*, 201 U.S. 303 (1906) (allowing review of a judgment reversing a divorce decree in the territory of the Philippines).

275 See Cahn, *supra* note 1, at 1075.



sional power to assign such matters to federal courts. What's more, our approach (like that of *Ankenbrandt*) would authorize Congress to broaden diversity jurisdiction to encompass contested divorces between diverse parties. (We see little prospect that such a proposal will gain traction with the political branches or that, if enacted, it would burden federal courts unduly. Contested divorces rarely occur these days and rarely arise between parties who maintain separate domiciles.) Such an authorization could address the concern of some critics that the domestic relations exception has resulted in the wholesale, and perhaps biased, relegation of family law matters to state courts.<sup>276</sup> More to the point, while our theory does not propose a drastic change in the scope of the domestic relations exception, it does offer a textual and historical framework for conducting a principled assessment of the scope of federal jurisdiction over domestic relations cases.

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276 See *supra* notes 83–85 and accompanying text.

