ANKENBRANDT TURNS 30: THE ILLUSORY SIMPLICITY OF THE DOMESTIC RELATIONS EXCEPTION

Drew Gehman*

ABSTRACT

Among the tools in a litigant's toolbox is the ability to invoke diversity jurisdiction of the federal courts with just two simple requirements: complete diversity of the parties and damages in excess of the requisite amount in controversy. However, a puzzling exception exists to this well-known rule of civil procedure: the domestic relations exception. Three decades ago, the decision in *Ankenbrandt v. Richards* showcased the force of the domestic relations exception. Despite the fact that Carol Ankenbrandt satisfied the requirements to invoke diversity jurisdiction, the district court dismissed her action because federal courts refuse to hear cases involving domestic issues. Since *Ankenbrandt*, a circuit split has continued to highlight the decision's murkier details. This Note focuses on the lasting impact of *Ankenbrandt* in the thirty years since it was decided and argues that its legacy is not one worth celebrating. The author provides a rich historical analysis of the development of the domestic relations exception and the policy considerations underlying the *Ankenbrandt* decision, as well as the practical outcomes of its holding. Ultimately, this Note argues that the domestic relations exception in its current iteration fails to adequately advance its supposed goal of restricting all domestic matters from federal courts and instead has resulted in patchwork access to federal courts amongst married and unmarried litigants. Finally, this Note suggests that the most principles way for federal courts to decline jurisdiction is through abstention, rather than the troublesome domestic relations exception.

*. J.D. (2023), Washington University School of Law.

INTRODUCTION

All first-year civil procedure students can recite what litigants must show to invoke the diversity jurisdiction of the federal courts: complete diversity of the parties and damages in excess of the requisite amount in controversy.[1] So if a first-year civil procedure student encountered the fact pattern in *Ankenbrandt v. Richards*, in which a woman (a Missouri domiciliary) sued her ex-husband and his girlfriend (Louisiana domiciliaries) in federal district court, alleging damages in excess of $9.8 million,[2] that student might be puzzled to hear that the district court dismissed this action, citing the judicially created domestic relations exception—the notion that despite having met all requirements for a district court's federal diversity jurisdiction, federal courts refuse to hear cases involving domestic issues.[3] On the face of the complaint, Carol Ankenbrandt satisfied the two magic elements of diversity jurisdiction. Though the Supreme Court reversed on this particular litigant's facts in *Ankenbrandt*, the domestic relations exception persists.

A circuit split that continues to develop highlights the blurry contours of *Ankenbrandt*. In 2021, the Ninth Circuit had its first opportunity since *Ankenbrandt* to evaluate the domestic relations exception.[4] Notably, the court made clear that it would interpret the domestic relations exception narrowly.[5] But the court did not stop there: it pointed out that it declined to "adopt the broad version of the exception embraced by some of our sister

1. 28 U.S.C. § 1332(a)(1) ("The district courts shall have original jurisdiction of all civil actions where the amount in controversy exceeds the sum or value of $75,000…and is between—citizens of different states…"). *See also* Strawbridge v. Curtiss, 7 U.S. 267 (1806) (emphasizing the requirement of complete diversity on either side of the case caption for federal district courts to have jurisdiction over the parties).

2. *L.R. ex rel. Ankenbrandt v. Richards*, 1990 WL 211545 (E.D. La. Dec. 10, 1990), *aff'd sub nom. Ankenbrandt v. Richards*, 934 F.2d 1262 (5th Cir. 1991), *rev'd*, 504 U.S. 689 (1992), and *vacated sub nom. Ankenbrandt v. Richards*, 973 F.2d 923 (5th Cir. 1992). The District Court conceded that "it has jurisdiction over this matter . . ." and recognized that diversity requirements had been met, but refused to hear the case under the domestic relations exception. *Id.* at n.1.

3. D. KELLY WEISBERG AND SUSAN FRELICH APPLETON, MODERN FAMILY LAW 567 (6th ed. 2016) (The domestic relations exception derives from the idea that federal courts "traditionally [have] declined to exercise jurisdiction over matters of domestic relations even in cases in which plaintiffs could establish the requisite diversity of citizenship and amount in controversy.").

4. *Bailey v. MacFarland*, 5 F.4th 1092, 1096 (9tht Cir. 2021).

5. *Id.* at 1097.

circuits,"[6] signaling the lack of clarity that, despite the passage of thirty years, continues to plague courts and litigants.

The focus of this Note is *Ankenbrandt's* impact thirty years after it was decided, ultimately finding that *Ankenbrandt*'s birthday is, sadly, not one to celebrate.

Part I of this Note will focus on the history and development of the domestic relations exception, from its inception in 1858 to its current form in 1992.[7] First, this Note will focus on the cases that laid the foundation for the doctrine.[8] Next, this Note examines an evidently widening circuit split by considering the various interpretations of *Ankenbrandt*'s holding by the circuit courts.[9] Part I will conclude by chronicling an increasingly important area: whether nonmarried couples ending their relationships in court may—or should—be barred from federal courts sitting in diversity under the domestic relations exception.[10] Part II will analyze the main legal and policy arguments animating *Ankenbrandt* and the various courts that have interpreted its holding, concluding with a recommendation that abstention—not the so-called domestic relations exception—is the most principled way for federal courts to decline jurisdiction over family law disputes.[11]

I. HISTORY

A. *Barber, Burrus, and Popovici: The Domestic Relations Exception is Born*

The Supreme Court's decision in *Barber v. Barber* is the Court's first pronouncement of the domestic relations exception.[12] In *Barber*, ex-wife Huldah Barber sued ex-husband Hiram Barber in a Wisconsin federal court, seeking enforcement of an alimony award issued by a New York state

6. *Id.*
7. See *infra* Part 0.
8. *See infra* Part I.0.
9. *See infra* Part 1.0.
10. *See infra* Part 1.0.
11. *See infra* Part 0.
12. *See* Naomi R. Cahn, *Family Law, Federalism, and the Federal Courts*, 79 IOWA L. REV. 1073, 1076 (1994) ("Although earlier Supreme Court cases frequently mentioned the power of states over domestic relations law in dicta, *Barber* was the first case in which the Supreme Court squarely addressed family law").

court.[13] First, the Supreme Court held (rather controversially for the time[14]) that a woman *could*, despite the doctrine of coverture, establish a domicile separate from her ex-husband such that she could satisfy the requirements for diversity jurisdiction.[15] The Court also concluded that a Wisconsin federal court could enforce the alimony award against Hiram.[16] Thus, given its relatively progressive approach to the issue of a woman establishing a separate domicile, and relatedly the relief the Court granted her, it may come as a surprise that this case ushered in the domestic relations exception. However, in infamous dicta, the Court explained at the beginning of the opinion:

> 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. . . . 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 a divorce *a vinculo*, or to one from bed and board.[17]

The *Barber* Court drew on no constitutional or statutory authority for this sweeping assertion about the jurisdictional limits of the federal courts.[18]

The Court expanded the scope of the exception in *In re Burrus*, reasoning that child custody disputes also fall outside the jurisdiction of the

13. Barber v. Barber, 62 U.S. 582, 583 (1858).

14. *See* Judith Resnik, "*Naturally" without Gender: Women, Jurisdiction, and the Federal Courts*. 66 N.Y.U. L. REV. 1682, 1697 ("Finding a woman capable of having a separate domicile, *Barber* is an early judicial recognition of women's rights . . . ").

15. *Barber*, 62 U.S. at 597-98. The dissent arrived at the opposite conclusion, finding that as a woman, Huldah could not establish a separate domicile. *Id.* at 603 (Daniel, J. dissenting). Indeed, the dissent characterizes the situation as "the disability of the wife as a party." *Id.*

16. *Id.* at 600 (majority opinion).

17. *Id.* at 584.

18. *See Ankenbrandt ex rel. L.R. v. Richards*, 504 U.S. 689, 694 (1992) ("The *Barber* Court, however, cited no authority and did not discuss the foundation for its announcement."). The *Barber* dissent, however, did argue that because it was England's ecclesiastical courts who heard divorce cases, and not England's chancery courts after which the United States had modeled its equity courts of the period, federal jurisdiction over the case was inappropriate. *Barber*, 62 U.S. at 604 (Daniel, J., dissenting). For an explanation of how this historical states-rights perspective is informed by the same logic as *Dred Scott*, *see* Cahn, *supra* note 12, at 1077-78.

federal courts.[19] In *Burrus*, Louis Miller's wife died of measles, so their child went to live with grandparents, the Burruses.[20] However, when Louis remarried and wanted custody of his child, the Burruses refused to return the child to Louis.[21] The case before the Supreme Court was actually the grandfather's habeas corpus action after he was held in criminal contempt by the Nebraska district court for failing to return the child to Louis.[22] The Court further cemented the domestic relations exception (again, without citing the specific authority on which it relied)[23] by declaring that "[t]he whole subject of the domestic relations of husband and wife, *parent and child*, belong to the laws of the States and not to the laws of the United States."[24] Thus, taken together with *Barber*, the domestic relations exception extended not only to divorce, but also to child custody by 1890.

The next canonical case in the progression of the domestic relations exception involves the dissolution of the marriage of a U.S. citizen and a foreign diplomat. In *Ohio ex. rel. Popovici v. Agler*, plaintiff sued her soon-to-be ex-husband, a Romanian diplomat, in Ohio state court, asking that the court grant her a divorce and alimony.[25] Her husband ultimately appealed the divorce decree all the way to the Ohio Supreme Court, arguing that Ohio courts lacked jurisdiction over him.[26] The United States Supreme Court granted certiorari. In his view, the only appropriate forum in which he could be sued would be federal court.[27] In support of his position, he cited the language of Article III of United States Constitution and the respective codification extending the jurisdiction of the federal courts to cases involving ambassadors.[28] The Court rejected his argument, relying on, *inter*

19. *In re Burrus*, 136 U.S. 586, 593-94 (1890). Interestingly, the case did not concern diversity jurisdiction, but rather the federal habeas corpus statute. *Id.* at 586. Notwithstanding, courts have broadly interpreted the *Burrus* dictum to encompass federal courts' diversity and federal question jurisdiction. *See* Cahn, *supra* note 12, at 1079-82.

20. *In re Burrus*, 136 U.S. at 587.

21. Id.

22. *Id.* at 588-89.

23. Cahn, *supra* note 12, at 1078-79.

24. *In re Burrus*, 136 U.S. at 593-94 (emphasis added). *See also* Cahn, *supra* note 12, at n.32 (pointing out that *Burrus* may not stand for the proposition for which it is often cited).

25. *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379, 382 (1930).

26. *Id.*

27. *Id.* at 382-83 ("A suit for divorce between the present parties brought in the District Court of the United States was dismissed.").

28. U.S. Const. art. III, § 2 ("[t]he judicial power shall extend . . .to all Cases affecting Ambassadors, other public Ministers and Consuls . . . the Supreme Court shall have original Jurisdiction.").

alia, *Burrus* and *Barber*.[29] The Court succinctly summarized its position: "If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife . . . were matters reserved to the States, there is no difficulty in constructing the instrument accordingly . . . ."[30] Though the *Popovici* Court was deciding a case about the jurisdiction of the federal courts over diplomats and did not involve diversity jurisdiction like the previous cases, the reliance on the then-domestic relations precedent cemented the domestic relations exception.[31] Finally, the *Popovici* Court's invocation of *Burrus* and *Barber* signals the Court's entrenchment in the view that the federal courts—no matter the source of their jurisdiction over a particular matter—have no business hearing cases involving domestic relations matters.

B. Ankenbrandt

As briefly discussed above, Carol Ankenbrandt sued her ex-husband and his companion in federal district court, alleging physical and sexual abuse of her children, and pleading damages in excess of $9 million.[32] The district court, relying on *Burrus*, refused to hear the case, despite Carol having satisfied all of the diversity jurisdictional requirements.[33] In the alternative, the district court reasoned that even if the domestic relations

29. *Popovici*, 280 U.S. at 383. Specifically, the Court quoted: "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not the laws of the United States." *Id.* (quoting *In re Burrus*, 136 U.S. at 593-94).

30. *Popovici*, 280 U.S. at 383-84. The Court further explained: "Suits against consuls and vice-consuls must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts." *Id.*

31. Professor Sack explains, however, that this case might not actually comment on the domestic relations exception:

> [D]ue to the procedural stance of the case, in which the diplomat was arguing that the state court lacked jurisdiction to decide the divorce, the Supreme Court was not considering whether a federal court could have jurisdiction over such a case, but rather whether or not the state had the right to exercise jurisdiction.

Emily J. Sack, *The Domestic Relations Exception, Domestic Violence, and Equal Access to Federal Courts*, 84 WASH. U. L. REV. 1441, 1479 (2006). For a critique of the Court's reasoning in *Popovici*, *see also* Cahn, *supra* note 12, at 1079 ("[T]he Court papered over seemingly clear legislative and constitutional provisions . . . further obscuring the source of the Exception. . . . The Court . . . shrugged off the explicit constitutional language in Article III concerning federal jurisdiction over suits against ambassadors").

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

33. *Id.* at 692.

exception did not apply, it was also proper for the court to decline jurisdiction under the abstention doctrine.[34] Thus, there were three main issues before the Supreme Court: (i) whether a domestic relations exception even existed, (ii) whether the exception, if it did exist, could prevent a federal district court from hearing a tort case alleging damages, and (iii), whether the district court erred in invoking the abstention doctrine.[35]

First, the Supreme Court continued to recognize the domestic relations exception while conceding that the *Barber* court had announced the exception "cit[ing] no authority and . . . not discuss[ing] the foundation for its announcement."[36] Notwithstanding, the Court announced: "Because we are unwilling to cast aside a rule that has been recognized for nearly a century and a half, we feel compelled to explain why we will continue to recognize this limitation on federal jurisdiction."[37]

The Court made clear that no *constitutional* prohibition exists on federal courts from hearing domestic relations cases.[38] Additionally, the Court concluded that the *Barber* Court was deciding on statutory, rather than constitutional, grounds.[39] As to its statutory analysis, the Court turned to the Judiciary Act of 1789, focusing on the language "all suits of a civil nature at common law or in equity . . ." and pointing to the *Barber* dissent's focus on the fact that England's *ecclesiastical* courts heard domestic relations cases.[40] Regardless, the Court declined to adopt any specific historical

34. *Id.* "The abstention doctrine, delineated in *Younger v. Harris*, 401 U.S. 37 (1971), is founded on principles of federalism. It provides that federal courts may refuse to adjudicate civil proceedings that involve important state interests or substantial policy concerns." WEISBERG & APPLETON, *supra* note 3, at 567.

35. *Ankenbrandt*, 504 U.S. at 692-93.

36. *Id.* at 694.

37. *Id.* at 694-95. "[D]espite [the Court's] own skeptical explanation of its origins, [it] did not overrule the doctrine." Sack, *supra* note 30, at 1449.

38. *Ankenbrandt*, 504 U.S. at 695. Professors Pfander and Damrau observe that *Ankenbrandt* achieved "some notable goals," explaining, "[B]y 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 them." James E. Pfander & Emily K. Damrau, *A Non-Contentious Account of Article III's Domestic Relations Exception*, 92 NOTRE DAME L. REV. 117, 150 (2016).

39. *Ankenbrandt*, 504 U.S. at 696.

40. *Id.* at 698-99. Prof. Sack finds the Court's historical analysis a "strained explication" and offers interpretations that militate in the opposite direction of the *Barber* dissent, including the idea that English ecclesiastical courts may not have actually exercised exclusive jurisdiction over matrimonial matters, or that American—not English—judicial practice should be the guide. Sack, *supra* note 30, at 1451-52.

analysis, explaining, "We . . . are content to rest our conclusion that a domestic relation exception exists as a matter of statutory construction not on the accuracy of the historical justifications on which it was seemingly based, but on Congress' apparent acceptance of this construction of the diversity jurisdiction provisions . . . ."[41] Interestingly, the Court ultimately justified the exception as deriving from legislative acquiescence: had Congress wanted the federal courts to exercise jurisdiction over domestic relations issues, it would have legislated accordingly.[42]

In its attempt to decide whether the domestic relations exception exists in the first instance, the Court announced that the exception only prohibits federal courts sitting in diversity from hearing cases involving "the issuance of a divorce, alimony, or child custody decree . . . ."[43] In so defining the exception, then, Carol Ankenbrandt's tort claim clearly belonged in federal court.[44] The Court also opined that, as a matter of policy, the domestic relations exception remained sound.[45] Specifically, it noted that the decrees entered by state courts in the domestic relations area involve retaining jurisdiction and enlisting social workers for compliance; that state courts, as a matter of judicial economy, can more efficiently work with the local and state agency sometimes involved in the consequences of the disposition of family law cases; and finally, that state courts have greater judicial expertise in the area of family law.[46]

Finally, the Court, having concluded that the domestic relations exception did not apply in this case, turned to whether the district court might prevent itself from hearing it based on the abstention doctrine. *Burford* abstention empowers federal courts to decline to hear cases in which "federal court intervention may interfere with the state's ability to create and develop regulatory policy," with the federal court giving "proper

41. *Ankenbrandt*, 504 U.S. at 700.

42. "[W]e have no trouble today reaffirming the validity of the exception as it pertains to divorce and alimony decrees and child custody orders." *Id.* at 703.

43. *Id.* at 704.

44. *Id.* ("This lawsuit in no way seeks [a divorce, alimony, or child custody] decree; rather it alleges that respondents Richards and Kesler committed torts against L.R. and S.R., Ankenbrandt's children by Richards").

45. *Id.* at 703-04 (emphasizing that the domestic relations exception serves the ends of judicial economy, efficiency, a respect for local government, and judicial expertise).

46. *Id.* For a critique of these rationales, *see, e.g.* Cahn, *supra* note 12, at 1088-89 ("These explanations, however, are incomplete and instead reflect judicial searches for a credible rationale that is in accord with contemporary jurisprudence.").

regard for the rightful independence of state governments in carrying on their domestic policy."[47] District courts may invoke *Younger* abstention when "there is a parallel, pending state criminal proceeding, . . . state civil proceeding[] akin to criminal prosecutions or [a case] that implicates a State's interest in enforcing the orders and judgments of its courts."[48] First, the Court noted that abstaining from exercising jurisdiction under the doctrine "is the exception, not the rule."[49] It then noted that abstention under *Younger* was inappropriate in this case, as no pending state action coincided with the filling of the federal suit.[50] However, the Court left the door to *Younger* and *Burford* abstention open as a viable means of keeping certain domestic relations matters out of federal courts.[51]

Although Justice Blackmun concurred in the judgment, he argued that neither a constitutional nor a statutory basis exists for the domestic relations exception.[52] Rather, Justice Blackmun found that, in general, abstention provides a more coherent explanation for the exception.[53] In a blistering critique of the majority's approach, Justice Blackmun asserted: "It is one thing for the Court to defer to more than a century of practice unquestioned by Congress. It is quite another to defer on a pretext that Congress legislated when it never in fact did."[54] The concurrence also equivocated as to whether it remained sound as a matter of policy for federal courts to abstain from

47. Lewis Yelin, *"Burford" Abstention in Actions for Damages*, 99 COLUM. L. REV. 1871, 1875 (1999).

48. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 72-73 (2013). Justice Ginsburg went on to emphasize that *Younger* abstention is "exceptional" and should be applied in a limited fashion, such as in "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions." *Id.* at 73.

49. *Ankenbrandt* , 504 U.S. 698, 705 (1992) (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976)).

50. *Id.* at 705.

51. *Id.* at 705-06 ("This would be so when a case presents 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar") (quoting *Colorado River Water Conservation Dist.*, 424 U.S. at 814). As Professors Weisberg and Appleton described, "*Ankenbrandt* left open an alternative means by which federal courts can still 'slam shut' the federal courthouse door to some domestic relations matters that do not involve divorce, alimony, or custody." WEISBERG & APPLETON, *supra* note 3, at 567. For a discussion of other types of possible abstention, *see Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717-18 (1995).

52. *Ankenbrandt*, 504 U.S. at 708-09 (Blackmun, J., concurring) ("I have great difficulty with the Court's approach. . . . Any inaction on the part of Congress . . . reflects the fact . . . that Congress likely had *no idea until the Court's decision today* that the diversity statute contained an exception for domestic relations matters.") (emphasis added).

53. *Id.* at 714.

54. *Id.* at 715-16.

hearing domestic relations cases given Congress's gradually increasing involvement in the family by way of federal legislation.[55]

C. The Post-Ankenbrandt Domestic Relations Exception

i. The Ninth Circuit Adopts a Narrow Reading of *Ankenbrandt*

It was not until 29 years after the Supreme Court's decision in *Ankenbrandt* that the Ninth Circuit had occasion to interpret its holding.[56] In *Bailey v. MacFarland*, ex-wife Christine Bailey sued her ex-husband Michael, and later Michael's son Derek as successor in interest, as well as a company (*The Public Group*) in which the couple supposedly held a 10% interest at the time of their divorce. She alleged *inter alia* fraud, constructive fraud, breach of fiduciary duty, and conspiracy.[57] While still married, Christine and her husband had loaned money to MacFarland's son Derek to start *The Public Group*.[58] During settlement negotiations in their divorce, Christine insisted on a paragraph in the agreement dividing their interest in *The Public Group*.[59] However, after their divorce, Michael filed a declaration stating that at the time of the dissolution, he maintained no ownership interest in the public company.[60] Evidently feeling duped, Christine filed a diversity action against Michael and *The Public Group* in federal district court in California.[61]

Relying on the domestic relations exception, the district court granted defendants' motion to dismiss for lack of subject matter jurisdiction.[62] The

55. *Id.* at 715.

56. *Bailey v. MacFarland*, 5 F.4th 1092, 1096 (9th Cir. 2021) (explaining that "we have not otherwise had occasion to discuss the [domestic relations] exception's proper scope after *Ankenbrandt*. We do so today.")

57. *Id.* at 1094. Shortly after filing the lawsuit, Michael MacFarland (ex-husband) died. *Id.* at 1095.

58. *Id.* at 1095.

59. *Id.* at 1094.

60. *Id.* ("He [Michael] also claimed that he had never had 'any actual interest in The Public Group in exchange for loaning Derek the money or any other reason' and had 'no percentage interest in the Public Group's profit, loss, or capital.")

61. *Bailey v. MacFarland*, No. 2:15-cv-01725-TLN-AC, 2016 WL 2626040 at *1 (E.D. Cal. May 9, 2016) (granting defendants' motion to dismiss). Complete diversity among the parties existed: Christine was a citizen of Hawaii, MacFarland resided in California, and The Public Group was incorporated in Utah. *Bailey*, 5 F.4th at 1094.

62. *Bailey*, 5 F.4th at 1095.

district court explained that Christine's claims were "'inextricably intertwined with the parties' divorce proceedings.'"[63] However, the court also posited an alternate rationale: that the abstention principles discussed in *Ankenbrandt* would also appropriately bar Christine's claim for reasons of institutional competence.[64] The Ninth Circuit began its analysis by emphasizing that the domestic relations exception also applies to attempted *modification* of a divorce decree.[65] Next, the court addressed the issue of artful pleading, concluding that a plaintiff may not escape the domestic relations exception by cloaking her desire to modify a divorce decree in the "trappings of another claim."[66] As a result, the court concluded that the domestic relations exception did bar Christine's claim, as, in substance, she sought *modification* of her divorce decree in federal court.[67] The court explained that "[Christine] wants the federal court to determine whether certain assets were acquired and held by [her ex-husband] during the marriage and then decide what share of them should have been apportioned to Bailey upon the parties' separation."[68] The court insisted that the appropriate forum for Christine's claim was state court to determine whether her ex-husband acted tortiously at the time of their divorce.[69] However, the court did not end with an analysis limited to Christine's facts. Rather, it explained that it would not adopt "the broad version of the exception embraced by some of our sister circuits."[70] This Note will continue by examining the two specific approaches disapproved of by the Ninth Circuit's narrower approach to the exception.

63. *Id.*

64. *Id.* ("[T]he state court was in a better position to adjudicate the dispute").

65. *Id.* at 1096 ("Under *Akenbrandt*, we ask whether the plaintiff seeks issuance or modification of a divorce, alimony, or child custody decree").

66. *Id.* (quoting *Irish v. Irish*, 842 F.3d 736, 742 (1st Cir. 2016)). The court also cited *McLaughlin v. Cotner*, 193 F.3d 410 (6th Cir. 1999), for the proposition that a party may not disguise modification of a divorce decree for a "claim for damages based on a breach of contract." However, the court was careful to note two examples of contract or property claims to which the domestic relations exception did not apply: (1) "repayment of past due loans" where no divorce decree had even been issued, and (2) "a quiet title claim brought against a third party, with respect to property subject to a divorce decree" (referencing *Chevalier v. Est. of Barnhart*, 803 F.3d 789 (6th Cir. 2015) and *Matusow v. Trans-County Title Agency*, 545 F.3d 241 (3d Cir. 2008)).

67. *Bailey*, 5 F.4th at 1097.

68. *Id.* (partially quoting *Irish*, 842 F.3d at 743).

69. *Id.*

70. Id.

ii. The Seventh Circuit: Penumbra-and-Core

The first approach eschewed by the Ninth Circuit, the penumbra-and-core approach to the domestic relations exception, is espoused by the Seventh Circuit.[71] In *Friedlander v. Friedlander*,[72] plaintiffs Maris Freed and her father, Zangwill Freed, sued Maris's ex-husband for intentional infliction of emotional distress, seeking to invoke the diversity jurisdiction of an Illinois federal court.[73] Years before, when Maris and her ex-husband, Burton Friedlander, divorced in New York, she was awarded alimony, and when it went unpaid, she filed suit in an Illinois state court to have the alimony decree enforced.[74] Burton allegedly telephoned Zangwill and threatened to reveal to Maris that Zangwill was not Maris's natural father if Zangwill did not convince Maris to drop her lawsuit to enforce the alimony decree.[75] The district court dismissed the action for lack of subject-matter jurisdiction, citing the domestic relations exception.[76] Ultimately, the Seventh Circuit determined that Maris and Zangwill's claim did not trigger the domestic relations exception, as it lay outside both what it termed the "core and the penumbra" of the domestic relations exception, the court explaining that "the penumbra of the exception consists of ancillary proceedings, such as a suit for the collection of unpaid alimony, that state law would require be litigated as a tail to the original domestic relations proceeding."[77]

The court also explained that if an action in tort before a federal court sitting in diversity overlapped with a domestic relations action in state court, the appropriate course of action would be for the district court to stay the

71. *Id.*
72. 149 F.3d 739 (7th Cir. 1998).
73. *Id.* at 739-40.
74. *Id.*
75. *Id.* at 740. As it turns out, Maris was the product of an extramarital affair her mother had while married to Zangwill. Zangwill ended up disclosing this to Maris, preferring to disclose it himself. Both alleged that they were "emotionally devastated" by the event. *Id.*
76. *Id.* (The court opined: "Plaintiffs are improperly seeking to make a federal case out of a domestic relations dispute which is currently pending in state court.") The "currently . . . pending" issue in state court was stayed pending arbitration pursuant to the New York alimony decree and did not involve the alleged conduct that resulted in the IIED claim. *Id.* at 739-40.
77. *Id.* at 740-41. The court itself actually called into question whether the penumbra-and-core formulation was supported by *Ankenbrandt*, but citing no authority, proceeded with the conclusion that the domestic relations exception consists of both a core and penumbra. *Id.* at 740.

federal action pending the outcome of the state court proceeding.[78] The court then called into question the logic of the district court with the following comment: "Had Mr. Friedlander murdered his former father-in-law, the ensuing suit for wrongful death would not have been conducted by a domestic relations court as an ancillary proceeding to the original divorce case; and it makes no difference that, happily, he did not behave quite so egregiously."[79]

The Ninth Circuit cited *Friedlander* for the proposition that "the exception divests jurisdiction not only from cases implicating 'distinctive forms of relief' such as the decrees in *Ankenbrandt*, but also a 'penumbra' of cases implicating 'ancillary proceedings . . . that state law would require be litigated as a tail to the original domestic relations proceeding.'"[80] The court in *Friedlander* lists just one example of what might fall within the penumbra: "a suit for the collection of unpaid alimony."[81]

iii. The Eighth Circuit's "Even More Expansive" Approach

Wallace v. Wallace[82] involved a state-law identity theft claim[83] brought by husband Michael (an Arkansas domiciliary) against soon-to-be ex-wife Claire (a Missouri domiciliary).[84] Michael averred that after Claire filed for divorce, he discovered that she had opened credit card accounts in his name without his knowledge, naming herself as an authorized signer.[85] According to Michael, Claire racked up in excess of $40,000 in credit card debt in his name. The district court held that the domestic relations exception barred Michael's tort claim, and the Eighth Circuit affirmed.[86] Relying on circuit

78. *Id.* at 741.
79. *Id*.
80. *Bailey v. MacFarland*, 5 F.4th 1092, 1097 (9th Cir. 2020) (citing *Friedlander*, 149 F.3d at 740 (7th Cir. 1998)).
81. *Friedlander*, 149 F.3d at 740. Professors Pfander and Damrau view the court's decision in *Friedlander* as "test[ing] the boundaries of these limits [of the exception], taking up disputes that implicate the parties' marital status and alimony payments." Pfander, *supra* note 37, at 158.
82. 736 F.3d 764 (8th Cir. 2013).
83. Michael sued under the Missouri identity theft criminal statute which allows for a private right of action. *See* MO. REV. STAT. § 570.223 (LEXIS through 101st General Assembly, Regular Session and the 2022 1st Extraordinary Session).
84. *Wallace*, 736 F.3d at 765.
85. Id.
86. Id.

precedent,[87] the court reasoned the Michael's suit sounding in tort was "inextricably intertwined" with the state court divorce proceeding, and therefore, Michael was unable to seek relief in a federal forum.[88] The court reasoned that if the federal court provided Michael the relief he requested, it "would undermine the judgment of the state court."[89] The *Wallace* court relied partially on the Missouri statute requiring family courts to evaluate the "conduct of the parties" in the division of marital property to justify its non-interference.[90] Finally, in reaching its conclusion, the Eighth Circuit did not mention the controlling Supreme Court authority, only its circuit authority in *Kahn*. Rather, the court justified the vitality of its circuit precedent by declining to view *Marshall v. Marshall*[91] as an intervening Supreme Court decision.[92]

D. Nonmarriage & the Domestic Relations Exception

Up to this point, this Note has focused exclusively on the domestic relations exception as it pertains to marital relationships, but this Note will continue by exploring how nonmarriage might also implicate the domestic relations exception. Although once viewed as immoral (if not altogether illegal), cohabitation of nonmarried romantic partners is now a prevalent feature of contemporary life in the United States.[93] The decision of the

87. *Kahn v. Kahn*, 21 F.3d 859 (8th Cir. 1994). In *Kahn*, ex-wife sued ex-husband in federal court alleging "breach of fiduciary duty, conversion, constructive fraud and fraud barred by res judicata." The Eighth Circuit found that these actions sounding in tort sought to disrupt the family court's division of assets and barred her from pursuing these claims. *Id.* at 861.

88. *Wallace*, 736 F.3d at 767.

89. *Id.*

90. MO. REV. STAT. § 452.330.1(4) (LEXIS through 101st General Assembly, Regular Session and the 2022 1st Extraordinary Session). The court was satisfied that because the divorce trial involved disputes about the identity of the cardholder and concluded that all the debt was marital, the issue of identity theft had been squarely decided. *Wallace*, 736 F.3d at 767.

91. 547 U.S. 293 (2006). *Marshall* examined the contours of the sibling of the domestic relations exception—the probate exception. The Supreme Court defined the probate exception narrowly: "Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court" *Id.* at 312.

92. *Wallace*, 736 F.3d at 767.

93. *See* Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RSCH. CTR. (Sept. 24, 2014), https://www.pewresearch.org/social-trends/2014/09/24/record-share-of-americans-have-never-married/ [https://perma.cc/N5PQ-GGCS]; *See also Marvin v. Marvin*, 557 P.2d 106, 112 (Cal. 1976) (rejecting the view that nonmarital cohabitation necessarily violates public policy due to the "'immoral' character of the relationship" despite defendant's contention that cohabitation

landmark California case *Marvin v. Marvin* in 1976 ushered in a new era for cohabiting couples' right to order their affairs and enter enforceable cohabitation agreements.[94] The *Marvin* case also gave rise to the term—and concept—of palimony, or the sum courts may award a party in the dissolution of a nonmarital relationship.[95] Though little caselaw exists involving the intersection of nonmarital relationships and the domestic relations exception, this Note will continue by discussing several cases in which the federal courts have discussed the collision of the two.

We first turn to a pre-*Ankenbrandt* decision. *Anastasi v. Anastasi*[96] concerned a promise to support in the context of a nonmarital relationship; indeed, plaintiff averred that her partner promised "to provide [her] with all of her financial support and needs for the rest of her life."[97] In its first order in the case, after a lengthy discussion of the then-state of the domestic relations exception, the district court concluded that, because the state of New Jersey treated disputes between separated non-married couples as pure contract disputes, nothing should bar the federal court from exercising jurisdiction over it.[98] However, between February (when the first order was issued) and August of 1982, the New Jersey Supreme Court determined that nonmarital relationships should be heard in the state's chancery courts (where family law issues are heard), rather than courts of law.[99] Because the

involved an "illicit relationship").

94. *Id.* The court stated:

> The fact that a man and woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses. . . . Agreements between nonmarital partners fail only to the extent that they rest upon a consideration of meretricious sexual services.

Id. at 670-71. Professor Antognini characterizes *Marvin* as "the leading case recognizing the rights of nonmarried couples." Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 104 (2021).

95. "Though not recognized under most state statutes, caselaw in some jurisdictions authorizes palimony claims. The term originated in the press coverage of *Marvin v. Marvin*." *Palimony*, BLACK'S LAW DICTIONARY (11th ed. 2019).

96. 544 F. Supp. 866 (D.N.J. 1982).

97. *Id.* at 866 (internal quotation marks omitted).

98. *Anastasi v. Anastasi*, 532 F. Supp. 720 (D.N.J. 1982) (this citation is to the first order of the court related to this case, entered Feb. 16, 1982). "Consequently, the present case . . . must be viewed as nothing more than a contract action. Neither the interest of the State of New Jersey nor the nature of the Court's inquiry is such as to bring it within the domestic relations exception to jurisdiction." *Id.* at 724.

99. *Crowe v. De Goia*, 90 N.J. 126 (1982) (holding that the state's chancery division (where the state's domestic relations cases are heard) to be the appropriate forum for cohabitation agreement dispute and reversing a lower appellate court's holding that the issue in question was no more than contract dispute for money damages).

district court reasoned that the state court would now treat this action not as one purely in contract, but one implicating the distinctive forms of relief associated with a state court divorce proceeding, it then dismissed the case as falling within the domestic relations exception.[100]

Convinced by the *Anastasi* court's logic, a Michigan district court in a post-*Ankenbrandt* decision, *Johnson v. Thomas*, reasoned similarly:

> In a palimony case, the court is asked to structure a settlement for the end of a domestic relationship. This function is the same one a court performs when granting a divorce. The fact that the label is different should not defeat the fact that this type of action falls within the exception.[101]

Because there was pending state court litigation that would be determinative of the status of the parties, the court explained that the case then at bar might be just the kind of case the *Ankenbrandt* court had in mind when it suggested abstention as a viable approach for those cases not falling directly within the ambit of the domestic relations exception.[102]

While *Anastasi* remains interesting by way of pre-Ankenbrandt background, it no longer adequately reflects the current state of the law.[103] Twenty-five years later in *Carino v. O'Malley*, a seventeen-year relationship (which did not involve traditional cohabitation) ended with several broken promises for support from Gresham O'Malley to Theresa Carino.[104] Theresa sued Gresham with causes of action in both tort and

100. *Anastasi*, 544 F. Supp. 866, 868 (D.N.J. 1982). ("[T]hese are the kinds of inquiries and judgments which the state courts are best equipped to handle. They are the kinds of inquiries and judgments which, under the domestic relations exception to jurisdiction, may not be made by federal courts").

101. *Johnson v. Thomas*, 808 F. Supp. 1316, 1320 (W.D. Mich. 1992).

102. *Id.*

103. Due to the paucity of cases in this area, broad generalizations about the state of the law in this area are inappropriate.

104. No. 05-5814, 2007 WL 951953, at *1 (D.N.J. Mar. 28, 2007). The first sentence of the court's opinion bears reproduction here: "This diversity action arises out of a long love affair, *and may at first blush seem an exotic entry on the federal docket*." *Id.* at *1 (emphasis added). The facts of the case are intriguing. In short, as a college sophomore at Penn, Theresa went in her mom's stead to a work function with her dad, and she met Gresham there. Gresham supported Theresa financially on many occasions, and Theresa averred that Gresham made promises to continue to support her both in life and upon his death. *Id.* at *3-5. Theresa also alleged various tort claims involving domestic violence, stating that Gresham assaulted her more than 100 times. *Id.* at *6. The court concluded that, despite the lack of formal cohabitation, Theresa's contract claims could proceed to trial. *Id.* at *14. The court also allowed

contract, and Gresham removed the case to federal court based on the diversity of citizenship of the parties.[105] The court discussed the domestic relations exception *sua sponte*, and it ultimately concluded that *Ankenbrandt* did not bar federal courts from hearing palimony disputes:

> The Supreme Court did not include palimony . . . within the 'narrow range of domestic relations issues' falling within the exception. . . . Moreover, while family court judges certainly have a 'special proficiency' for cases involving intimate relationships, a palimony claim arises out of a *contract* between the parties as opposed to their relationship.[106]

Thus, short of simply reasoning that a palimony dispute falls outside of the domestic relations exception, the court went one step further. Contrary to *Anastasi's* logic, the court found that there was nothing distinctively domestic about the issues raised, and relief sought, in a palimony dispute—it is just a garden-variety contract claim.[107]

II. ANALYSIS

Part I revealed how the Supreme Court arrived at the current iteration of the domestic relations exception. It also traced a circuit split, the consequence of which is various levels of access to the federal courts for litigants seeking to vindicate their rights in factual scenarios that may implicate domestic relations issues. Part I also explored how, both pre- and post-*Ankenbrandt*, federal courts have dealt with nonmarital contracts. This Note continues by analyzing the implications of the circuit split for litigants, concluding that there is more similarity between the Seventh and Ninth Circuit approaches than the *MacFarland* court may have let on. Next, this Note considers the willingness of federal courts to hear cases involving the dissolution of nonmarital relationships which sound in contract, concluding that basic principles of substance over form and avoidance of artful pleading might suggest a contrary result.

Theresa to proceed with her intentional tort claims. *Id.* at *14-15.

105. *Id.* at *1-2.

106. *Id.* at *2.

107. *Id.* at *5-6.

A. The Wisdom of the Ankenbrandt Concurrence

On its face, the *Ankenbrandt* test *seems* fairly straightforward—indeed, the Court enumerates the exact types of cases federal courts shall not hear: divorce, child custody, and alimony.[108] However, as the ensuing circuit split illustrates, these seemingly clear categories have led to anything but an administrable result. The superior result already exists in the literature—indeed, it exists in Justice Blackmun's concurrence in *Ankenbrandt* abstention.[109] In 1984, twelve years before the Court's decision in *Ankenbrandt*, Barbara Atwell opined:

> [*Burford* abstention] provides the federal courts with a pragmatic justification for refusing to entertain in the first instance claims of divorce or separation, support, or child custody . . . [which would] require the courts to determine whether a state has shown heightened concern for a particular kind of case, through the creation of specialized tribunals or otherwise, and whether the exercise of jurisdiction in such cases would have an adverse impact on state policy.[110]

The key word in Atwood's analysis is *whether*, as courts would be required to engage in a more fact-intensive inquiry as to whether taking the case would, *e.g.*, disrupt important state policies.

Though the *Ankenbrandt* Court, as well as many lower courts, seem to imply that the state's interest in adjudicating domestic matters is invariable across jurisdictions, the reality on the ground is far from uniform. Indeed, "[T]hree-quarters of states [have] specially designed family courts that are either separate courts or distinct parts of general jurisdiction state courts. . . . Other states handle family law matters within their general state civil trial courts."[111] And as the procedural saga in *Anastasi* illustrates, the forum in

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108. *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992).

109. *Id.* at 715 (Blackmun, J., concurring) ("Absent a contrary command of Congress, the federal courts should properly abstain, at least from diversity actions traditionally excluded from the federal courts, such as those seeking divorce, alimony, and child custody").

110. Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 610-11 (1984).

111. DOUGLAS NEJAIME ET AL., FAMILY LAW IN A CHANGING AMERICA 327 (2021) (Alaska, Arkansas, Idaho, Iowa, Mississippi, Montana, Nebraska, Oklahoma, South Dakota, Tennessee, Utah,

which a state deems it appropriate to hear certain matters might even influence the analysis of the federal court. From that perspective, abstention allows federal district court judges greater flexibility in determining whether, upon considering all the unique facets of domestic relations in a given jurisdiction, hearing the case would truly implicate a unique feature of a given state's court system.

Notwithstanding, this Note's counterfactual world in which Justice Blackmun's reasoned, administrable, and jurisdiction-sensitive approach carries the day is not the law. And as the law stands, the Ninth Circuit's interpretation of the domestic relations exception as one to be narrowly construed best conforms to the established notion that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress."[112] Indeed, the Ninth Circuit is correct, especially in declining to adopt the Eighth Circuit's approach in *Wallace v. Wallace* which would leave a possibly distinct tort unheard in a federal forum—the very result *Ankenbrandt* appears to have hoped to prevent.[113] The *Wallace* court was satisfied that the Missouri statutory language requiring a family court judge to consider the conduct of the parties in the marriage in equitably distributing the property was sufficient to provide adequate redress for the plaintiff. However, the Missouri Supreme Court—recognizing independent tort liability in the context of a dissolution—has ruled contrary to that point, explaining that a subsequent tort action following dissolution might even use the record from the dissolution proceeding as substantive evidence in the tort case.[114] Thus, far from re-litigating a divorce contrary to principles of *res judicata*, courts would be wise to engage in the fact-intensive inquiry (following the example of the Ninth Circuit) of teasing out whether an independent basis exists for bringing the tort suit, or whether, as in *MacFarland*, an aggrieved ex is trying to "pull a fast one" to get a traditional

Virginia, and Wyoming are the states (as of 2006) which had no specialized family court).

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

113. *Wallace v. Wallace*, 736 F.3d 764, 765 (8th Cir. 2013).

114. *S.A.V. v. K.G.V.*, 708 S.W.2d 651, 653 (Mo. 1986) (en banc) ("While there are distinct differences between the division of marital property between spouses and awards of damages for an injury, to the extent that conduct of the spouses is taken into account in division of marital property pursuant [Missouri law] the dissolution decree might be admissible in the subsequent tort action…"). *See also Sotirsecu v. Sotirescu*, 52 S.W.3d 1 (Mo. App. 2001) (holding that *res judicata* did not bar ex-wife's tort claims for physical violence against ex-husband despite existence of pending dissolution action).

domestic relations matter before a federal court.[115] This approach is considerably more consistent with the goal of disclaiming jurisdiction where it is unwarranted, but balances that concern with providing litigants with access to the federal courts when current jurisdictional restraints will indeed allow for it.

Finally, the Ninth Circuit's distancing of itself from Seventh Circuit precedent as overly broad may have been a bridge too far—the two cases do not appear to disagree significantly. Though Judge Posner explained the Seventh Circuit's penumbra-and-core approach, he went so far as to say that *Ankenbrandt* "casts doubt on the existence of the penumbra," explaining that, even if a penumbra did exist, Burton's allegedly tortious conduct certainly fell outside of it.[116] Judge Posner even suggests a way for a district court to maintain its jurisdiction over an independent tort suit *while* a state dissolution proceeding is ongoing—by issuing a stay.[117] Though the *existence* of the penumbra-and-core approach surely does not gel with the Ninth Circuit's narrow approach, its application in the *Friedlander* case appears more consonant with the Ninth Circuit's holding than might be apparent from reading the opinion. This is of course partially because of Judge Posner's questioning of the approach, and the result of the case: the *Friedlander* court, like the *Bailey* court, made clear that it was not reading the domestic relations exception in an expansive way.

B. Why Federal Courts?

In any civil action, the traditional and widely accepted justification for diversity jurisdiction is avoidance of the potential bias of state judiciaries and juries against out-of-state litigants.[118] "Justice Story wrote . . . that diversity jurisdiction guards against state prejudices that 'might sometimes obstruct, or control, or be supposed to control, the regular administration of justice . . . in controversies between . . . citizens of different states.'"[119] Indeed, in the most intimate relationships, those local biases might be especially pronounced. Professor Sack expands on that thought: "The

115. *Bailey v. MacFarland*, 5 F.4th 1092 (9th Cir. 2021).
116. *Friedlander v. Friedlander*, 149 F.3d at 740-41 (7th Cir. 1998).
117. *Hunter v. Martin's Lessee*, 14 U.S. 304, 347 (1816).
118. Scott Dodson, *Civil Procedure: Beyond Bias in Diversity Jurisdiction*, 4 THE JUDGE'S BOOK 15, 16 (2020).
119. *Id.* at 16 (quoting *Martin v. Hunter's Lessee*, 9 U.S. 61, 87 (1809)).

traditional argument that federal diversity jurisdiction reduces the potential for bias in litigation with out-of-state parties is particularly applicable in domestic relations cases, which often involve out-of-state plaintiffs in divorce and custody actions who have relocated after marital breakups."[120] Though Professor Sack's analysis focuses principally on women's unequal access to the federal courts via the domestic relations exception, any litigant across state lines, especially in an ultra-sensitive domestic relations dispute, may benefit from a tribunal less bogged down by local prejudice than the state court.[121]

However, with respect to access to a federal forum, the *Ankenbrandt* decision has also created disparate treatment of those who choose to marry and those who choose to cohabit. Based on the *O'Malley* interpretation of the domestic relations exception vis-à-vis palimony and nonmarital relationships, the following hypothetical seems plausible. A has been married to her husband for five years, and they never had children. They own a variety of assets together, and A (an Illinois domiciliary, having moved to Belleville, IL, just across the river from their marital home, upon their separation) alleges that her husband (a Missouri domiciliary) inflicted emotional distress on her and, just before A filed for divorce, he stole from her. A and B obtain a divorce decree in state court, fully dividing their property. After the decree is entered, A sues her husband in federal district court in Indiana for her IIED and conversion claims. There is no question the federal court would never have taken jurisdiction over the divorce action and the division of property, and it is likely that the Missouri district court would decline to hear the tort claim due to the *Wallace* decision. A is without a federal forum for any of her claims.

Meanwhile, C (now a Pennsylvania domiciliary; she, too, moved right after the couple's separation) never decided to marry her husband (a New

120. Sack, *supra* note 30, at 1487.

121. Prejudice is not the only issue which may attract certain domestic relations litigants (justifiably) to federal court:

> [F]ederal courts are less susceptible to influence and have better evidentiary and discovery processes; state courts have often been criticized for their handling of family law cases (state judges [may] rotate out of family law courts after only one year); the confining authority of local control over family law often restricts the rights of traditionally subordinated groups; [and] distinctions between marital property and marital status are blurry.

WEISBERG & APPLETON, *supra* note **Error! Bookmark not defined.**, at 568.

Jersey domiciliary), but they have lived together for seven years. C alleges to have suffered the same potentially tortious behavior as A. C sues her ex, D, in federal district court in Missouri, alleging breach of contract (D retained various assets obtained during their relationship, and they had an oral contract that they would be split 50/50 if they broke up), IIED, and conversion. And consistent with its decision in *O'Malley*, the district court takes up the case—deciding how the disputed property should be divided and weighing evidence on whether her IIED and conversion claims were substantiated. These hypotheticals reveal that it is certainly not outside of a federal court's competence to engage in virtually identical functions as a state family court.

Indeed, the *O'Malley* court reasoned that it had jurisdiction over various contract- and tort-related claims stemming from a years-long intimate relationship and its accompanying conduct because the *Ankenbrandt* court did not bar federal courts from hearing cases involving domestic disputes among individuals who choose not marry.[122] However, in so doing, the district court performed similar functions to what the family division of a New Jersey state court might have done: consider the actions of parties to an intimate relationship and determine to what assets a party to an intimate relationship of more than a decade might be entitled. However, had these two parties been married, the federal court, though asked to consider *in substance* the same question, would be barred from adjudicating the dispute. The above hypothetical and the *O'Malley* case reveal the major loophole in the *Ankenbrandt* majority's holding, especially in a changing America. This Note suggests, ultimately, that the domestic relations exception, as it stands, fails to adequately advance its supposed goals of restricting all domestic matters to the tribunals supposedly better equipped to handle them. It will be essential for the Court to revisit whether and to what extent states have an *equal* interest in exclusive jurisdiction in marriages as they do in nonmarital relationships that may well implicate almost identical fact patterns and judicial determinations. And short of doing so, abstention remains a principled way for federal courts to avoid domestic issues.

122. *Carino v. O'Malley*, No. 05-5814, 2007 WL 951953, at *2-3 (D.N.J. Mar. 28, 2007).

CONCLUSION

Though the domestic relations exception has existed in the United States since at least its first formal invocation in *Barber* in the late 19th century, it got a facelift thirty years ago in *Ankenbrandt*. And in those thirty years, as the continuing circuit split demonstrates, there remains significant dispute about the contours of the exception and what types of domestic matters, if any, belong in federal court. Moreover, as this analysis has revealed, it is possible for never-married litigants to have a federal court perform almost exactly what it would refuse to perform for divorcing litigants. *Ankenbrandt*'s thirty-year anniversary makes it clear that its central holding—seemingly simple—has proved unworkable and has left key questions unanswered. Abstention provides but one potential and intellectually honest solution, but important policy questions remain for the legislature and the courts must continue to address in a changing America.