SUPREME COURT OF THE UNITED STATES

No. 91–367

CAROL ANKENBRANDT, AS NEXT FRIEND AND MOTHER OF L. R. AND S. R., PETITIONER *v.* JON A. RICHARDS AND DEBRA KESLER

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[June 15, 1992]

JUSTICE BLACKMUN, concurring in the judgment.

I agree with the Court that the District Court had jurisdiction over petitioner's claims in tort. Moreover, I agree that the federal courts should not entertain claims for divorce, alimony, and child custody. I am unable to agree, however, that the diversity statute contains any "exception" for domestic relations matters. The Court goes to remarkable lengths to craft an exception that is simply not in the statute and is not supported by the case law. In my view, the longstanding, 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. For these reasons I concur only in the Court's judgment.

The Court holds that the diversity statute contains an "exception" for cases seeking the issuance of a divorce, alimony, or child custody decree. *Ante*, at 11–15. Yet no such exception appears in the statute. The diversity statute is not ambiguous at all. It extends the jurisdiction of the district courts to "*all* civil actions" between diverse parties involving the requisite amount in controversy (emphasis added). 28 U. S. C. §1332.

This Court has recognized that in the absence of a "clearly expressed" intention to the contrary, the language of the statute itself is ordinarily "conclusive." See, *e.g.*, *Consumer Product Safety*

Comm'n v. *GTE Sylvania, Inc.*, 447 U. S. 102, 108 (1980). The Court apparently discovers in the history of the diversity statute and this Court's own case law a clearly expressed intention contrary to the words of the statute. First, the Court observes that the diversity statute formerly extended only to "all suits of a civil nature at common law or in equity" rather than to "all civil actions." *Ante*, at 8–9. Then the Court interprets this Court's decision in *Barber* v. *Barber*, 21 How. 582 (1859), to read into this "common law or equity" limitation an exclusion of matters, such as actions for divorce and alimony, that were not cognizable in the English courts of common law and equity. *Ante*, at 9. The Court points to what it regards as Congress' "apparent acceptance" of this construction of the diversity statute. *Ante*, at 10. Finally, notwithstanding Congress' replacement in 1948 of the "common law and equity" limitation with the phrase "all civil actions," the Court considers this to be evidence that Congress adopted the prior "well-known construction" of the diversity statute. *Ante*, at 11.

I have great difficulty with the Court's approach. Starting at the most obvious point, I do not see how a language change that, if anything, expands the jurisdictional scope of the statute can be said to constitute evidence of approval of a prior narrow construction.[1] Any inaction on the part of Congress in

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[1]To be sure, this modification in language was part of a wholesale revision of the Judicial Code in 1948, and this Court has recognized that "no changes in law or policy are to be presumed from changes of language in the revision unless an intent to make such changes is clearly expressed." *Fourco Glass Co.* v. *Transmerra Products Corp.*, 353 U. S. 222, 227 (1957); see *Finley* v. *United States*, 490 U. S. 545, 554 (1989). This principle may negate an inference that the change in language expanded the scope of the statute, but it does not affirmatively authorize an inference that Congress' recodification was designed to approve of

1948 in failing expressly to mention domestic relations matters in the diversity statute reflects the fact, as is discussed below, that Congress likely had no idea until the Court's decision today that the diversity statute contained an exception for domestic relations matters.

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prior constructions of the statute.

This leads to my primary concern: the Court's conclusion that Congress understood *Barber* as an interpretation of the diversity statute. *Barber* did not express any intent to construe the diversity statute—clearly, *Barber* "cited no authority and did not discuss the foundation for its announcement" disclaiming jurisdiction over divorce and alimony matters. *Ante*, at 5. As the Court puts it, it may only be "inferred" that the basis for declining jurisdiction was the diversity statute. *Ante*, at 9. It is inferred not from anything in the *Barber majority* opinion. Rather, it is inferred from the comments of a dissenting justice and the absence of rebuttal by the *Barber* majority. *Ante*, at 9.[2] The Court today has a difficult enough time arriving at this unlikely interpretation of the *Barber* decision. I cannot imagine that Congress ever assembled this construction on its own.

In any event, at least three subsequent decisions of this Court seriously undermine any inference that *Barber*'s recognition of a domestic relations "exception" traces to a "common law or equity" limitation of the diversity statute. In *Simms* v. *Simms*, 175 U. S. 162 (1899), the Court heard an appeal by a husband from the Supreme Court of the Territory of Arizona affirming the territorial District Court's dismissal of his bill for divorce and its award to his wife of alimony and counsel fees *pendente lite*. The

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[2]Moreover, as the Court intimates, *ante*, at 9–10, and n. 4, there is good reason to question the *Barber* dissent's interpretation of English practice. The historical evidence, while not unequivocal, suggests that the English chancery courts did in fact exercise some jurisdiction over matrimonial matters. See, *e.g.*, *Lloyd* v. *Loeffler*, 694 F. 2d 489, 491–492 (CA7 1982); *Spindel* v. *Spindel*, 283 F. Supp. 797, 802–803, 806–809 (EDNY 1968); Atwood, Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction, 35 Hastings L.J. 571, 584–585 (1984).

wife sought dismissal of the appeal to this Court because the suit involved domestic relations. In contrast to *Barber*, the Court undertook an extensive review and discussion of the statutory bases for its jurisdiction over the appeal. It expressly recognized that its appellate jurisdiction was confined to "those cases, and those cases only, *at law or in equity*." 175 U. S., at 167 (emphasis added).[3] Nevertheless, the Court in *Simms* did not find the "common law or equity" limitation to be a bar to jurisdiction.[4] The Court distinguished *Barber*, not on grounds that the jurisdictional statute in *Barber* was limited to cases in law and equity while that in *Simms* was not—indeed, it could not be so distinguished. The Court distinguished *Barber* on grounds that it involved domestic relations matters in the States rather than in the territories. It reasoned that the whole subject of domestic relations "belongs to the laws of the State, and not to the laws of the United States," while

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[3]The Court stated:

> "[T]he appellate jurisdiction of this court to review and reverse or affirm the final judgments and decrees of the Supreme Court of a Territory includes those cases, and those cases only, at law or in equity, in which `the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars.'" 175 U. S., at 167.

See also *id.*, at 166 (citing the Act of March 3, 1885, c.355, 23 Stat. 443, limiting appellate jurisdiction from the territorial courts to "any suit at law or in equity").

[4]The Court concluded it could not review the question of divorce, because it involved "no matter of law, but mere questions of fact" and because, contrary to the statutory amount-in-controversy requirement, it involved "a matter the value of which could not be estimated in money." 175 U. S., at 168–169. It modified and affirmed the alimony award. *Id.*, at 172.

"[i]n the Territories of the United States, Congress has the entire dominion and sovereignty, national and local." *Id.*, at 167–168. Today the Court infers an interpretation of *Barber* that the Court in *Simms* plainly rejected.

The second decision undermining the Court's interpretation of *Barber* is *De La Rama* v. *De La Rama*, 201 U. S. 303 (1906), in which the Court took jurisdiction over an appeal from the Supreme Court of the Philippine Islands in a wife's action for divorce and alimony. Citing *Barber*, *De La Rama* explained the historical reasons that federal courts have not exercised jurisdiction over actions for divorce and alimony. The "common law or equity" limitation the Court now finds so significant was not among those reasons.[5] This was so even though the appellate jurisdictional statute at issue there extended to "all actions, cases, causes, and proceedings," 32 Stat. 695, opening the door for the Court easily to have distinguished *Barber* on the grounds of the "common

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[5]The Court in *De La Rama* justified the exception "both by reason of fact that the husband and wife cannot usually be citizens of different States, so long as the marriage relation continues (a rule which has been somewhat relaxed in recent cases), and for the further reason that a suit for divorce in itself involves no pecuniary value." *Id.*, at 307. The first reason obviously was discounted by *De La Rama* itself and is of course untenable today. The second reason can apply only to non-monetary divorce actions but not to actions for alimony above the amount-in-controversy limitation. The second reason, moreover, was disclaimed by *De La Rama* itself in joint divorce and alimony actions. *Id.*, at 310. At any rate, in view of *De La Rama*'s explanation, surely the Court is mistaken when it states it "has never addressed the basis" for the domestic relations exception. *Ante*, at 5.

law or equity" limitation in the diversity statute. Instead, explicitly reaffirming the grounds relied upon in *Simms* for distinguishing *Barber*, the Court pointed to the absence of any need to defer to the States' regulation of the area of domestic relations in the context of an appeal from a nonstate, territorial court. *Id.*, at 308.

The third decision is *Ohio ex rel. Popovici* v. *Agler*, 280 U. S. 379 (1930). In *Popovici*, a Roumanian vice-consul was sued by his wife in an Ohio state court for a divorce and alimony. He defended by claiming that the Ohio state court had no jurisdiction to grant the divorce, because federal statutes granted *exclusive* jurisdiction to the federal courts of "all suits and proceedings against . . . consuls or vice-consuls" and "all suits against consuls and vice-consuls." 280 U. S., at 382–383 (quoting the Act of March 3, 1911, c. 231, 36 Stat. 1161, 1093). Rejecting this claim, Justice Holmes observed for a unanimous Court that the jurisdictional statutes "do not affect the present case if it be true as has been unquestioned for three-quarters of a century that the Courts of the United States have no jurisdiction over divorce." *Id.*, at 383. The Court traced this absence of jurisdiction not to the diversity statute but apparently to the Constitution itself:

> "If when the Constitution was adopted the common understanding was that the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. `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.*, at 383–384.

I think it implausible to believe that, especially after

Popovici, Congress could be said to have accepted this Court's decision in *Barber* as simply a construction of the diversity statute.[6] Accordingly, the Court is without a requisite foundation for ratifying what Congress intended. Compare *Flood* v. *Kuhn*, 407 U.S. 258, 283–284 (1972) (declining to overturn prior precedent *explicitly* exempting professional baseball from antitrust laws where Congress "by its positive inaction" has allowed prior decisions to stand).

Even assuming the Court today correctly interprets *Barber*, its extension of any domestic relations "exception" to the diversity statute for child custody matters is not warranted by any known principles of statutory construction. The Court relies on *In re Burrus*, 136 U. S. 586 (1890), in which the Court denied the "jurisdiction" of a federal district court to issue a writ of habeas corpus in favor of a father to recover the care and custody of his child from the child's grandfather. That case did not involve the diversity statute, but rather the habeas corpus

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[6]The Court claims that "by hearing appeals from legislative, or Article I courts, this Court implicitly has made clear its understanding that the source of the constraint on jurisdiction from *Barber* was *not* Article III; otherwise the Court itself would have lacked jurisdiction over appeals from these legislative courts." *Ante*, at 7. The Court, however, overlooks the rule that "[w]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans* v. *Levine*, 415 U. S. 528, 533, n. 5 (1974); see *Pennhurst State School and Hosp.* v. *Halderman*, 465 U. S. 89, 119 (1984). This Court has never understood the rule differently. *United States* v. *More*, 3 Cranch. 159, 172 (1805) (Marshall, C.J.) (statement at oral argument).

statute, and the Court expressly declined to address the diversity statute.[7] *Id.*, at 597. To the Court today this is just a "technica[l]" distinction. *Ante*, at 13. I find it germane, because, to the best of my knowledge, a court is not at liberty to craft exceptions to statutes that are not at issue in a case.

To reject the Court's construction of the diversity statute is not, however, necessarily to reject the federal courts' longstanding practice of declining to hear certain domestic relations cases. My point today is that no coherent "jurisdictional" explanation for this practice emerges from our line of such cases, and it is unreasonable to presume that Congress divined and accepted one from these cases. To be sure, this Court's old line of domestic relations cases disclaimed "jurisdiction" over domestic relations matters well

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[7]If, in *Barber*, the Court might have been said plausibly to have relied on limitations of the English chancery courts with respect to divorce and alimony, it seems highly unlikely that the Court in *Burrus* might have relied on a similar justification for child custody matters. The Court in *Burrus* attached as an appendix to its opinion, 136 U. S., at 597, a "very instructive" and "a very careful and a very able opinion," *In the Matter of Barry*, from the Circuit Court of the United States for the Southern District of New York. See *In re Burrus*, 136 U. S., at 594. That opinion stated that child custody matters "res[t] solely in England on the common law" and that such determinations "devolved upon the high courts of equity and law." *Id.*, at 609. See also *Lehman* v. *Lycoming County Children's Services*, 458 U. S. 502, 524 (1982) (dissenting opinion) ("Historically, the English common-law courts permitted parents to use the habeas writ to obtain custody of a child as a way of vindicating their own rights").

before the growth and general acceptance in recent decades of modern doctrines of federal abstention that distinguish the refusal to exercise jurisdiction from disclaiming jurisdiction altogether. See generally C. Wright, Law of Federal Courts 302–330 (1983) (discussing growth of traditional abstention doctrines). See also *Francis* v. *Henderson*, 425 U. S. 536, 538–539 (1976) (recognizing abstention in the context of the habeas corpus statute where "considerations of comity and concerns for the orderly administration of criminal justice require"). Nevertheless, the common concern reflected in these earlier cases is, in modern terms, abstentional—and not jurisdictional—in nature. These cases are premised not upon a concern for the historical limitation of equity jurisdiction of the English courts, but upon the virtually exclusive primacy at that time of the States in the regulation of domestic relations. As noted above, in *Simms* and *De La Rama*, this Court justified its exercise of jurisdiction over actions for divorce and alimony not by any reference to the scope of equity jurisdiction but by reference to the absence of any interest of the States in appeals from courts in territories controlled by the National Government. Similarly, in cases wholly outside the "common law or equity" limitation of the diversity statute, the Court has denied federal court review. *Popovici*, *supra* (consuls and vice-consuls statutes); *In re Burrus*, *supra* (habeas corpus). As the Court once stated: "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States." *In re Burrus*, 136 U. S., at 593–594.

Whether the interest of States remains a sufficient justification today for abstention is uncertain in view of the expansion in recent years of federal law in the domestic relations area.[8] I am confident,

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[8]See, *e.g.*, Victims of Child Abuse Act of 1990, 104

nonetheless, that the unbroken and unchallenged practice of the federal courts since before the War Between the States of declining to hear certain domestic relations cases provides the very rare justification for continuing to do so. It is not without significance, moreover, that, because of this historical practice of the federal courts, the States have developed specialized courts and institutions in family matters, while Congress and the federal courts generally have not done so. Absent a contrary command of Congress, the federal courts properly should abstain, at least from diversity actions traditionally excluded from the federal courts, such as those seeking divorce, alimony, and child custody.

The Court is correct that abstention "rarely should be invoked." *Ante*, at 15. But rarer still—and by far the greater affront to Congress—should be the

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Stat. 4792, 42 U. S. C. § 13001 *et seq.*; Family Violence Prevention and Services Act, 98 Stat. 1757, 42 U. S. C. §10401 *et seq.*; Parental Kidnaping Prevention Act of 1980, 94 Stat. 3568, 28 U. S. C. §1738A; Adoption Assistance and Child Welfare Act of 1980, 94 Stat. 500, 42 U. S. C. §§ 620–628, 670–679a; Child Abuse Prevention and Treatment and Adoption Reform Act of 1978, 92 Stat. 205, 42 U. S. C. §5111 *et seq.*; Child Abuse Prevention and Treatment Act, 88 Stat. 4, 42 U. S. C. §5101 *et seq*.

Like the diversity statute, the federal-question grant of jurisdiction in Article III of the Constitution limits the judicial power in federal-question cases to "Cases, in Law and Equity." Art. III, §2. Assuming this limitation applies with equal force in the constitutional context as the Court finds today that it does in the statutory context, the Court's decision today casts grave doubts upon Congress' ability to confer federal-question jurisdiction (as under 28 U. S. C. §1331) on the federal courts in any matters involving divorces, alimony, and child custody.

occasions when this Court invents statutory exceptions that are simply not there. It is one thing for this 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 what in fact it never did. Although there is no occasion to resolve the issue in definitive fashion in this case, I would suggest that principles of abstention provide a more principled basis for the Court's continued disinclination to entertain domestic relations matters.[9]

Whether or not the domestic relations "exception" is properly grounded in principles of abstention or principles of jurisdiction, I do not believe this case falls within the exception. This case only peripherally involves the subject of "domestic relations." "Domestic relations" actions are loosely classifiable into four categories. The first, or "core," category involves declarations of status, *e.g.*, marriage, annulment, divorce, custody, and paternity. The second, or "semi-core," category involves declarations of rights or obligations arising from status (or former status), *e.g.*, alimony, child support, and division of property. The third category consists of secondary suits to enforce declarations of status, rights, or obligations. The final, catch-all category covers the suits not directly involving status or obliga-

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[9]As this Court has previously observed that the various types of abstention are not "rigid pigeonholes," *Pennzoil Co.* v. *Texaco Inc.*, 481 U. S. 1, 11, n. 9 (1987), *New Orleans Pub. Serv., Inc.* v. *New Orleans*, 491 U. S. 350, 359 (1989), there is no need to affix a label to the abstention principles I suggest. Nevertheless, I fully agree with the Court that *Younger* abstention is inappropriate on the facts before us, because of the absence of any pending state proceeding.

tions arising from status but that nonetheless generally relate to domestic relations matters, *e.g.*, tort suits between family or former family members for sexual abuse, battering, or intentional infliction of emotional distress. None of this Court's prior cases that consider the domestic relations "exception" involves the type of periphery domestic relations claim at issue here.

Petitioner does not seek a determination of status or obligations arising from status. Moreover, any federal court determination of petitioner's claims will neither upset a prior state court determination of status or obligations appurtenant to status, nor pre-empt a pending state court determination of this nature. Compare *Moore* v. *Sims*, 442 U. S. 415 (1979) (applying *Younger* abstention doctrine to prevent federal court action seeking to enjoin pending state child custody proceeding brought by state authorities). While petitioner's claims do not involve a federal question or statute—the presence of which would strongly counsel against abstention, see *Colorado River Water Cons. Dist.* v. *United States*, 424 U. S. 800, 815, n. 21 (1976)—petitioner's state law tort claims for money damages are easily cognizable in a federal court. All these considerations favor the exercise of federal jurisdiction over petitioner's claims.