FIGHTING THE PROBATE MAFIA: A DISSECTION OF THE PROBATE EXCEPTION TO FEDERAL COURT JURISDICTION

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I. INTRODUCTION

Imagine the following:[1] a Muslim woman with a history of chronic mental illness immigrates to the United States from Iran and settles in Colorado Springs, Colorado. At age 80, she visits a car dealership in Colorado Springs owned by a self-described Christian political activist. The woman's vulnerability is obvious, and in the course of selling the woman a car, the owner of the car dealership discovers that she lives by herself and possesses significant assets. Shortly after selling her the car, the owner of the car dealership, in concert with some local probate attorneys, persuades the Muslim woman to execute an inter vivos trust giving the owner of the car dealership the power upon the woman's death to use the entire principal of the trust at his sole discretion for "Christian/Religious purposes." The car dealer and the attorneys also persuade the woman to execute documents giving them the power to make

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1. The scenario described is based on allegations contained in a complaint filed in the United States District Court for the District of Colorado. *See* Complaint and Demand for Jury Trial at 4–31, Nicolas v. Perkins, No. 00 Civ. 1414 (D.Colo. filed July 14, 2000). The author served without pay as the attorney of record in the matter. *See id.* at 31. For additional background information on the issues inspiring this hypothetical see Cara DeGette, *Perkins, Attorneys Accused of Wrongful Death and Fraud in Federal Court Case*, COLO. SPRINGS INDEP., July 20, 2000; Erin Emery, *Perkins Named in Suit over Estate, Family Claims $2.5 Million Diverted*, DENVER POST, July 20, 2000, at B5; Dick Foster, *Suit: 5 Defrauded Mentally Ill Woman, Car Dealer, Attorneys Deny Taking Control of Estate for 'Christian Religious Purposes,'* DENVER ROCKY MOUNTAIN. NEWS, Jul. 24, 2000, at 4A.

medical decisions on her behalf. While the woman is still alive, the car dealer persuades her to withdraw large sums of money from the trust to "invest" in his "business ventures."

Shortly after the inter vivos trust and the power of attorney are executed, the woman's health begins to deteriorate in a manner consistent with neglect. She is admitted to the emergency room no fewer than twenty times where she is repeatedly diagnosed as suffering from malnutrition, dehydration, failure to thrive, weight loss, and pneumonia. The emergency room doctors repeatedly note in her chart that the inability or unwillingness of those entrusted to make medical decisions on her behalf is hampering their ability to treat her effectively. While the woman's health is deteriorating, not only do the car dealer and the attorneys fail to intervene under the power of attorney, but they also falsely communicate to members of the woman's family residing outside of the area that the woman is in perfect health. At the same time they take steps to ensure that her family cannot locate her.

Ultimately, the woman dies. Shortly thereafter, one of the attorneys files a petition in the local probate court seeking appointment as the personal representative of the woman's estate as well as a motion seeking a construction of the living trust document in a manner most favorable to the car dealer. These various filings make their way to one of the woman's daughters, a citizen of New York. In the course of the ongoing probate proceedings, the woman's daughter discovers what the car dealer and the attorneys did to her mother. While the probate proceedings are still pending, the daughter files suit against the car dealer and the attorneys in federal district court, in part because she perceives that the probate court judge's actions indicate open hostility toward her, as a resident of another state, and toward her attorneys. The federal action includes state common law claims of wrongful death and conversion, as well as a claim under the federal Racketeer Influenced and Corrupt Organizations Statute ("RICO").[2] She also seeks a declaratory judgment that the inter vivos trust is invalid.

Normally when a suit is brought in federal court, the court would determine its jurisdiction over the dispute by making a number of standard, independent inquiries. First, the court would determine whether there is a statutory grant of subject matter jurisdiction over the dispute.[3] In this

2. 18 U.S.C. §§ 1961–68 (1994).

3. *See, e.g.*, Powell v. McCormack, 395 U.S. 486, 512–13 (1969) (stating that "a federal district court lacks jurisdiction over the subject matter . . . if the cause is not one described by any jurisdictional statute."); Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850).

hypothetical there is complete diversity[4] giving the federal court subject matter jurisdiction over the state common law claims, provided the amount in controversy exceeds $75,000.[5] Additionally, since the RICO claim arises under a federal statute, there would seem to be statutory federal question jurisdiction.[6] Because a federal district court would have diversity jurisdiction over an action brought by the trustee to enforce the purported trust against the plaintiff in the federal action, the federal court likewise would have statutory subject matter jurisdiction over the declaratory judgment action.[7] Second, the court would determine whether these statutory grants of subject matter jurisdiction are among the permitted bases of subject matter jurisdiction provided for in Article III of the United States Constitution.[8] The statutory grants of jurisdiction involved here—diversity and federal question—are both firmly rooted in Article III.[9] Third, the court would determine whether the action presents a justiciable case or controversy; in other words, whether the action presents an actual dispute touching on the legal relations of parties having adverse legal interests (as contrasted with a dispute of a hypothetical or abstract character) and whether there is a substantial likelihood that a favorable

4. The statutory grant of diversity jurisdiction has been interpreted to require that no plaintiff be from the same state as *any* defendant, and that *any* overlap will defeat diversity jurisdiction. *See* Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267, 267–68 (1806), *overruled on other grounds by* Louisville, C. & C.R. Co. v. Letson, 43 U.S. (2 How.) 497 (1844).

5. *See* 28 U.S.C. § 1332(a)(1) (1994) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between . . . citizens of different states.").

6. *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."). Moreover, the RICO statute itself provides an independent grant of subject matter jurisdiction to the federal courts. *See* 18 U.S.C. § 1964(a) (1994) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of [the RICO statute] by issuing appropriate orders."); *id.* § 1964(c) ("Any person injured in his business or property by reason of a violation of [the RICO statute] may sue therefor in any appropriate United States district court.").

7. The Declaratory Judgment Act, 28 U.S.C. §§ 2201–02 (1994), provides a cause of action but does *not* expand federal court subject matter jurisdiction. *See* Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 667, 671–72 (1950). In order to determine whether a federal court has statutory subject matter jurisdiction over a declaratory judgment action, the court must determine whether an ordinary coercive suit brought by one of the parties would fall within the statutory subject matter jurisdiction of the federal courts. *See id.*

8. *See, e.g.*, Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480 (1983); Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809) (holding that "the statute cannot extend the jurisdiction beyond the limits of the constitution").

9. *See* U.S. CONST. art. III, § 2, cl. 1. "The judicial Power shall extend to all Cases, in Law and Equity, arising under . . . the Laws of the United States . . . [and] to Controversies . . . between Citizens of different States." *Id.* *See also* Bankers' Trust Co. v. Tex. & Pac. Ry. Co., 241 U.S. 295 (1916) (upholding constitutionality of statutory grant of federal subject matter jurisdiction).

federal court decision will bring about some change or have some effect.[10] The facts of the above-described scenario would seem to satisfy the justiciability requirement. Fourth, because there is an ongoing in rem[11] proceeding in state probate court in the above-described scenario, the federal court would need to determine whether the doctrine of *custodia legis*, or prior exclusive jurisdiction, would prevent it from adjudicating the claims raised in federal court.[12] Fifth, if the court has subject matter jurisdiction and a justiciable controversy, and the doctrine of *custodia legis* does not bar adjudication of the claims raised in the federal court proceeding, the federal court would nonetheless determine whether it should abstain under one of the many recognized doctrines of prudential abstention.[13] Finally, the district court would refer to the law of the state in which it sits to determines the existence and scope of any common law tort or contract claims.[14]

Yet, lurking in the background of this hypothetical is the "probate exception" to federal court jurisdiction. It has the effect of excluding most probate and probate-related matters from federal court and has been aptly described as "one of the most mysterious and esoteric branches of the law of federal jurisdiction."[15] The rationale for this judicially-created[16] exception is mired in confusion. It has variously been justified in Supreme Court and lower court decisions on grounds similar to those routinely used to evaluate federal jurisdiction as delineated above, including assertions that the statutory grant of subject matter jurisdiction conferred on the

10. *See, e.g.*, Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464 (1982); Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937).

11. A proceeding in rem is one in which a determination is made as to ownership of a thing or object that is binding on the whole world and not just on the parties to the proceeding. BLACK'S LAW DICTIONARY 793 (6th ed. 1991) [hereinafter BLACK'S LAW DICTIONARY].

12. Princess Lida of Thurn & Taxis v. Thompson, 305 U.S. 456, 465–67 (1939). Under the doctrine of *custodia legis*, where in rem proceedings involving the same *res* are brought in multiple courts, the first court to assume jurisdiction over the *res* has exclusive jurisdiction over it. *Id.* at 467.

13. *E.g.*, Wilton v. Seven Falls Co., 515 U.S. 277 (1995); Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983); Colorado River Water Conservation Dist. v. United States, 424 U.S. 800 (1976); Younger v. Harris, 401 U.S. 37 (1971); County of Allegheny v. Frank Mashuda Co., 360 U.S. 185 (1959); Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959); Burford v. Sun Oil Co., 319 U.S. 315 (1943); Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491 (1942); Railroad Comm'n of Tex. v. Pullman Co., 312 U.S. 496 (1941); Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923).

14. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938). This would include the state's choice-of-law rules, which might, in turn, refer the court to the laws of yet another state. Klaxon v. Stentor Electric Mfg., 313 U.S. 487, 496 (1941).

15. Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982).

16. *E.g.*, Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988).

federal courts by Congress does not extend to probate matters;[17] that because the probate of a will is a proceeding in rem, a federal court cannot exercise jurisdiction over an estate if the state probate court has already taken jurisdiction of the estate (i.e., the doctrine of *custodia legis*);[18] that probate matters are not justiciable "cases or controversies" within the meaning of Article III;[19] and the prudential desire to avoid interfering with ongoing state court proceedings.[20] In addition, courts have explained the basis of the probate exception by noting that probate matters are by state law committed to the exclusive jurisdiction of the state probate courts;[21] that because the authority to make wills is derived from the states, and the requirement of probate is but a regulation to make a will effective, matters of "strict probate" are not within the jurisdiction of the federal courts;[22] the need for legal certainty as to the disposition of the deceased's estate;[23] the interest in judicial economy;[24] and the relative expertise of state and federal courts with respect to probate matters.[25]

This confusion over the rationale for the exception has also resulted in confusion as to its scope. First, is it a limitation on federal court subject matter jurisdiction, a discretionary doctrine of abstention, or both? Second, if it is a limitation on federal court subject matter jurisdiction, is this limitation based on Congress' statutory grants of subject matter jurisdiction to the federal courts or is it an Article III limitation? Third, does the probate exception apply only to the federal courts' grant of diversity jurisdiction, or does it also extend to other statutory grants of jurisdiction, such as federal question jurisdiction? Fourth, which types of actions fall within the exception—is it limited to the actual probate of a will, or does it

17. *E.g.*, Markham v. Allen, 326 U.S. 490, 494 (1946); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 509 (1874).

18. *E.g.*, Sutton v. English, 246 U.S. 199, 205 (1918); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 44 (1909) (citing Farrell v. O'Brien, 199 U.S. 89 (1905)); Byers v. McAuley, 149 U.S. 608, 617 (1893). *See In re Broderick's Will*, 88 U.S. (21 Wall.) at 509.

19. *E.g.*, Galleher v. Grant, 160 F. Supp. 88, 94 (N.D. Ill. 1958).

20. *E.g.*, *Georges*, 856 F.2d at 974; Rice v. Rice Foundation, 610 F.2d 471, 475 (7th Cir. 1979) (citing Markham v. Allen, 326 U.S. 490, 494 (1946)); Hudson v. Abercrombie, 682 F. Supp. 1218, 1219 (N.D. Ga. 1987).

21. *E.g.*, Reinhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999); Bedo v. McGuire, 767 F.2d 305, 306 (6th Cir. 1985); Lamberg v. Callahan, 455 F.2d 1213, 1216 (2d Cir. 1972); Foster v. Carlin, 200 F.2d 943, 947 (4th Cir. 1953).

22. *Sutton*, 246 U.S. at 205; *Farrell*, 199 U.S. at 110.

23. Dragan v. Miller, 679 F.2d 712, 714 (7th Cir. 1982); *Georges*, 856 F.2d at 973–74; Cenker v. Cenker, 660 F. Supp. 793, 795 (E.D. Mich. 1987); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 110–11 (D. Or. 1957).

24. *Dragan*, 679 F.2d at 714; *Georges*, 856 F.2d at 974; *Cenker*, 660 F. Supp. at 795.

25. *Dragan*, 679 F.2d at 714–15; *Georges*, 856 F.2d at 974; *Cenker*, 660 F. Supp. at 795.

extend to matters ancillary to probate? If the latter, what does "ancillary" mean? Fifth, is the scope of the exception fixed as a matter of federal law, or does it vary based on the internal division of probate jurisdiction within the court systems of each state? Finally, is the probate exception limited only to suits involving wills proper, or does it extend to suits involving will substitutes, such as inter vivos trusts? Although a close analysis of the Supreme Court's probate exception precedents reveals that the applicability of the doctrine turns on the overlapping results of the six independent inquiries delineated above,[26] the lower federal courts have instead created and applied competing, one-step formulae for determining whether a given suit falls within or without the probate exception.

Despite the complexity and confusion surrounding the probate exception to federal court jurisdiction—or perhaps because of it—it has been given scant attention in the literature.[27] This Article seeks to fill the gap. Part II of this Article sets forth the current application of the probate exception in the lower federal courts. Part III of this Article examines the statutory and constitutional constraints on the federal courts' exercise of subject matter jurisdiction over probate and probate related matters. Part III concludes that the probate exception is a mere gloss on the statutory grants of subject matter jurisdiction to the federal courts and that the extent of this limitation is not nearly as great as judicial decisions and commentators have suggested. Part IV examines the constraints placed on the federal courts' exercise of jurisdiction over probate and probate-related matters by the doctrine of *custodia legis*, and concludes that the doctrine prevents federal courts from exercising jurisdiction over certain probate-related matters not otherwise excluded from their jurisdiction by the conventional understanding of the statutory grants of subject matter jurisdiction to the federal courts. Part V examines the role of prudential abstention with respect to probate-related matters falling outside the formal scope of the probate exception, and concludes that although courts can properly invoke abstention with regard to certain probate-related claims not otherwise excluded by the limits of the statutory grants of subject matter jurisdiction or by the doctrine of *custodia legis*, some lower courts are

26. *See supra* text accompanying notes 3–14.

27. *See, e.g.*, ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 5.3, at 300–01 (3d ed. 1999) (noting domestic relations and probate exceptions to federal jurisdiction but focusing primarily on issues related to the domestic relations exception). *See also* RICHARD H. FALLON, DANIEL J. MELTZER, & DAVID L. SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1333–36 (4th ed. 1996); CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, 13B FEDERAL PRACTICE AND PROCEDURE § 3610 (2d ed. 1984); Gregory C. Luke & Daniel J. Hoffheimer, *Federal Probate Jurisdiction: Examining the Exception to the Rule*, 39 FED. B. NEWS & J. 579 (1992).

improperly abstaining on grounds not justified under any recognized doctrine of abstention. Part VI demonstrates that what has been described by the lower federal courts as the "probate exception" to federal court subject matter jurisdiction cannot be reduced to the simplistic formulae adopted by various federal appeals courts. Instead, the probate exception is really an amalgam of five distinct rules that must be applied in tandem to determine whether a given suit falls within the probate exception: (1) the *Erie* doctrine; (2) the statutory and constitutional limitations on federal court subject matter jurisdiction; (3) the doctrine of *custodia legis*; (4) the requirement of a justiciable case or controversy; and (5) prudential abstention. This Article concludes that courts should construe the probate exception narrowly to prevent prejudice against out of state claimants and to ensure that claimants' federal statutory rights may be enforced. In addition, this Article recommends that Congress consider enacting a statutory override of the probate exception.

II. MODERN APPLICATION OF THE PROBATE EXCEPTION

A. *MARKHAM V. ALLEN*: THE SUPREME COURT'S MOST RECENT RULING ON THE PROBATE EXCEPTION

The Supreme Court last addressed the probate exception in *Markham v. Allen*.[28] There, the will of a California resident had been admitted into probate and had named as legatees[29] certain persons resident in Germany.[30] Six U.S. citizens—heirs-at-law[31] of the decedent—filed a petition in state court asserting that under state law the German legatees were ineligible as beneficiaries[32] and that the U.S. heirs were thus entitled to inherit the decedent's estate.[33] The Alien Property Custodian, acting pursuant to the Trading with the Enemy Act, purported to vest himself as Custodian with all right, title and interest of the German legatees, and brought suit in federal district court against the executor of the estate and the six U.S. heirs-at-law for a determination that the U.S. claimants had no interest in

28. 326 U.S 490 (1946).

29. A legatee is one who is named in a will to take personal property. BLACK'S LAW DICTIONARY, *supra* note 11, at 897–98.

30. *Markham*, 326 U.S. at 492.

31. An "heir-at-law" is a person who inherits a deceased person's estate under state statutes of descent and distribution in the absence of a valid testamentary disposition. BLACK'S LAW DICTIONARY, *supra* note 11, at 723.

32. The state law at issue purported to limit inheritance by non-resident aliens to nationals of countries that granted reciprocal rights of inheritance to U.S. citizens. *Markham*, 326 U.S. at 492 n.1.

33. *Id.* at 492.

the estate and that, moreover, the entire estate belonged to the Custodian.[34] The district court granted judgment for the Alien Property Custodian,[35] but the Court of Appeals reversed, holding that the suit filed in federal court was barred by the probate exception.[36]

After stating the general rule that the federal courts lack jurisdiction to probate a will or to administer an estate, the Supreme Court stated yet another, general rule:

> [F]ederal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court."[37]

The Court clarified somewhat the meaning of the word "interfere," holding the mere fact that the state probate court—when ultimately distributing the estate—would be bound to recognize the rights adjudicated in the federal court would not constitute an interference with the state probate proceedings.[38] Thus, the effect of the declaratory judgment sought by the Custodian in the case before the Court would not be an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court. Instead, it would merely decree the Custodian's right in the property to be distributed after its administration by the state probate court.[39]

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34. *Id.*

35. *See* Crowley v. Allen, 52 F.Supp. 850 (N.D. Cal. 1943).

36. *See* Allen v. Markham, 147 F.2d 136 (9th Cir. 1945), *rev'd*, 326 U.S. 490 (1946).

37. *Markham*, 326 U.S. at 494 (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43 (1909)). *See also* Sutton v. English, 246 U.S. 199, 205 (1918) (stating that "questions relating to the interests of heirs, devisees, or legatees, or trusts affecting such interests, which may be determined without interfering with probate or assuming general administration, are within the jurisdiction of the federal courts where diversity of citizenship exists and the requisite amount is in controversy"); Hess v. Reynolds, 113 U.S. 73, 76–77 (1885) (holding that suits by an executor to enforce payment of debts owed to the decedent as well as suits against the executor on obligations contracted by the decedent fall within the federal courts' grant of diversity jurisdiction); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868) (noting a suit by a distributee against the administrator of the estate was within the subject matter jurisdiction of the federal courts).

38. *Markham*, 326 U.S. at 494. The debt thus established, however, "must take its place and share of the estate as administered by the probate court; and it cannot be enforced by process directly against the property of the decedent." Byers v. McAuley, 149 U.S. 608, 620 (1893). *Accord Waterman*, 215 U.S. at 44.

39. *Markham*, 326 U.S. at 495.

B. DEVELOPMENT OF THE PROBATE EXCEPTION IN THE LOWER COURTS

1. Lower Court Tests for Determining What Falls Within the Exception

To be sure, *Markham* provided some guidance to the lower federal courts as to the scope of the probate exception. In the wake of *Markham*, the lower courts are in agreement that the federal courts lack subject matter jurisdiction over so-called "pure" probate matters,[40] including the actual probate of a will[41] (the "procedure by which a will is proved to be valid or invalid"),[42] the administration of the estate (the process of collecting the decedent's assets, liquidating liabilities, paying necessary taxes, and distributing property to heirs),[43] as well as obtaining an accounting of the same[44] and appointing or removing the deceased's personal representative or the attorney representing the estate.[45] Moreover, the lower courts generally agree that creditors, legatees, heirs, and other claimants may establish their claims against the estate in federal court, with the caveat that the claims so established—whether by way of a declaratory judgment in the case of a legatee or heir establishing his or her right to a share of the estate, or in an actual suit on the merits in the case of a creditor—must then take their place and share in the estate as provided for in the probate court proceedings.[46] Yet, beyond these guideposts derived from the *Markham*

40. Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988). *See* Hudson v. Abercrombie, 682 F. Supp. 1218, 1219 (N.D. Ga. 1987) (citing *Markham*, 326 U.S. at 494; Ellis v. Davis, 109 U.S. 485 (1883)).

41. *E.g.*, *Georges*, 856 F.2d at 973; Celentano v. Furer, 602 F. Supp. 777, 780–81 (S.D.N.Y. 1985).

42. BLACK'S LAW DICTIONARY, supra note 11, at 1202.

> The matters and things to be determined upon the probate of a will, are the mental capacity of the testator, the factum of the making of the will, and its due execution according to law. The question of a construction of the will, or any clause thereof is never properly before the court in a proceeding to establish the instrument.

3 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 1890, at 490 (14th ed. 1918) [hereinafter 3 STORY, COMMENTARIES].

43. *E.g.*, Oliver v. Oliver, No. 98-1460, 1999 U.S. App. LEXIS 9347, at *3–*5 (4th Cir. May 17, 1999) (unpublished decision); Turton v. Turton, 644 F.2d 344, 347 (5th Cir. 1981); Galion Iron Works & Mfg. Co. v. Russell, 167 F. Supp, 304, 308 (W.D. Ark. 1958) (observing that "[i]t is a well settled rule that federal courts may not engage in the general administration of an estate or disturb the possession of property within the custody of a state court").

44. *E.g.*, Bortz v. DeGolyer, 904 F. Supp. 680, 684 (S.D. Ohio 1995); Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064, 1068 (E.D.N.C. 1988).

45. *E.g.*, Jones v. Harper, 55 F. Supp.2d 530, 533 (S.D.W. Va. 1999) (holding that "the probate exception prevents [the district court] from . . . removing the defendant and appointing the plaintiff as personal representative" because this would interfere with the administration of the estate).

46. *E.g.*, Michigan Tech. Fund v. Century Nat'l Bank, 680 F.2d 736, 740 (11th Cir. 1982) (holding that it is permissible for a federal court to adjudicate a breach of agreement to make a mutual will because it is akin to a creditor suing for breach of contract); *Turton*, 644 F.2d at 344, 347

opinion as to the scope of the probate exception, "the contours of the exception are vague and indistinct,"[47] creating substantial uncertainty as to the sorts of actions that would "interfere" with state probate proceedings. In an attempt to fill the gap left by the Supreme Court, the lower courts have developed several competing formulae for determining whether a cause of action falls within the probate exception, "endeavor[ing] to distinguish between direct interference with or control of the *res* and adjudication of the rights of individuals who have an interest in the res . . . [a] line of distinction [that] is not always clear."[48]

a. The "Nature of Claim" Test

One lower court test for determining whether a claim is sufficiently related to probate so as to fall within the probate exception examines the nature of the plaintiff's claim, with the plaintiff's position vis-à-vis the will being the dispositive factor. Under the "nature of claim" test, if the plaintiff's claim rests upon an assertion that the will is invalid (such as where the plaintiff seeks to void the will due to undue influence or lack of testamentary capacity), then the case falls within the probate exception. This is because the federal court must rule on the validity of the will in order to resolve the claim—a ruling that would directly overlap and thus "interfere" with the state court's probate process. On the other hand, if the plaintiff acknowledges the validity of the will and merely asserts a right to share in the distribution of the estate (either as a matter of interpretation of the will or in reliance on some state law forced-share provision), the federal court is free to adjudicate the claim.[49]

(explaining that a creditor can obtain a federal judgment that he has a valid claim for a given amount against the estate, and that the judgment can be asserted as res judicata in the state probate court proceedings); Holt v. King, 250 F.2d 671, 675 (10th Cir. 1957); Holt v. Werbe, 198 F.2d 910, 915 (8th Cir. 1952); McClendon v. Straub, 193 F.2d 596, 598 (5th Cir. 1952) (asserting that "[j]urisdiction of the [federal] court to ascertain and declare the interest of the plaintiff in the estate . . . is clearly established by a long line of cases"); Milam v. Sol Newman Co., 205 F. Supp. 649, 650, 653–54 (N.D. Ala. 1962) (holding that the federal court can adjudicate tort action against estate for injuries plaintiff sustained in auto accident); Odom v. Travelers Ins. Co., 174 F. Supp. 426, 434 (W.D. Ark. 1959) (noting that federal court can hear controverted question of debt or no debt as against the estate); *Galion Iron Works & Mfg. Co.*, 167 F. Supp. at 309–10 (noting that federal courts can entertain suits to establish claims against the estate, but those claims must stand in line). *But cf.* White v. White, 126 F. Supp. 924, 925–26 (S.D. Idaho 1954) (holding the statement in *Markham* that the federal courts have jurisdiction to entertain suits in favor of creditors and legatees does not apply in diversity actions, and that the court must look to whether under state law, the state courts of general jurisdiction would have jurisdiction over such suits).

47. *Georges*, 856 F.2d at 973.

48. Starr v. Rupp, 421 F.2d 999, 1005 (6th Cir. 1970). *Accord* Bassler v. Arrowood, 500 F.2d 138, 142 (8th Cir. 1974); Martz v. Braun, 266 F. Supp. 134, 138 (E.D. Pa. 1967).

49. *E.g.*, Turja v. Turja, 118 F.3d 1006, 1009 (4th Cir. 1997) (noting that no federal court has found that it has jurisdiction to invalidate a will due to lack of testamentary capacity or undue

b. The "Route" Test

A far more common lower court test examines the route that the suit would take had it been brought in state court. Under the "route" test, if the dispute under state law could be adjudicated only in a probate court, then there is no federal court jurisdiction. If, however, under state law the state courts of general jurisdiction would have jurisdiction over the dispute, then federal court jurisdiction exists (assuming, of course, that the complete diversity and amount in controversy requirements are satisfied).[50] Under

influence); *Michigan Tech. Fund*, 680 F.2d at 739–40 (holding that a challenge to a will's validity is not within the federal court's subject matter jurisdiction, but that an action seeking an interpretation of a will is within its jurisdiction); Blakeney v. Blakeney, 664 F.2d 433, 434 (5th Cir. 1981) (finding no jurisdiction where there is an attack on the deceased's testamentary capacity as that goes to the will's validity); Rice v. Rice Found., 610 F.2d 471, 476 (7th Cir. 1979) (describing but not adopting rule). *See also* Gant v. Grand Lodge, 12 F.3d 998, 1003–04 (10th Cir. 1993) (noting federal courts have jurisdiction to construe wills). While this approach is often attributed to a line of Fifth Circuit cases, *e.g.*, *Rice*, 610 F.2d at 476 (citing Akin v. Louisiana Nat'l Bank, 322 F.2d 749, 753–54 (5th Cir. 1963)); Mitchell v. Nixon, 200 F.2d 50, 51–52 (5th Cir. 1952); *Michigan Tech Fund*, 680 F.2d at 739 (citing Kausch v. First Wichita Nat'l Bank, 470 F.2d 1068, 1070 (5th Cir. 1972)), a closer examination of these cases reveals that they were applying the "route" test, discussed *infra* Part II.B.1.b. *See Kausch*, 470 F.2d at 1069–70 (examining Texas law); *Akin*, 322 F.2d at 753–55 (examining Louisiana law, and distinguishing between suits that attack the validity of a will and suits in which parties differ only as to a will's effect or construction, and exercising jurisdiction over suit to declare plaintiff's interest as a forced heir); *Mitchell*, 200 F.2d at 51–52 (examining Alabama law). *See also* Gaines v. Chew, 43 U.S. (2 How.) 619, 647–50 (1844) (holding that although the court likely lacked jurisdiction in equity to set aside a will due to fraud, the heir could bring suit under the state's forced heirship laws, since it does not require the court either to prove or to set aside the will); Robertson v. Robertson, 803 F.2d 136, 138–39 (5th Cir. 1986) (applying Arkansas law, and concluding there is federal court jurisdiction where validity of will is not contested, and where all that is sought is a declaration decedent died a resident of Louisiana, and that the plaintiff was thus entitled to forced heirship).

50. *See* Green v. Doukas, No. 99-7733, 2000 U.S. App. LEXIS 2239, at *8–9 (2d Cir. Feb. 15, 2000) (unpublished decision) (holding that the probate-exception standard is whether under state law, the claims will be cognizable only in state probate court); Oliver v. Oliver, No. 98-1460, 1999 U.S. App. LEXIS 9347, at *4 (4th Cir. May 17, 1999) (unpublished decision) (noting that federal courts have no subject matter jurisdiction over matters exclusively within the jurisdiction of state probate courts); Reinhardt v. Kelly, 164 F.3d 1296, 1299–1300 (10th Cir. 1999); McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988) (stating that if a state vests its courts of equity with jurisdiction to hear contested will suits, the federal courts in the state may enforce that right); Bedo v. McGuire, 767 F.2d 305, 306 (6th Cir. 1985) (holding that the federal court had no jurisdiction over breach of fiduciary duty action by beneficiaries of estate against executor because only the probate courts of the state have jurisdiction over such disputes); Moore v. Lindsey, 662 F.2d 354, 361 (5th Cir. 1981); *Rice*, 610 F.2d at 476 (describing but not adopting rule); *Bassler*, 500 F.2d at 142 (suggesting that "[w]here a claim is enforceable in a state court of general jurisdiction, the argument becomes more persuasive that federal diversity jurisdiction should be assumed") (citing Lamberg v. Callahan, 455 F.2d 1213, 1216 (1972)); Harris v. Pollack, 480 F.2d 42, 45–46 (10th Cir. 1973); *Lamberg*, 455 F.2d at 1216 (2d Cir. 1972) (setting forth the standard); Looney v. Capital Nat'l Bank, 235 F.2d 436 (5th Cir. 1956) (holding that because a declaratory judgment action could be brought in state court to have a testamentary trust declared invalid based on the rule against perpetuities, such an action also could be maintained in a federal court); Foster v. Carlin, 200 F.2d 943, 947 (4th Cir. 1953) (citing district court cases holding that whether an action could be maintained in a state court of general jurisdiction determines whether

this standard, the scope of the probate exception varies across the federal courts according to the internal division of jurisdiction within each state between its probate courts and its courts of general jurisdiction.

c. The "Practical" Test

Judge Posner developed yet a third test for determining whether a suit, while not a "pure matter of probate," was nonetheless barred by the probate exception because it was "ancillary" to probate.[51] Under Judge Posner's "practical" test, the question of whether a suit is "ancillary" to probate—and thus within the probate exception to federal court jurisdiction—turns on whether "allowing it to be maintained in federal court would impair the policies served by the probate exception."[52] Judge Posner identified a number of practical purposes that the probate exception was designed to serve: the promotion of legal certainty (by having all issues regarding the transfer of property at death litigated in a single forum); judicial economy; and the relative expertise of state probate court judges in adjudicating probate-related questions, such as testamentary capacity.[53] Judge Posner

federal court jurisdiction exists); Sullivan v. Title Guarantee & Trust Co., 167 F.2d 393, 395 (2d Cir. 1948) (asserting that a federal court can exercise jurisdiction only if state court of general jurisdiction would exercise jurisdiction); Cmty. Ins. Co. v. Rowe, 85 F. Supp.2d 800, 805 (S.D. Ohio 1999); Johnson v. Porter, 931 F. Supp. 761, 762 (D. Colo. 1996) (stating that the issue is whether under state law, suit would be cognizable only in state probate court); Celentano v. Furer, 602 F. Supp. 777, 779 (S.D.N.Y. 1985) (stating that the standard is whether under state law, the dispute would be cognizable only in the probate court); Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250, 252 (D. Kan. 1984) (asserting that "[t]he court must determine whether under Kansas law the claims are such as would traditionally have been cognizable only in a probate court or whether the claims are such as could be asserted in a court of general jurisdiction"); Dunaway v. Clark, 536 F. Supp. 664, 670 (S.D. Ga. 1982) (stating that an "exception to the [probate exception] is present where a state by statute or custom gives parties a right to bring an action in [state] courts of general jurisdiction"); Lightfoot v. Hartman, 292 F. Supp. 356, 357–58 (W.D. Mo. 1968) (ruling that the federal court has no jurisdiction because under state law the claim is in exclusive jurisdiction of state probate court); Eyber v. Dominion Nat'l Bank of Bristol Office, 249 F. Supp. 531, 532–33 (W.D. Va. 1966) (observing that the state legislature "has not chosen to make probate a part of the general equity jurisdiction of the courts of Virginia, and it follows that a federal court sitting in the state will be limited in the same manner as the State Equity Court"); *Galion Iron Works & Mfg. Co.*, 167 F. Supp. 304, 311–12 (W.D. Ark. 1958) (remarking that if state law does not afford a remedy in a state court of general jurisdiction, federal courts cannot assume jurisdiction); Quinlan v. Empire Trust Co., 139 F. Supp. 168, 169–70 (S.D.N.Y. 1956) (reasoning that because state courts of general jurisdiction can declare trusts and wills invalid due to undue influence, fraud, and lack of mental capacity, the federal courts likewise have jurisdiction to do so); Illinois State Trust Co. v. Conanty, 104 F. Supp. 729, 731–32 (D.R.I. 1952).

51. Dragan v. Miller, 679 F.2d 712, 715 (7th Cir. 1982). The Seventh Circuit had previously noted the existence of the "nature" and "route" tests but had declined to adopt either test. *See Rice*, 610 F.2d at 476.

52. *Dragan*, 679 F.2d at 715–16.

53. *Id.* at 714–15. Taken to its logical extreme the interest in judicial economy and the relative expertise of state court judges contained in Judge Posner's practical test would provide an argument for eradicating diversity jurisdiction altogether. Federal court judges sitting in diversity must often struggle

attributed the least weight to the policy of promoting legal certainty, reasoning that it is neutralized by the policy of avoiding parochial bias in favor of in-state litigants that underlies the federal courts' grant of diversity jurisdiction.[54] Under his test, the force of the other two policies varies with state law: for example, relative expertise carries greater force in states that create a specialized cadre of probate judges than in states in which probate matters are heard in courts of general jurisdiction. Similarly, judicial economy carries more weight in states that restrict the raising of a challenge to testamentary capacity to the original probate proceeding than in states allowing the issue to be raised in separate judicial proceedings.[55]

In *Dragan*, Judge Posner applied his "practical factors" test and held there was no jurisdiction over a suit brought by the heirs-at-law of the decedent against the beneficiaries of the decedent's will for tortious interference with an expectancy of inheritance.[56] Key in Judge Posner's view was the interest in judicial economy. Under Illinois law, a challenge to the validity of a will—whether characterized as a "will contest" or as a tort claim of interference with an expectancy—could be brought only in the ongoing proceeding to probate the will and within a specified time period.[57] For a federal court to exercise jurisdiction over the tort action would

to determine the meaning of state law, and it would certainly be more efficient to eliminate diversity jurisdiction entirely and have state law decided exclusively in state courts by judges more familiar with state law. Yet, the diversity statute as drafted has struck a balance between the interest in judicial economy and fairness to litigants, and it is thus difficult to see why probate-related cases should be treated any differently from other cases involving issues of state law. Subsequent cases often make mention of the fact that the probate proceeding has closed, *see e.g.*, Loyd v. Loyd, 731 F.2d 393, 397 (7th Cir. 1984); McClain v. Anthony, No. 88 C 8503, 1989 WL 44307, at *2 (N.D. Ill. Apr. 28, 1989), but this does not appear to be a formal requirement, *see e.g.*, Hamilton v. Nielsen, 678 F.2d 709, 710 (7th Cir. 1982). The Supreme Court, in discussing the analogous exception to federal court jurisdiction for domestic relations matters in *Ankenbrandt v. Richards*, indicated the exception was justified by the interests in judicial economy and the relative expertise of state family court judges. 504 U.S. 689, 703–04 (1992).

54. *Dragan*, 679 F.2d at 716.

55. *Id.* at 715.

56. *Id.* at 716–17.

57. *Id.* Under Judge Posner's test, however, the probate exception does not apply where the state relegates probate matters to its courts of general jurisdiction rather than to specialized probate courts, or provides that the specific claim is not, as a matter of state law, part of the will contest and thus need not be brought exclusively in the ongoing proceeding to probate the will. *See Loyd*, 731 F.2d at 393, 396–97 (proper to exercise jurisdiction over suit brought against the estate's administrator by the decedent's widow for fraud in connection with the sale of certain real property owned by the estate, where probate matters in the state were relegated to the courts of general jurisdiction and the specific statutory provision providing for contesting alleged frauds was not limited to probate court); Georges v. Glick, 856 F.2d 971, 972–75 (7th Cir. 1988) (finding that it is proper to exercise jurisdiction over claims of legal malpractice and breach of contract brought by the decedent's heirs against the decedent's attorney as such claims are not, as a matter of state law, part of the will contest and need not be brought exclusively in the ongoing proceeding to probate the will).

undermine the state's demonstrated interest in judicial economy.[58] Relative expertise also weighed in favor of using the probate exception: undue influence over a testator is an issue with which Illinois state judges have greater expertise.[59] But unlike courts that follow the "nature of the claim" test, Judge Posner did not hold that such challenges are categorically outside the federal courts' grant of diversity jurisdiction. Instead, he held that if Illinois state law allows an action challenging the validity of a will to be brought as a separate tort action before a different judge than the one who probated the will, then the policy of judicial economy would lose its force.[60]

2. Application of the Probate Exception

a. Inter Vivos and Testamentary Trusts

While a great deal of property is transferred at death by way of devises in a will, an increasing number of people transfer their property using "will substitutes," including trusts.[61] In a trust, property is held by a trustee at the request of the owner of the property (the settlor) for the benefit of a third party, the beneficiary.[62] In a trust relationship, the trustee holds legal title to the property, but has an equitable duty to hold the property for the benefit of the beneficiary.[63] There are, broadly speaking, two different types of trusts: inter vivos trusts and testamentary trusts. Inter vivos trusts are created and take effect during the settlor's lifetime.[64] Thus, the

58. *Dragan*, 679 F.2d at 716.

59. *Id.*

60. *Id.* at 717. In *Hamilton v. Nielsen*, 678 F.2d 709 (7th Cir. 1982), published just two weeks prior to *Dragan*, Judge Posner found that the federal courts had subject matter jurisdiction over an action brought by a beneficiary of a testamentary trust against the executors for negligent breach of fiduciary duty. *Id.* at 709–10. Judge Posner reasoned that because "such cases when brought in state courts in Illinois are brought in its courts of general jurisdiction rather than in courts with a specialized probate jurisdiction . . . retention of federal diversity jurisdiction over such cases will not interfere with a state policy of channeling all probate-related matters to specialized courts." *Id.* at 710. The court went on to hold, however, that this would not allow federal courts to probate wills, even though that is done in state courts of general jurisdiction, reasoning that "[p]robate remains a peculiarly local function which federal courts are ill equipped to perform." *Id.* The court did note that the suit did not seek to enjoin the probate proceedings, involve the validity or construction of the will, or try to change the distribution of the estate assets. *Id.*

61. *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108 (1984); Nathaniel W. Schwickerath, *Public Policy and the Probate Pariah: Confusion in the Law of Will Substitutes*, 48 DRAKE L. REV. 769, 770 (2000).

62. BLACK'S LAW DICTIONARY, *supra* note 11, at 1508.

63. RESTATEMENT (SECOND) OF TRUSTS § 2 cmt. h (1959); BLACK'S LAW DICTIONARY, *supra* note 11, at 1509.

64. BLACK'S LAW DICTIONARY, *supra* note 11, at 1511. A special kind of inter vivos trust is the "pour-over trust": it is created during the settlor's lifetime, but the settlor's assets are not immediately

property is transferred to the trustee while the settlor is still alive. In contrast, a testamentary trust is created by a will and does not take effect until the settlor dies.[65]

Legal disputes frequently arise in connection with trusts. For example, the beneficiaries might bring suit against the trustee for breach of fiduciary duty or conversion, demanding an accounting, removal of the trustee, or both.[66] Alternatively, heirs who are not named as beneficiaries in the trust instrument might bring a suit challenging the validity of the trust (usually alleging lack of capacity or undue influence),[67] alleging that the trust instrument failed to comply with the requirements of state law;[68] or alleging that the settlor had revoked the trust during her lifetime.[69]

The probate exception is frequently raised as a defense when such actions are filed in federal court. Most courts have rejected this defense, holding the probate exception does not apply to trusts.[70] Often no explanation is given for this distinction, but a few courts have relied on the fact that trusts, unlike wills, did not fall within the exclusive jurisdiction of the ecclesiastical courts in eighteenth-century England, but instead were within the jurisdiction of the High Court of Chancery, and thus fall within the statutory grant of equity jurisdiction to U.S. federal courts.[71] A few

transferred to the trustee. Rather, upon the settlor's death, the trust receives property by way of a devise from the settlor's will, usually by way of the residual estate. *Id.* at 1512.

65. BLACK'S LAW DICTIONARY, *supra* note 11 at 1513.

66. *See, e.g.*, Georges v. Glick, 856 F.2d 971, 972–73 (7th Cir. 1988); Schonland v. Schonland, No. Civ. 397CV558(AHN), 1997 WL 695517, at *1 (D. Conn. Oct. 23, 1997); Weingarten v. Warren, 753 F. Supp. 491, 492–93 (S.D.N.Y. 1990); Barnes v. Brandrup, 506 F. Supp. 396, 397–98 (S.D.N.Y. 1981); Rousseau v. U.S. Trust Co. of N.Y., 422 F. Supp. 447, 450–51 (S.D.N.Y. 1976).

67. *E.g.*, Turja v. Turja, 118 F.3d 1006, 1007–08 (4th Cir. 1997); Johnston v. Goss, No. 95-6295, D.C. CIV-94-1465-A, 1997 WL 22530, at *1 (10th Cir. Jan. 22, 1997) (unpublished decision); Davis v. Hunter, 323 F. Supp. 976, 977–78 (D. Conn. 1970); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 108 (D. Or. 1957).

68. *E.g.*, Lancaster v. Merchants Nat'l Bank, 752 F. Supp. 886, 887–89 (W.D. Ark. 1990), *rev'd*, 961 F.2d 713 (8th Cir. 1992).

69. *E.g.*, Sisson v. Campbell Univ., Inc., 688 F. Supp. 1064, 1065 (E.D.N.C. 1988).

70. *See Schonland*, 1997 WL 695517, at *2 (stating that "the probate exception does not apply to trusts"); *Weingarten*, 753 F. Supp. at 494–95 (stating that "[t]he probate exception to diversity jurisdiction does not apply to trusts"); *Lancaster*, 752 F. Supp. at 888 (holding the probate exception does not apply to challenges to the validity of a trust); *Barnes*, 506 F. Supp. at 399 (holding the probate exception does not apply because the case "involves a probate court's jurisdiction over trusts, not wills"). *See also Turja*, 118 F.3d at 1006–09 (implicitly distinguishing between a challenge to the validity of a will and a challenge to a trust).

71. *See Barnes*, 506 F. Supp. at 399 ("Controversies concerning trusts were not in 1789 part of the exclusive jurisdiction of the ecclesiastical courts."); Knoop v. Anderson, 71 F. Supp. 832, 837–38 (N.D. Iowa 1947) ("At the time of the adoption of the Constitution of the United States, the English High Court of Chancery had jurisdiction as to the enforcement of trusts."). For a detailed discussion of

courts have also suggested that since a challenge to the validity of a trust has the effect of adding assets to a probate estate (as contrasted with a challenge to the validity of a will, which has the effect of taking assets away from the probate estate), challenges to inter vivos transfers of property do not have the effect of interfering with the probate of the estate.[72]

At least one court has expressly rejected this distinction, reasoning that a trust is little more than a will substitute and thus ought not to be treated differently.[73] Other courts, while not directly rejecting the distinction, have done so implicitly by subjecting challenges to trusts to the same tests[74] that they employ for determining whether a challenge to a will falls within the probate exception.[75] Still other courts implicitly have drawn a line between testamentary and inter vivos trusts, applying the probate exception to the former but not to the latter without providing justification for drawing such a distinction.[76]

b. Suits Arising Under Federal Law and Statutory Interpleader Actions

In the typical probate-related case, the basis for federal court subject matter jurisdiction will be diversity of citizenship,[77] as the cause of action is usually either a breach of contract claim[78] or a garden-variety state common law claim—such as fraud,[79] breach of fiduciary duty,[80]

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the relationship between U.S. federal court subject matter jurisdiction and the distribution of jurisdiction among British courts in the eighteenth century, *see infra* Part III.A.

72. *See* McKibben v. Chubb, 840 F.2d 1525, 1530–31 (10th Cir. 1988); Gearheard v. Gearheard, 406 F. Supp. 704, 705–06 (S.D. Miss. 1976).

73. *See* Georges v. Glick, 856 F.2d 971, 974 n.2 (7th Cir. 1988).

74. *See supra* Part II.B.1.

75. Johnston v. Goss, No. 95-6295, D.C. CIV-94-1465-A, 1997 WL 22530, at *1 (10th Cir. Jan. 22, 1997) (unpublished decision) (applying "route" test in challenge to validity of inter vivos trust); *McKibben*, 840 F.2d at 1530–31 (applying "route" test in challenge to validity of inter vivos transfer of property); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104 (D. Or. 1957).

76. *See* Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447, 450–60 (S.D.N.Y. 1976). *See also Jackson*, 153 F. Supp. 104 (treating a challenge to the validity of a testamentary trust as a challenge to the validity of the will itself).

77. *See, e.g.*, Ashton v. Paul, 918 F.2d 1065, 1072 (2d Cir. 1990).

78. *See, e.g.*, *Georges*, 856 F.2d at 971, 974–75 (adjudicating breach of contract claims against the attorney who drafted will by beneficiaries); Michigan Tech. Fund v. Century Nat'l Bank of Broward, 680 F.2d 736, 740 (11th Cir. 1982) (reviewing claim of breach of contract to execute mutual wills); Lamberg v. Callahan, 455 F.2d 1213, 1214–15 (2d Cir. 1972).

79. *See, e.g.*, Green v. Doukas, 2000 U.S. App. LEXIS 2239, at *2 (2d Cir. Feb. 15, 2000) (unpublished decision); Newland v. Newland, 82 F.3d 338, 339 (10th Cir. 1996); Vizvary v. Vignati, 134 F.R.D. 28, 29 (D.R.I. 1990); Dinger v. Gulino, 661 F.Supp. 438, 443 (E.D.N.Y. 1987).

negligence,[81] conversion,[82] unjust enrichment,[83] tortious interference with expectancy of inheritance,[84] or wrongful death[85]—against the administrator (personally or in a representative capacity) or the beneficiaries named in the will. Indeed, the probate exception is frequently referred to as the probate exception to federal court *diversity* jurisdiction,[86] and it has only been in diversity cases that the Supreme Court has actually applied the probate exception to deny subject matter jurisdiction over a suit.[87]

The probate exception, however, is sometimes raised in cases where federal jurisdiction is not based on diversity. *Markham*, for example, was a federal question case—although notably one in which the Court refused to apply the probate exception. In addition to diversity cases, there are a handful of probate-related suits that fall within the subject matter jurisdiction of the federal courts either because they state a claim under federal statutory or constitutional law[88] or because they fall within the interpleader jurisdiction[89] of the federal courts.

i. Statutory Interpleader Actions

80. *See, e.g.*, *Green*, 2000 U.S. App. LEXIS 2239, at *2–*3; *Newland*, 182 F.3d at 339, 767 F.2d at 306; *Bortz*, 904 F. Supp. at 683–84; *Dinger*, 661 F. Supp. at 443; Tarlton v. Townsend, 337 F. Supp. 888, 892 (D. Miss. 1971); Martz v. Braun, 266 F.Supp. 134, 138 (E.D. Pa. 1967).

81. *See, e.g.*, *Newland*, 82 F.3d at 339; *Georges*, 856 F.2d at 974–75; *Dinger*, 661 F. Supp. at 443.

82. *See, e.g.*, *Green*, 2000 U.S. App. LEXIS 2239, at *2; *Newland*, 82 F.3d at 339; Harder v. Rafferty, 709 F. Supp. 1111, 1113 (M.D. Fla. 1989).

83. *See, e.g.*, *Green*, 2000 U.S. App. LEXIS 2239, at *2.

84. *See, e.g.*, *id.*; Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *1, *5 (N.D.Ill. Sept. 18, 1995); Beren v. Ropfogel, Civ. A. No. 91-2425-O, 1992 WL 373935, at *1 (D.Kan. Nov. 18, 1992).

85. *See, e.g.*, *Harder*, 709 F. Supp. at 1113.

86. *E.g.*, Michigan Tech. Fund v. Century Nat'l Bank of Broward, 680 F.2d 736, 739 (11th Cir. 1982).

87. Sutton v. English, 246 U.S. 199 (1918); Farrell v. O'Brien, 199 U.S. 89 (1905); Byers v. McAuley, 149 U.S. 608 (1893); Ellis v. Davis, 109 U.S. 485 (1883); *In re* Broderick's Will, 88 U.S. 503 (21 Wall.) (1874); Gaines v. Chew, 43 U.S. (2 How.) 619 (1844).

88. *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

89. The federal interpleader statute provides the federal courts with subject matter jurisdiction over interpleader actions filed by anyone in possession of money or property exceeding $500 in value, provided that two or more adverse claimants of diverse citizenship claim or may claim to be entitled to the money or the property and that the stakeholder deposits the money or property with the court upon filing suit. 28 U.S.C. § 1335 (1994). Only minimal diversity is required: so long as at least two of the stakeholders are of different citizenship, it does not matter that there is overlap in the citizenship of the claimants. State Farm Fire & Cas. Co. v. Tashire, 386 U.S. 523, 530 (1967). The purpose of the federal interpleader statute is to "provide a forum in which a holder of money admittedly owing to someone and claimed by several parties may have the question of entitlement to the fund settled in one proceeding and be himself discharged from all further liability as to the fund." Mass. Mut. Life Ins. Co. v. Central-Penn. Nat'l Bank, 362 F. Supp. 1398, 1401 (E.D. Pa. 1973).

A probate-related interpleader action typically arises when an individual or entity is in possession of certain assets and there is dispute as to whether the assets even belong to the deceased's estate.[90] All courts considering the matter have refused to apply the probate exception in the context of federal statutory interpleader actions.[91] The primary rationale for non-application of the probate exception is that by definition the action cannot impermissibly "interfere" with the probate proceedings because the assets at issue are not yet within the possession of the state probate court; indeed, the very purpose of the action is to determine whether or not the assets belong to the estate.[92] Moreover, even if an interpleader action would "interfere" with the state probate proceedings, some courts hold that Congress' express authorization to the federal courts to issue injunctions in aid of federal interpleader actions against proceedings to adjudicate rights to the property in state court proceedings[93] justifies any such interference.[94]

ii. Suits Arising Under Federal Law

Suits grounded in the RICO statute,[95] the Ku Klux Klan Act [96] and the Foreign Judicial Assistance Statute[97] have involved what might be deemed

90. *E.g.*, *Ashton*, 918 F.2d 1065 (2d 1990) (adjudicating a case in which the executor was in possession of assets that plaintiffs claimed were part of the estate); Union Nat'l Bank of Texas v. Gutierrez, 764 F. Supp. 445, 445–46 (S.D. Tex. 1991) (denying jurisdiction over question of whether money in a bank account with a "payable on death" designation was part of probate estate or was the property of the "payable on death" designee).

91. *Ashton*, 918 F.2d at 1072 n.6 ("We have found no reported decision in which the probate exception has foreclosed a federal court from exercising interpleader jurisdiction.").

92. *Id.*; *Union National Bank of Texas*, 764 F. Supp. at 445–446. This is akin to the justification for excluding challenges to trusts from the probate exception since both interpleader actions and challenges to trusts have the effect of adding assets to the probate estate. *See supra* note 72 and accompanying text.

93. *See* 28 U.S.C. § 2361 (1994) ("In any civil action of interpleader or in the nature of interpleader under section 1335 of this title, a district court may issue its process for all claimants and enter its order restraining them from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument, or obligation involved in the interpleader action until further order of the court.").

94. *Ashton*, 918 F.2d at 1072 ("In the face of such clear legislative direction on an issue of federal/state comity, there is little room for courts to infer that the murky probate exception prevents the injunction in the instant matter even at the cost of frustrating the statutory purpose.").

95. 18 U.S.C. §§ 1961–68. (1994).

96. 42 U.S.C. § 1983 (1994).

97. 28 U.S.C. § 1782(a) (1994) "The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal." *Id.* A suit has also arisen under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132 (1994), but in the only case involving such an action, the court found that the action at issue did not fall within the definition of the word "probate" for purposes of the exception. *See* Cmty. Ins. Co. v. Rowe, 85 F. Supp. 2d 800, 805–06 (S.D. Ohio 1999).

to be probate-related matters. Typically, the RICO suits involve claims that some combination of the attorneys who drafted the will, the beneficiaries of the will, and the executor of the will conspired to defraud the decedent of his or her assets and to cheat the decedent's heirs out of their inheritance.[98] In contrast, the § 1983 claims usually involve allegations of wrongdoing by the state probate court judge.[99] The Foreign Judicial Assistance Statute suits involve requests for U.S. judicial assistance in obtaining evidence located in the United States for use in foreign probate proceedings.[100] Courts that have adjudicated these three kinds of claims have unanimously held that the probate exception does not apply to suits arising under federal statutes,[101] although none has provided a rationale for distinguishing such claims from those grounded in diversity jurisdiction.[102]

98. *See* Glickstein v. Sun Bank/Miami, N.A., 922 F.2d 666, 668 (11th Cir. 1991) ("alleging the defendants conspired to 'plunder' the assets of [the decedent] and cheat the [heirs] out of their inheritance."); Maxwell v. Southwest Nat'l Bank, 593 F. Supp. 250, 252–56 (D. Kan. 1984) (alleging the defendants "engaged in a pattern of racketeering activities . . . whereby defendants identify and target elderly rich people for the purpose of defrauding them, their heirs and legatees out of their estates").

99. *See* Williams v. Adkinson, 792 F.Supp. 755, 757 (M.D. Ala. 1992) (alleging state probate court judge denied plaintiff's rights to substantive and procedural due process and to equal protection, and that the state court decision violated the Takings Clause).

100. *See In re* Application of Horler, 799 F. Supp. 1457, 1459 (S.D.N.Y. 1992) (seeking evidence in aid of Swiss probate court proceedings).

101. *Glickstein*, 922 F.2d at 672 ("the probate exception is an exception to diversity jurisdiction and has no application to the federal RICO claims"); *Cmty. Ins. Co.*, 85 F.Supp.2d at 806 ("[T]he probate exception has been applied only in the context of diversity jurisdiction. The Court's research has yielded no instances where a federal court has declined to exercise subject matter jurisdiction, under this doctrine, when based on a federal question."); *Williams*, 792 F. Supp. at 761 n.9 ("Where, as here, the plaintiff does not predicate federal jurisdiction on diversity among the parties, the probate exception is not relevant."); Powell v. American Bank & Trust Co., 640 F. Supp. 1568, 1574–75 (N.D. Ind. 1986) (holding, in suits arising under RICO and the federal securities laws, "that the probate exception applies to diversity jurisdiction; there is nothing to suggest that a federal court cannot take jurisdiction over a federal question raised by a plaintiff"); *Maxwell*, 593 F. Supp. at 252–56 (applying the probate exception to state law claims, but not to a federal RICO claim).

102. In the analogous domestic relations exception to federal court jurisdiction, it is an open question whether the exception is limited to diversity actions or whether it extends to federal question suits raising federal statutory or constitutional questions. *Compare* United States v. Bailey, 115 F.3d 1222, 1231 (5th Cir. 1997) (holding the exception applies only in diversity suits), *and* United States v. Johnson, 114 F.3d 476, 481 (4th Cir. 1997), *and* Flood v. Braaten, 727 F.2d 303, 307 (3d Cir. 1984), *with* Thompson v. Thompson, 798 F.2d 1547, 1558 (9th Cir. 1986) (holding the exception applies even to federal question cases if it would deeply involve the federal court in adjudicating domestic matters) *and* Peterson v. Babbitt, 708 F.2d 465, 466 (9th Cir. 1983) (applying the exception where a state court action concerning similar issues is pending); Hernstadt v. Hernstadt, 373 F2d 316, 318 (2d Cir. 1967) (holding the exception applies where the federal court would necessarily become enmeshed in domestic factual disputes).

C. SUMMARY

The competing shorthand formulae developed by the lower federal courts for determining the scope of the probate exception are on a collision course with one another. Suppose an heir brings an action to have a will declared invalid for lack of testamentary capacity or undue influence. The "nature of claim" test suggests that this falls within the probate exception. But what if under state law such a challenge could be brought in a state court of general jurisdiction? The "nature of claim" test would still classify such a claim as falling within the probate exception, but both the "route" test and the "practical" test would reach the opposite conclusion. And what result if the suit involved not a challenge to the validity of the will, but instead sought a declaration of the parties' rights under the will? Here, the "nature of claim" test would allow a federal court to exercise diversity jurisdiction even if such matters were by state law committed to the exclusive jurisdiction of specialized probate courts, but under the "route test"—and probably the "practical" test as well—such disputes would likely fall within the probate exception. Moreover, what result where the suit involves not a will but instead some sort of will substitute, such as an inter vivos trust, or if the suit arises under federal law? None of the tests provides answers to these questions, and the lower courts have resolved these questions on an ad hoc basis without setting forth a principled rule of decision.

These deficiencies in the lower court formulae make them unacceptable substitutes for a multi-faceted inquiry into the statutory and Article III limitations on federal court subject matter jurisdiction, the existence of a justiciable case or controversy, the applicability of the doctrine of *custodia legis* or the various doctrines of prudential abstention, and the constraints placed on federal courts by the *Erie* doctrine. Accordingly, this Article now turns to such a multi-faceted inquiry.

III. SCOPE OF FEDERAL COURT SUBJECT MATTER JURISDICTION OVER PROBATE AND PROBATE-RELATED MATTERS

A. STATUTORY LIMITATIONS ON FEDERAL COURT SUBJECT MATTER JURISDICTION

It is well-established that federal courts are courts of limited subject matter jurisdiction, subject not only to the constraints imposed by Article III,[103] but also limited to exercising subject matter jurisdiction over only those disputes for which Congress has provided a statutory grant of authority.[104] Yet many legal scholars, lawyers, and law students would be surprised to learn that federal courts lack subject matter jurisdiction over probate matters. The text of Article III contains no express limitation on the federal judicial power.[105] Moreover, neither the statutory grant of federal question jurisdiction[106] nor the grant of diversity jurisdiction[107] contains any such limitation. Thus, where the parties to a state court probate proceeding are diverse, and the value of the estate exceeds $75,000, one would expect the case could be filed in federal court or removed to federal court.

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103. Hodgson v. Bowerbank, 9 U.S. (5 Cranch) 303 (1809).

104. Powell v. McCormack, 395 U.S. 486, 512–13 (1969) (asserting that "a federal district court lacks jurisdiction over the subject matter . . . if the cause is not one described by any jurisdictional statute").

105. *See* U.S. CONST. art. III, § 2.

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States; —between a State and Citizens of another State; —between Citizens of different States; —between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Id. Cf. Ankenbrandt v. Richards, 504 U.S. 689, 695 (1992) (noting that in the parallel context of the domestic relations exception to federal court jurisdiction the plain language of Article III, § 2 "contains no limitation on subjects of a domestic relations nature").

106. *See* 28 U.S.C. § 1331 (1994) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.").

107. *See* 28 U.S.C. § 1332(a) (1994).

> The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—(1) citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state . . .as plaintiff and citizens of a State or of different States.

Id. The only mild restriction on subject matter jurisdiction over diversity suits that are related to probate matters is contained in 28 U.S.C. § 1332(c)(2), which states that "the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent."

The genesis of the probate exception traces back to the granting of diversity jurisdiction to the federal courts by the Judiciary Act of 1789 ("1789 Act").[108] The 1789 Act gave the lower federal courts jurisdiction over "all suits of a civil nature *at common law or in equity*, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought and a citizen of another State."[109] Courts have construed this language as limiting the grant of jurisdiction to those suits that would have been within the jurisdiction of the English courts of common law ("suits . . . at common law") and the English High Court of Chancery ("suits . . . in equity") in 1789.[110] Most courts have found that the probate of wills and the administration of estates were outside the jurisdiction of both the common law courts and the High Court of Chancery in eighteenth-century England and instead were vested in England's ecclesiastical, or religious, courts and thus outside the statutory grant of subject matter jurisdiction to U.S. federal courts.[111] Accepting for the moment that the scope of diversity jurisdiction under the 1789 Act was limited in this manner, one might find it strange that it would be relevant to the modern diversity statute, since the modern statute replaces the phrase "all suits of a civil nature at common law or in equity" with the seemingly more expansive phrase "all civil actions."[112] This change, however, has been described as a mere simplification of the original language in the First Judiciary Act and not an enlargement of the jurisdiction granted by the 1789 Act.[113] So it was that in *Markham v. Allen*[114] the Supreme Court set

108. Ch. 20, § 13, 1 Stat. 73 (1789).

109. *Id.* § 11 (emphasis added).

110. *See* Ashton v. Paul Found., 918 F.2d at 1065, 1071 (2d Cir. 1990); Georges v. Glick, 856 F.2d 971, 973 (7th Cir. 1988); Dragan v. Miller, 679 F.2d 712, 713 (7th Cir. 1982); Rice v. Rice Found., 610 F.2d 471, 475 & n.6 (7th Cir. 1979); Starr v. Rupp, 421 F.2d 999, 1004 (6th Cir. 1970); Akin v. La. Nat'l Bank, 322 F.2d 749, 751 (5th Cir. 1963); Hudson v. Abercrombie, 682 F. Supp. 1218, 1219 (N.D. Ga. 1987); Barnes v. Brandrup, 506 F. Supp. 396, 398–99 (S.D.N.Y. 1981); Martz v. Braun, 266 F. Supp. 134, 135 (E.D. Pa. 1967). *Cf.* Lloyd v. Loeffler, 694 F.2d 489, 491 (7th Cir. 1982) (chronicling the historical basis of the domestic relations exception).

111. *Ashton*, 918 F.2d at 1071; *Georges*, 856 F.2d at 973; *Dragan*, 679 F.2d at 713; *Rice*, 610 F.2d at 475 n.6; *Starr*, 421 F.2d at 1004; *Akin*, 322 F.2d at 751; Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *4 n.3 (N.D.Ill. Sept. 18, 1995); *Hudson*, 682 F. Supp. at 1219; *Barnes*, 506 F. Supp. at 398–99; *Martz*, 266 F. Supp. at 135. *See also Lloyd*, 694 F.2d at 491 (holding the same with regard to the domestic relation's exception).

112. *See* 28 U.S.C. § 1332(a) (1994).

113. *See Lloyd*, 694 F.2d at 491–92; *Dragan*, 679 F.2d at 713; *Rice*, 610 F.2d at 475 n.6; Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 107–08 (D. Or. 1957). *See also* Reviser's Note to 28 U.S.C. § 1332 (1994) (noting the change was made for the purpose of conforming with the unification of law and equity as provided for in the Federal Rules of Civil Procedure). The statutory grant of federal question jurisdiction also uses the phrase "all civil actions," 28 U.S.C. § 1331 (1994), and while no grant of federal question jurisdiction was contained in the Judiciary Act of 1789, the predecessors to

forth the historical basis[115] for the exception, stating in dicta, "a federal court has no jurisdiction to probate a will or administer an estate, the reason being that the equity jurisdiction conferred by the Judiciary Act of 1789 . . . , which is that of the English Court of Chancery in 1789, did not extend to probate matters."[116]

When examined in light of one of the principles animating Article III's grant of diversity jurisdiction—protecting out-of-state litigants from the actual or perceived prejudice of state court judges[117]—the probate exception is questionable even if it applied only to the probate of a will, and not also to matters ancillary to probate. For "[i]f there is diversity of citizenship among the claimants to an estate, the possible bias that a state court might have in favor of citizens of its own state might frustrate the decedent's intentions; it is just such bias, of course, that the diversity jurisdiction of the federal courts was intended to counteract."[118] For the most part, probate proceedings take place before specialized state courts,[119] and there is no evidence suggesting that the potential for bias against out-of-state litigants is any less than it is in state courts of general jurisdiction. If anything, the signs point in the other direction: judges who sit in some probate courts need not even be lawyers or have legal training[120] and probate courts have a reputation for bias and corruption.[121] Thus,

§ 1331 also used the phrase "all suits of a civil nature, at common law or in equity." *See* Reviser's Note to 28 U.S.C. § 1331 (1994).

114. 326 U.S 490 (1946).

115. *See Georges*, 856 F.2d at 973.

116. *Markham*, 326 U.S. at 494. *See also In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 509–11 (1874); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868); Gaines v. Chew, 43 U.S. (2 How.) 619, 645 (1844).

117. *See, e.g.*, Bank of United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809) (Marshall, C.J.) As Marshall observed:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Id.

118. *Dragan*, 679 F.2d at 714.

119. *See* Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: I*, 42 MICH. L. REV. 965, 993–1008 (1944) [hereinafter Simes & Basye, *Probate Court I*].

120. Lewis M. Simes & Paul E. Basye, *The Organization of the Probate Court in America: II*, 43 MICH. L. REV. 113, 138–40 (1944) [hereinafter Simes & Basye, *Probate Court II*].

121. *See* CHARLES REMBAR, THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM 71 (1980) (noting that the New York probate courts have a history as "factories of corruption"); Ronald Chester, *Less Law, but More Justice?: Jury Trials and Mediation As Means of Resolving Will Contests*, 37 DUQ. L. REV. 173, 178–81 (1999) (documenting instances of bias). *Cf.* CHEMERINSKY, *supra* note 27, at 290 (discussing bias concerns in diversity jurisdiction in general and citing Jerry Goldman

relegating suits brought pursuant to complex and significant federal statutes such as RICO or § 1983 to potentially biased and untrained state probate court judges by invoking the exception seems anathematic.[122]

Moreover, one can criticize the manner in which the Court has construed the statutory grants of subject matter jurisdiction to the federal courts. First, in light of the United States' long-standing view that state and theocratic institutions should remain separate, it is unlikely that the drafters of the 1789 Act would have thought of federal jurisdiction as divided among common law, equity, and ecclesiastical law. Indeed, it is likely that they thought the latter category was subsumed by the former two.[123] Second, it is unclear why this 1789 Act language should be interpreted as referring to English court practice rather than to the practice of U.S. colonial courts regarding probate and administration in the eighteenth century.[124] Third, assuming eighteenth-century English practice is the appropriate reference point, it is not at all clear that the jurisdiction of the ecclesiastical courts over probate matters was entirely exclusive of the courts of common law and equity.[125] Accordingly, this Section of the

& Kenneth S. Marks, *Diversity Jurisdiction and Local Bias: A Preliminary Empirical Inquiry*, 9 J. LEGAL STUD. 93, 97–99 (1980)); Note, *The Choice Between State and Federal Court in Diversity Cases in Virginia*, 51 VA. L. REV. 178 (1965)) (discussing studies indicating that 40–60 percent of litigants who file diversity cases in federal court cite fear of local bias as a motivating factor).

122. Indeed, the "judicial economy" prong of Judge Posner's "practical" test would suggest suits raising questions of federal law should *not* be subject to the probate exception. *See supra* notes 51–60 and accompanying text.

123. *See* Ashton v. Paul Found., 918 F.2d at 1065, 1071 (2d Cir. 1990) ("Ecclesiastical courts are not part of the American legal tradition, and the drafters of the Judiciary Act may well have viewed chancery's deference to such courts as nothing but a quirk of English legal history and an anachronistic vestige of the Reformation."); *Dragan*, 679 F.2d at 713 (observing that "there was no ecclesiastical court in America"). *See also Lloyd*, 694 F.2d at 491–92 (noting, in the context of the domestic relations exception to federal court jurisdiction, that "it would be odd if the jurisdiction of England's ecclesiastical courts, theocratic institutions unlikely to be well regarded in America, should have been thought to define the limits of the jurisdiction of the new federal courts").

124. *See Dragan*, 679 F.2d at 713. *See also Lloyd*, 694 F.2d at 492 (noting that the justification of the domestic relations exception "assumes without discussion that the proper referent is English rather than American practice").

125. *See Dragan*, 679 F.2d at 713 (noting ecclesiastic jurisdiction did not extend beyond personal property, and that the chancery court had extensive jurisdiction over inheritance of land). *Accord Ashton*, 918 F.2d at 1071. This inquiry may be to a large degree academic because in the analogous domestic relations exception, the Court has held that even though subsequent historical discoveries have made it clear that the High Court of Chancery possessed certain jurisdiction with respect to alimony and divorce actions, this would not alter the scope of the exception. Indeed, the Court concluded that the "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 Congress substantively amended the statute but did not make mention of domestic relations, with full knowledge that the Court had interpreted the current language as excluding such suits; thus, it impliedly accepted

Article examines colonial practice as well as English practice in the late eighteenth century.

1. Division of Jurisdiction over Probate-Related Matters in British Courts in the Eighteenth Century

a. Overview

Probate-related matters in eighteenth-century England were not all relegated to the ecclesiastical courts. Rather, the complete administration of an estate could and often did require judicial proceedings in three different courts:[126] the ecclesiastical, common-law, and chancery (or equity) courts.[127] With respect to some probate-related matters, these courts exercised jurisdiction exclusively of one another, whereas in some such matters they exercised concurrent jurisdiction.[128] This section examines the jurisdiction of these three types of courts over probate-related matters.

b. Probate of Wills

i. Personal and Real Estate Distinguished

In examining the probate jurisdiction of England's ecclesiastical courts, a distinction must be made between a decedent's real estate and personal estate. The ecclesiastical courts had exclusive jurisdiction to probate wills of personal property,[129] but no jurisdiction to probate wills of

the gloss on the diversity statute. Ankenbrandt v. Richards, 504 U.S. 689, 699–700 (1992). Similar reasoning apparently justifies the probate exception. *See Dragan*, 679 F.2d at 713 (noting that "Congress's failure to repeal the exception when reenacting from time to time the grant of diversity jurisdiction to the federal courts indicates congressional acquiescence").

126. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

127. *Id.* at 967.

128. Where chancery and the ecclesiastical courts had concurrent jurisdiction, once one of the courts had taken jurisdiction of a case, the other would not interfere provided that the same remedies and protections were available. 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 806, at 190–91 (14th ed. 1918) [hereinafter 2 STORY, COMMENTARIES].

129. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 625 (7th ed. 1956); ROSCOE POUND, ORGANIZATION OF COURTS 78, 136 (1940); 2 R.S. DONNISON ROPER & HENRY HOPLEY WHITE, A TREATISE ON THE LAW OF LEGACIES *1791 (2d ed. 1848); 3 STORY, COMMENTARIES, *supra* note 42, § 1887, at 485; Simes & Basye, *Probate Court I*, *supra* note 119, at 968. While chancery would generally not allow a suit against an executor before the will was probated in the ecclesiastical court, in rare circumstances, arising out of the misconduct of the executor or for the protection of the property, it would exercise jurisdiction over suits against the executor by interested parties prior to probate. *Id.* at *1796. Thus, where the will was destroyed or concealed by the executor and spoliation or suppression was plainly proved, chancery may have had jurisdiction over a suit brought by a legatee. *Id.* at *1796–97. Moreover, where the executor engaged in misconduct, misapplied the assets, or was bankrupt or insolvent, chancery had the power to appoint a receiver after probate. *Id.* at *1797–98. In

real property.[130] Indeed, wills of real property were operative without any probate whatsoever, with title passing to the devisee[131] immediately on the death of the testator.[132] Any subsequent disputes with regard to title fell within the jurisdiction of the common law courts.[133] Where a will disposed of both personalty and realty, the ecclesiastical court's jurisdiction was effective only with respect to the personal estate.[134] Life estates were deemed to be real property, and thus within the jurisditction of the common law courts, but where the testator's interest in real property was less than freehold (such as a term of years), it was deemed to be personalty and thus within the jurisdiction of the ecclesiastical courts.[135]

c. Challenges to the Validity of Wills

As with probate, a distinction must be made between challenges to wills of personal estate and challenges to wills of real estate. The ecclesiastical courts had jurisdiction to set aside wills of personal estate that had been probated, and their jurisdiction in that regard was exclusive.[136] There was no direct method of setting aside a will of land, however. Thus, an heir or other interested party wishing to test the validity of a devise of land had to bring an action to try title—such as ejectment or trespass—against the devisee-in-possession in a common law court.[137] While the jurisdictions of the ecclesiastical and the common law courts were thus exclusive in these regards, special situations arose in which chancery at least indirectly exercised jurisdiction over actions challenging wills of both real and personal property.

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the case of fraud, chancery could appoint a receiver for the purpose of preventing the destruction of the testator's property even while the litigation over the probate of the will was pending in the ecclesiastical court. *Id.*

130. HOLDSWORTH, *supra* note 129, at 625; ROPER & WHITE, *supra* note 129, at *1791 ("The jurisdiction of the Ecclesiastical Courts [was] confined to testaments merely, or in other words to dispositions of personalty: if, therefore, real estate [were] the subject of a devise to be sold for payment of debts, or portions, these Courts [could not] hold plea in relation to such disposition."); Simes & Basye, *Probate Court II*, *supra* note 120, at 121. Where a party to a proceeding before an ecclesiastical court believed that the court had exceeded its jurisdiction, a writ of prohibition could be obtained from the common law court. Simes & Basye, *Probate Court I*, at 972.

131. A "devisee" is one who is named in a will to inherit lands or other real property. BLACK'S LAW DICTIONARY, *supra* note 11, at 453.

132. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

133. POUND, *supra* note 129, at 78. *See also infra* Part III.A.1.c.

134. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

135. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *95 n.20 (1898); ROPER & WHITE, *supra* note 129, at *1791.

136. *See* ROPER & WHITE, *supra* note 129, at *1787.

137. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

i. Quieting Title

The method for proving and challenging the validity of wills of real estate in England posed a number of problems. First, because no court had jurisdiction to admit a will of land into probate, the only means of testing the validity of such a will was by an ejectment or trespass action, yet if the devisee was in possession, he could not bring such an action against himself, but had to instead await an action brought by an heir.[138] Moreover, devisees were sometimes subject to a never-ending stream of ejectment and trespass actions brought by different heirs.[139]

Thus, it was possible for the devisees and other interested parties to bring an action in chancery to establish the validity of a will of real estate in order to avoid interminable litigation and to give security and repose to title.[140] When such suit was brought, chancery would direct an issue of *devisavit vel non*[141] to ascertain the validity of the will, and would direct new trials to be held in a common law court until it was satisfied that there was no reasonable ground for doubt. At that point it would issue a perpetual injunction against the heirs at law and others restraining them from contesting its validity in the future.[142]

ii. Estoppel

During the course of proceedings in either chancery or a common law court, a party might either admit the validity of a will or admit facts material to its validity, but would subsequently attempt to contest its validity in proceedings before the ecclesiastical court.[143] Under such circumstances, chancery would hold the party to that admission, and would permanently enjoin that party from proceeding to challenge the will in the ecclesiastical court.[144]

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138. 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1158, n.16 (5th ed. 1941) [hereinafter 4 POMEROY].

139. *See* 3 STORY, COMMENTARIES, *supra* note 42, § 1889, at 486.

140. *Id.*

141. *Devisavit vel non* is:

> The name of an issue sent out of a court of chancery, or one which exercises chancery jurisdiction, to a court of law, to try the validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will.

BLACK'S LAW DICTIONARY, *supra* note 11, at 452.

142. 3 STORY, COMMENTARIES, *supra* note 42, § 1889, at 486.

143. *See* ROPER & WHITE, *supra* note 129, at *1788–91; 3 STORY, COMMENTARIES, *supra* note 42, § 1887, at 485.

144. *See* sources cited *supra* note 143.

iii. Fraud

Although chancery lacked jurisdiction to set aside a will of personal estate probated in an ecclesiastical court where the grant of probate was obtained due to fraud, under certain circumstances chancery could either convert the person who committed the fraud into a constructive trustee with respect to such probate, or oblige him to consent to a repeal or revocation of the probate in the ecclesiastical court from which probate was granted.[145]

Intrinsic Fraud: Kerrich v. Bransby

In *Kerrich v. Bransby*, the decedent had left virtually all of his personal and real estate to Kerrich, whom he named as his executor by a will dated March 18, 1715.[146] Kerrich succeeded in having the will admitted into probate in the Prerogative Court of Canterbury[147] in common form,[148] and subsequently, in a contest over the validity of the instrument with the decedent's father in that same court, the will was determined to be valid.[149] Thereafter, the decedent's father filed a bill in chancery against, inter alia, Kerrich, in which he set forth two previously executed wills that his son had made in which he left his entire real and personal estate to his father, claimed that the March 18, 1715 will was obtained by fraud on the decedent, and asked chancery to set aside that will.[150] On appeal, the High Court of Parliament held, however, that chancery could not set aside a will for fraud. The portion of the will that dealt with personal estate could be

145. BLACKSTONE, *supra* note 135, at *95 n.20; ROPER & WHITE, *supra* note 129, at *1788 Roper and White note that there is:

> a material difference between the Court of Chancery taking upon itself to set aside a will of personal estate on account of fraud or forgery in obtaining or making that will, and taking from the party the benefit of a will established in the Ecclesiastical Court by his fraud, not upon the testator, but the person disinherited thereby.

Id.

146. 7 Brown P.C. 437 (1727).

147. The Prerogative Court of Canterbury exercised probate jurisdiction over the estates of persons owning property located in more than one diocese within the province of Canterbury, persons owning property located in both the Provinces of Canterbury and York, and those who died overseas. BLACKSTONE, *supra* note 135, at 1076; PETER WALNE, ENGLISH WILLS: PROBATE RECORDS IN ENGLAND AND WALES WITH A BRIEF NOTE ON SCOTTISH AND IRISH WILLS 19–20 (1964).

148. When someone died testate, there were two different procedures by which the executor could have the will probated: in common (noncontentious) form, or in solemn (contentious) form. When a will was probated in common form, notice was not issued to the heirs or to other interested parties, and actual evidence of due execution of the will was not required. Within 30 years thereafter, the executor or any other interested person could seek to have the will probated in solemn form, which required notice to interested parties as well as testimony as to the due execution of the will. An order admitting a will to probate in the solemn form was binding on all parties who appeared in the proceeding or who were given notice. Simes & Basye, *Probate Court I*, *supra* note 119, at 969.

149. *Id.* at 437–38.

150. *Id.* at 438.

set aside only in the ecclesiastical court, while the portion of it dealing with real estate could be set aside in a common law court by issue of *devisavit vel non*.[151]

Extrinsic Fraud: Barnesly v. Powel

In *Barnesly v. Powel*,[152] the High Court of Chancery limited the reach of the *Kerrich* decision. In *Barnesly*, the defendants had forged the decedent's will of his real and personal estate, and by misrepresenting to the decedent's next of kin that the forgery was in fact genuine, had obtained from the next of kin a deed in which he consented to the probate of said will.[153] The defendants presented the deed to the ecclesiastical court, which admitted the will into probate as to the personal estate.[154] In a subsequent proceeding tried in a court of common law, a jury determined that the will was a forgery.[155] In chancery, while not disputing the jury's finding as to their interest in the decedent's real estate, the defendants, citing *Kerrich*, protested that only the ecclesiastical court had jurisdiction to set aside the will as to the decedent's personal estate.[156] The High Court agreed chancery lacked the power to set aside a will of personal estate for fraud, that the power to do so was lodged solely in the ecclesiastical court, and that the inconsistency between a jury at common law finding the will to be invalid as to the real estate and the ecclesiastical court having found the will to be valid as to the personal estate, although unsettling, was one which the law tolerated.[157]

Yet, the court distinguished between fraud or forgery in obtaining a will (i.e., intrinsic fraud), as was present in both *Kerrich* and *Barnesly*, and fraud in obtaining *probate* of a will (i.e., extrinsic fraud), which was present only in *Barnesly*.[158] The court reasoned that while the ecclesiastical court had jurisdiction to set aside a will, it lacked jurisdiction to determine the validity of a deed under hand and seal such as that obtained from the testator's next of kin.[159] Having thus determined that the deed was fraudulently obtained, the court reasoned that because equity could take away benefits to which a person was entitled if the person was

151. *Id.* at 437, 443. *Accord* 3 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 913, at 583–84 (5th ed. 1941) [hereinafter 3 POMEROY].
152. 1 Ves. Sen. 119 (1748), 1 Ves. Sen. 284 (1749).
153. 1 Ves. Sen. 119, 119–20; 1 Ves. Sen 284, 284, 287–88.
154. 1 Ves. Sen. 284, 284, 287–88.
155. *Id.* at 284.
156. *Id.* at 285–86.
157. *Id.* at 287.
158. *Id.* at 287–88.
159. *Id.* at 288.

guilty of wrongdoing, the court could declare the defendants constructive trustees for the plaintiff for an amount equal to the value of the personal estate.[160] Because there were in fact other prior wills, however, the validity of which had not yet been determined in the ecclesiastical courts, the chancery court decreed that the defendants must consent in the ecclesiastical court to a revocation of the probate of the latter will, but be given the opportunity to prove that the prior wills—which also gave them a stake in the decedent's estate—were valid.[161]

Thus, in determining whether chancery would declare the beneficiary of a fraudulent will a trustee for those who have been defrauded, the eighteenth-century British courts appear to have drawn a line between extrinsic and intrinsic fraud: Only if the fraud is extrinsic (i.e., a fraud practiced on a party to prevent the presention of that party's case in the probate proceedings) will relief be granted; intrinsic fraud, such as the use of perjured testimony or a false will in the probate proceedings, will not suffice.[162]

d. Appointment and Removal of Administrator/Personal Representative

The ecclesiastical courts had exclusive jurisdiction to appoint an administrator (or personal representative) for the estate to dispose of the decedent's personal estate.[163] And while chancery had the primary

160. *Id.* at 289. Equity's powers in this regard presumably would apply with equal force to the real estate as well, but the *Barnesly* court did not reach this issue since there was no longer a dispute between the parties as to the disposition of the real estate.

161. *Id.* at 289–90. In *Gaines v. Chew*, the Supreme Court relied on *Barnesly* in a suit alleging that the executors fraudulently set up for probate the decedent's older will and suppressed the decedent's subsequently executed will. 43 U.S. (2 How.) 619, 627 (1844). While holding that a federal court sitting in equity lacked the authority to set up the subsequent will and set aside the probate of the former, the Supreme Court nonetheless ordered the defendants to respond to the plaintiff's inquiries about the circumstances surrounding the two wills. *Id.* The Court suggested such answers could be used as evidence in the proceedings before the state probate court to establish the latter will and revoke the former. *Id.* The Court also held that the lower federal court could order the parties to go before the probate court and consent to the probate of the latter will and revocation of the former one, and suggested that the inherent powers of a federal equity court could empower it to probate the latter will. *Id.* at 646–47. *See also In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 517–19 (1874) (suggesting a federal court sitting in equity could provide a remedy in a case involving fraud if the time for challenging the will in the probate court had passed and the plaintiffs could not by that time have discovered the fraud within that time).

162. 3 POMEROY, *supra* note 151, § 913, at 583–86. *Cf.* GARY B. BORN, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 985–86 (3d ed. 1996) (noting that U.S. courts distinguish between intrinsic and extrinsic fraud in deciding whether to enforce foreign judgments).

163. HOLDSWORTH, *supra* note 129, at 626–27; POUND, *supra* note 129, at 136. *See* 3 STORY, COMMENTARIES, *supra* note 42, § 1887, at 485; Simes & Basye, *Probate Court I*, *supra* note 119, at 968.

authority to appoint guardians for individuals and for the property of minors, the ecclesiastical courts had concurrent jurisdiction with respect to personalty.[164]

e. Administration of Estates

The ecclesiastical courts formally had jurisdiction to "administer" the deceased's personal estate,[165] but they did not order distribution of the estate.[166] Rather, the personal representative appointed by the ecclesiastical court would pay the debts of the deceased and then distribute the residue in accordance with the terms of the will.[167] Although the ecclesiastical courts had previously administered estates themselves and made the distributions, because their conduct in doing so had been negligent and in fact fraudulent—clergy as executors and administrators converted goods to their own use—Parliament limited their powers of administration to appointing an administrator from among the relatives of the deceased and delegating powers to that person.[168]

Unlike the power to admit wills of personal estate into probate and to appoint personal representatives, the ecclesiastical courts' jurisdiction over administration was not exclusive but was instead concurrent with chancery.[169] Chancery's jurisdiction in this regard was invoked by the filing of a bill by a creditor or a distributee seeking to have the estate administered in chancery.[170] Chancery would then issue notices to creditors, enjoin actions by creditors in common law courts, and bring in assets and distribute them to creditors and legatees or next of kin.[171]

The rationale for chancery's jurisdiction over administration in a given case was two-fold. First, the administrator of an estate was in effect a constructive trustee for the creditors, legatees and distributees of the

164. Simes & Basye, *Probate Court II* , *supra* note 120, at 130. The power in general to appoint guardians for the mentally ill, however, was within chancery's jurisdiction. *Id.* at 132.

165. *See* POUND, *supra* note 129, at 78.

166. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 970.

167. *Id.*

168. HOLDSWORTH, *supra* note 129 at 627; William Searle Holdsworth, *The Ecclesiastical Courts and Their Jurisdiction*, *in* SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 255, 304 (Ass'n of Am. Law Sch. ed., 1908).

169. *See* ROPER & WHITE, *supra* note 129, at *1793; Simes & Basye, *Probate Court I*, *supra* note 119, at 972–73. While the jurisdiction was concurrent, however, chancery in general would not interfere if the ecclesiastical court was already engaged in administration. ROPER & WHITE, *supra* note 129, at *1793.

170. Simes & Basye, *Probate Court I*, *supra* note 119, at 972.

171. 2 STORY, COMMENTARIES, *supra* note 128, § 731, at 134 n.4 ("Where equity has taken jurisdiction of an administration, it may proceed to distribution and relief as in probate."); Simes & Basye, *Probate Court I*, *supra* note 119, at 973.

deceased, and chancery, as explained below,[172] had jurisdiction to enforce trusts.[173] Second, there were often special circumstances, such as the need to take accounts and compel discovery of assets,[174] or to provide a simple, adequate, and complete remedy, that warranted chancery exercising jurisdiction.[175] In addition to chancery's jurisdiction to administer and settle the decedent's estate, it had the power to decide incidental questions relating to the construction and enforcement of wills of personal property.[176]

The procedures of chancery were thus well-suited to deal with the complicated equities that might arise in the administration of an estate,[177] and stood in sharp contrast to the limited procedures available in the ecclesiastical courts.[178] In addition, the sixteenth and seventeenth centuries witnessed a rapid decay in the jurisdiction of the ecclesiastical courts as the common law court justices, who were jealous of the ecclesiastical courts, effectively crippled them by way of issuing writs of prohibition.[179] Thus, while the ecclesiastical courts in theory retained concurrent jurisdiction over the administration of estates, with time their jurisdiction was, in practice, limited to the granting of probate and to the issuance of letters of

172. *See infra* Part III.A.1.g.

173. *See* 4 POMEROY, *supra* note 138, § 1127, at 342; 2 STORY, COMMENTARIES, *supra* note 128, §§ 728–731, at 132–34.

174. While chancery could not act upon a testamentary instrument until proven in the ecclesiastical court, it could act on a bill for discovery of assets before the will was proven or while it was the subject of litigation in the ecclesiastical court. ROPER & WHITE, *supra* note 129, at *1792.

175. 2 STORY, COMMENTARIES, *supra* note 128, § 731, at 133. *See* 4 POMEROY, *supra* note 138, § 1127, at 342; Simes & Basye, *Probate Court I*, *supra* note 119, at 972–73. In common law courts, nothing more could be done than to establish the debt of the creditor: if there was any controversy as to the existence of the assets and discovery was required, or if the assets were not of a legal nature, or if a marshalling of the assets was necessary to effect due payment of the creditor's claim, resort to chancery was necessary. 2 STORY, COMMENTARIES, *supra* note 128, § 732, at 134. Moreover, while the ecclesiastical court could compel the administrator to provide an accounting, it lacked the power to require the administrator to prove or swear to the truth of it. *Id.* § 733, at 135.

176. 4 POMEROY, *supra* note 138, § 1155, at 461. Courts of equity also had the power to construe and enforce wills of real as well as personal property to the extent that they created, or their dispositions involved the creation of, trusts; however, they had no jurisdiction to interpret wills of real property that bequeath purely legal estate, as that fell within the jurisdiction of the common law courts. *Id.* Chancery's jurisdiction to construe wills was incident to its general jurisdiction over trusts, and it would never entertain a suit brought solely for the purpose of interpreting the provisions of a will unless further equitable relief was also sought. *Id.* § 1156, at 462.

177. HOLDSWORTH, *supra* note 129, at 629.

178. For example, orders of the ecclesiastical court were normally enforced by excommunication; where this proved ineffective, an attachment could be sought from chancery imprisoning the party until the ecclesiastical court's order was obeyed, but it was only through chancery that the ecclesiastical court could so act. Simes & Basye, *Probate Court I*, *supra* note 119, at 970.

179. HOLDSWORTH, *supra* note 129, at 629.

administration[180]—the actual administration of estates took place in chancery with far greater frequency.[181]

f. Suits for Legacies and Debts

As a general rule, the ecclesiastical courts[182] and chancery[183] exercised concurrent jurisdiction over suits for legacies:[184] in all instances, any legacy recoverable in an ecclesiastical court was also recoverable in chancery.[185] Certain types of legacies, however, only could be sued for in chancery. Among these were suits over legacies of land; as with other probate-related matters, the ecclesiastical courts' jurisdiction was limited to personalty.[186] Chancery also exercised jurisdiction exclusive of the ecclesiastical courts over suits in which a husband sought to obtain payment of his wife's legacy and suits which involved a legacy to a child, for only chancery had the power to ensure that the interests of the wife and the child, respectively, were adequately protected.[187] In addition, chancery's jurisdiction was also exclusive where the bequest of the legacy

180. *Id.*

181. Simes & Basye, *Probate Court I*, *supra* note 119, at 972–73. While the jurisdiction was concurrent, however, chancery would not interfere if the ecclesiastical court was first possessed of the administration. ROPER & WHITE, *supra* note 129, at *1793.

182. In those cases where the ecclesiastical court had jurisdiction, and a common law defense was raised (such as payment as a defense in a suit for a legacy), the ecclesiastical court was required to proceed according to the rules of the common law (i.e., one witness would suffice instead of the two required under ecclesiastical practice), or a prohibition could have been be obtained in the common law courts. ROPER & WHITE, *supra* note 129, at *1792.

183. When suit was brought in chancery to recover on a legacy, chancery had the power to interpret the language effecting the gift in question, although frequently chancery would send the case out of chancery for an opinion of the courts of common law where a question of mere law arose, but this was within the discretion of chancery and certainly was not done if the construction was clear. *Id.* at *1803–04.

184. BLACKSTONE, *supra* note 135, at *98; 2 STORY, COMMENTARIES, *supra* note 128, § 797, at 186.

185. ROPER & WHITE, *supra* note 129, at *1793; 2 STORY, COMMENTARIES, *supra* note 128, § 800, at 187–88. The same rationales that justified chancery's exercise of jurisdiction over the administration of estates justify chancery's exercise of jurisdiction over suits by legatees. *See supra* text accompanying notes 172–75. *See also* 4 POMEROY, *supra* note 138, § 1127, at 342; 2 STORY, COMMENTARIES, *supra* note 128, § 800, at 188.

186. 2 STORY, COMMENTARIES, *supra* note 128, § 809, at 191. Where a testator devised that the executor should sell his lands and that the legatee should be given a portion of the proceeds, and the executor failed to do so, the ecclesiastical court lacked jurisdiction over a suit by the legatee for payment of the legacy as it was considered to be not a legacy testamentary but rather one out of land. ROPER & WHITE, *supra* note 128, at *1791.

187. BLACKSTONE, *supra* note 135, at *95 n.20; 4 POMEROY, *supra* note 138, § 1128, at 343; ROPER & WHITE, *supra* note 129, at *1794–95; 2 STORY, COMMENTARIES, *supra* note 128, §§ 805, 807, at 190–91.

involved the execution of express or implied trusts[188] (including charitable trusts),[189] where the assets were equitable, or where the remedy could only be enforced under the process of chancery, such as where a full discovery of assets was required.[190] In all such cases, chancery had the power to grant injunctions to protect its exclusive jurisdiction.[191]

Under certain circumstances, a legacy could be sued upon in a court of common law. First, if a legatee altered the nature of his demand by changing it into a debt or a duty (such as by accepting a bond from the executor for payment of the legacy), the legatee had the option to sue either in the ecclesiastical court on the legacy or in a common law court on the debt.[192] Second, although a specific legacy[193] contained in a will could normally be sued upon only in the ecclesiastical courts or in chancery,[194] once the executor "accepted" the legacy by performing some overt act[195] indicating that the property was set aside for the legatee, legal title vested in the legatee at law irrevocably, and he could bring a replevin or trover action in a common law court to assert his rights to the property.[196] The

188. 4 POMEROY, *supra* note 138, § 1128, at 343; ROPER & WHITE, *supra* note 129, at *1794–95; 2 STORY, COMMENTARIES, *supra* note 128, § 802, at 188. Chancery's jurisdiction to enforce the execution of trusts was exclusive not only of the ecclesiastical courts, but also of the common law courts. 2 STORY, COMMENTARIES, *supra* note 128, § 802, at 188–89.

189. ROPER & WHITE, *supra* note 129, at *1796.

190. 4 POMEROY, *supra* note 138, § 1128, at 343; ROPER & WHITE, *supra* note 129, at *1794; 2 STORY, COMMENTARIES, *supra* note 128, § 808, at 191.

191. ROPER & WHITE, *supra* note 129, at *1794; 2 STORY, COMMENTARIES, *supra* note 128, § 803, at 189. Chancery would, as a general matter, issue an injunction in any case involving a legacy in which the ecclesiastical courts could not exercise jurisdiction in a manner adequate to protect the just rights of all the parties concerned. *Id.* § 804, at 189–90.

192. BLACKSTONE, *supra* note 135, at *95 n.20; ROPER & WHITE, *supra* note 129, at *1799 (stating that "the obligee might sue for the legacy in the Ecclesiastical Court, or at Common Law upon the bond . . . the acceptance of the bond for payment of the legacy, had not totally destroyed the nature of it").

193. A specific legacy is:

> A legacy or gift by will of a particular specified thing . . . . In a strict sense, a legacy of a particular chattel, which is specified and distinguished from all other chattels of the testator of the same kind . . . . A legacy is specific, when it is limited to a particular thing, subject, or chose in action, so identified as to render the bequest inapplicable to any other.

BLACK'S LAW DICTIONARY, *supra* note 11, at 892.

194. 2 STORY, COMMENTARIES, *supra* note 128, § 798, at 186.

195. In some instances, the law would presume assent by the executor based on certain facts. In the case of a legacy of real property, where a devisee had possessed land for 39 years, it was presumed to be with the assent of the executor, and thus a suit over that legacy was cognizable in a court of common law. *Id.* § 800, at 187 n.1.

196. Simes & Basye, *Probate Court I*, *supra* note 119, at 971. *See* ROPER & WHITE, *supra* note 129, at *1799–*1802; 2 STORY, COMMENTARIES, *supra* note 128, § 798, at 186–87. If it subsequently appeared that there was a deficiency in the assets to pay the creditors, chancery had jurisdiction to interfere and make the legatee refund in the proportion required, whether the bequest was real or

rule was otherwise where a general legacy[197] was at issue, however, and remedy could only be had by way of an action in chancery[198] or an ecclesiastical court.[199]

Finally, contract actions that survived the death of the decedent could be brought either on behalf of or against the decedent in a common law court, with the personal representative having the capacity to sue and be sued on the decedent's behalf.[200]

g. Trusts

In eighteenth-century England, the entire system of trusts[201] was within the exclusive jurisdiction of chancery,[202] and chancery would thus

personal. *See* ROPER & WHITE, *supra* note 129, at *1801; 2 STORY, COMMENTARIES, *supra* note 128, § 804, at 190.

197. A general legacy is a "pecuniary legacy which is payable out of general assets of estate of testator, being bequest of money or other thing in quantity and not separated or distinguished from others of the same kind." BLACK'S LAW DICTIONARY, *supra* note 11, at 892.

198. Simes & Basye, *Probate Court I*, *supra* note 119, at 972.

199. *Id.* For a time, it was thought that an action of assumpsit could be brought in a court of common law, but it was later determined that such actions could not be maintained. *Id. See also* 2 STORY, COMMENTARIES, *supra* note 128, § 798, at 187 (noting that "though they have not been directly overturned in England, they have been doubted and disapproved by judges as well as by elementary writers"). As Blackstone noted:

> Cases have occurred in which *courts of common law* have assumed jurisdiction of testamentary matters, and permitted actions to be instituted for the recovery of legacies, upon proof of an express *assumpsit* or undertaking by the executor to pay them. But it seems to be the opinion of modern judges that this jurisdiction extends to cases of *specific* legacies only; for when the executor assents to those bequests, the legal interests vest in the legatees, which enable them to enforce their rights at law. It seems to be the better opinion that when the legacy is not specific, but merely a gift out of the *general* assets, and particularly when a *married woman* is the legatee, a court of common law will not entertain jurisdiction to compel payment of such a legacy, upon the ground that a court of common law is, from its rules, incompetent to administer that complete justice to the parties which courts of equity have the power, and are in the constant habit, of doing.

BLACKSTONE, *supra* note 135, at *95 n.20 (citations omitted) (emphasis in original). The general concern with allowing such actions at law appears to have been that common law courts lacked the power that chancery had to impose terms on the parties, such as in a suit by a husband for a legacy given to his wife, where there was a need to ensure that he made provisions for her and her family. *See* ROPER & WHITE, *supra* note 129, at *1797–98.

200. Simes & Basye, *Probate Court I*, *supra* note 119, at 971.

201. A trust is:

> An equitable right, title, or interest in property real or personal, distinct from the legal ownership thereof . . . the legal owner holds the direct and absolute dominion over the property in the view of the law; but the income, profits, or benefits thereof in his hands belong wholly or in part to others. The legal estate in the property is thus made subservient to certain uses, benefits, or charges in favor of others; and these uses, benefits, or charges constitute trusts which Courts of Equity will compel the legal owner as trustee to perform in favor of the cestui que trust or beneficiary.

2 STORY, COMMENTARIES, *supra* note 128, § 1304, at 648–49. In Roman law, trusts were not enforceable at law, but depended solely on the honor of those to whom they were entrusted, thus making chancery the appropriate court to exercise jurisdiction over their enforcement. *Id.* §§ 1305–06, at 649.

never refuse to adjudicate matters relating to trusts.[203] In addition to exercising jurisdiction over express trusts, chancery would impress and exercise jurisdiction over constructive trusts in certain situations.

In some instances, a person would die intestate relying on a promise by an heir or next of kin that he would hold the property devolving on him for the benefit of a third person or convey it to such person.[204] Similarly, a person might procure from the testator a devise or bequest through fraudulent representations that he would carry out the true purpose of the testator and apply the devise or bequest for the benefit of a third person.[205] In such instances, chancery would enforce the obligation by impressing a constructive trust on the purported beneficiary.[206]

If someone died intestate, the ecclesiastical court had the power to compel a distribution.[207] But if the testator drafted a will yet made no disposition of the residue of his personal estate, the executor was entitled at law to the surplus of the personal estate.[208] Under such circumstances, it was chancery, and only chancery, that could decree the executor to be the trustee for the next of kin and to distribute the residue of the estate among them.[209]

2. Colonial Practice

Early in the colonial period, it was not uncommon for the colonies to probate wills and administer estates legislatively rather than judicially.[210] Probate jurisdiction would often be vested in the colonial governors and their councils or the General Court,[211] which would often act as the highest tribunal for probate matters, and the governor of the colony was often made the "ordinary" or "supreme ordinary."[212] The governor as ordinary would sometimes delegate this authority to deputies or "surrogates;"[213] such was

202. BLACKSTONE, *supra* note 135, at *439; 1 JOHN NORTON POMEROY, TREATISE ON EQUITY JURISPRUDENCE § 151, at 206 (5th ed. 1941); 2 STORY, COMMENTARIES, *supra* note 128, § 731, at 134; §§ 1300–03, at 647–48.

203. BLACKSTONE, *supra* note 135, at *95.

204. 4 POMEROY, *supra* note 138, § 1054, at 122.

205. *Id.*

206. *See id.*

207. *See* ROPER & WHITE, *supra* note 129, at *1795.

208. 2 STORY, COMMENTARIES, *supra* note 128, § 803, at 189.

209. *See* ROPER & WHITE, *supra* note 129, at *1795; 2 STORY, COMMENTARIES, *supra* note 128, § 803, at 189.

210. POUND, *supra* note 129, at 79.

211. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

212. POUND, *supra* note 129, at 79; Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

213. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

the case in New Hampshire,[214] Massachusetts,[215] Maryland,[216] New Jersey,[217] and New York.[218] In Virginia[219] and Connecticut,[220] the power was exercised by the General Court. In Rhode Island, the jurisdiction was also exercised legislatively, but by the individual town councils instead of the state legislative body.[221] A few of the colonies, however, including North Carolina,[222] South Carolina,[223] and Georgia,[224] vested probate and administrative authority in their established superior or inferior courts,

214. POUND, *supra* note 129, at 79.

215. In 1691, the royal charter put the power over probate and administration in the colony governor who appointed surrogates to perform this function. *See* Wales v. Willard, 2 Mass. 120, 124 (1806) (Parsons, C.J.). *See also* Sean M. Dumphy, 21 MASS. PRAC. PROBATE LAW & PRACTICE § 1.1 (2d ed. 1997).

216. Under the system in place in Maryland in the early eighteenth century, Commissioners or Delegates of the governor were responsible for taking probate. *See* Act of 1715, ch. 39, §§ 2, 29 (Md.); Smith's Lessee v. Steele, 1 H. & McH. 419 (Md. Prov. 1771). *See also* POUND, *supra* note 129, at 79.

217. New Jersey had a Prerogative Court held by the provincial governor as ordinary with surrogates appointed throughout the state. POUND, *supra* note 129, at 79.

218. *Id.* at 80. New York had a Prerogative Court held by the governor as ordinary or to delegated surrogates. *See In re* Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. 1862); Weston v. Weston, 14 Johns 428 (NY.Sup. 1817). Its jurisdiction, however, was not entirely exclusive: The Court of Common Pleas had jurisdiction to probate wills and grant letters of administration in remote areas of the state and where the size of the estate was minimal. *See In re* Brick's Estate, 15 Abb. Pr. at 12; POUND, *supra* note 129, at 80.

219. Virginia's statute provided:

> That the said General court shall take cognisance of, and are hereby declared to have power and jurisdiction to hear and determine, all causes, matters and things whatsoever, relating to or concerning any person or persons, ecclesiastical or civil, or to any persons or things of what nature so ever the same shall be, whether brought before them by original process, appeal from any inferior court, or by any other ways or means whatsoever.

Act of Assembly, ch. 6 (Va. 1748). *See* Bagwell v. Elliot, 23 Va. 190 (1824) (noting the general court exercised all jurisdiction, including ecclesiastical jurisdiction); Godwin v. Lunan, Jeff. 96 (Va.Gen. 1771) (holding the General Court of Virginia possessed general ecclesiastical jurisdiction); Spicer v. Pope, Jeff. 43 (Va.Gen. 1736) (noting the General Court has "a three fold jurisdiction, as a court of equity, a court of law, and it has also a jurisdiction of testamentary matters").

220. *See* STATE OF CONNECTICUT JUDICIAL BRANCH WEBSITE, PROBATE COURT HISTORY, *available at* http://www.jud.state.ct.us/probate/history.html (last visited Sept. 24, 2001) [hereinafter PROBATE COURT HISTORY].

221. *See* Williams v. Herrick, 25 A. 1099, 1101 (R.I. 1893) (noting King Charles' charter gave each town council the power "as judges of probate, to take the probate of wills and testaments, and grant administration, and all other matters relating thereto"). *See also* POUND, *supra* note 129, at 80.

222. POUND, *supra* note 129, at 79. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 978. The jurisdiction was concurrent with the Inferior Court of Pleas and the Quarter Sessions with appeal either to the Court of Chancery or to the Superior Court. POUND, *supra* note 129, at 80 & n.3.

223. POUND, *supra* note 129, at 79. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 978.

224. POUND, *supra* note 129, at 79. *See* Simes & Basye, *Probate Court I*, *supra* note 119, at 978. *See also* THE FEDERALIST NO. 83 (Alexander Hamilton) (noting Georgia had only common law courts).

while Pennsylvania[225] and Delaware[226] created Orphans' Courts vested with probate jurisdiction.

Toward the end of the colonial period, virtually all of the colonies that had not already done so vested probate and administration jurisdiction in some sort of specialized court separate from their courts of equity and common law.[227] New Hampshire,[228] Massachusetts,[229] and Connecticut[230] developed specialized probate courts. The system by which the governor appointed surrogates in New York[231] and New Jersey[232] resulted in the

225. POUND, *supra* note 129, at 79; Simes & Basye, *Probate Court I*, *supra* note 119, at 978–79; Act of 1713 § 1, 1 St. Laws 98; Good v. Good, 7 Watts. 195 (Pa. 1838); App. v. Dreisbach, 2 Rawle 287 (Pa. 1830); McPherson v. Cunliff, 11 Serg. & Rawle 422 (Pa. 1824).

226. POUND, *supra* note 133, at 79; Simes & Basye, *Probate Court I*, *supra* note 119, at 978–79.

227. Nonetheless, in many instances the general courts continued to exercise some probate jurisdiction even where separate courts were created. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

228. By act of the legislature, probate courts were given exclusive jurisdiction over probate in 1789. *See* Act of Feb. 3, 1789, Laws of N.H. In 1793, the state constitution was amended to so state. *See* N.H. CONST. art. 80 (stating that "[a]ll matters relating to the probate of wills, and granting letters of administration, shall be exercised by the judges of probate"). Following this early practice of the governor appointing commissioners to probate wills, probate judges in New Hampshire continued to be appointed by the governor. Simes & Basye, *Probate Court I*, *supra* note 119, at 980.

229. POUND, *supra* note 129, at 79; George L. Haskins, *The Beginnings of Partible Inheritance in the American Colonies*, *in* ESSAYS IN THE HISTORY OF EARLY AMERICAN LAW 204, 209 (David H. Flaherty ed. 1969); Simes & Basye, *Probate Court I*, *supra* note 119, at 1002. Appeal from these probate judges, however, was still to the governor and council. 21 SEAN M. DUMPHY, MASSACHUSETTS PRACTICE SERIES, PROBATE LAW AND PRACTICE § 1, 1 (2d ed. 1997). In 1784, in reliance on a provision in the 1780 Constitution, the legislature enacted a statute providing for the appointment of judges of probate courts with appeal to the Supreme Judicial Court. *See* MASS. CONST., art. V (establishing probate courts and providing that "all . . . appeals from the judges of probate, shall be heard and determined by the governor and council, until the legislature shall by law make other provision"); Peters v. Peters, 62 Mass. (8 Cush.) 529, 541–42 (1851); DUMPHY, *supra* note 229, at § 1.1.

230. THE FEDERALIST NO. 83 (Alexander Hamilton); POUND, *supra* note 129, at 79. In 1666 Connecticut lodged the probate power in county courts, but created separate probate courts within each county in 1698. In the early eighteenth century, Connecticut created separate probate districts throughout the state. Judge F. Paul Kurmay, *Connecticut's Probate Courts*, QUINNIPIAC PROB. L.J. 379, 379–80 (1999). Appeals from the probate districts were made to the superior courts. *See* POUND, *supra* note 129, at 79.

231. In 1778, the power over probates and administration was vested by the legislature exclusively in a single judge of the Court of Probate, equal to that of the colonial governor as judge of the Prerogative Court under prior practice, but without the power to appoint surrogates. Act of Mar. 16, 1778, ch. 12, 1 LAWS OF NEW YORK (1886). *See generally In re* Brick's Estate, 15 Abb. Pr. 12 (N.Y. Sup. Ct. 1862); Weston v. Weston, 14 Johns 428 (NY. Sup. Ct. 1817); Goodrich v. Pendleton, 4 Johns. Ch. 549 (N.Y. Ch. 1820). In 1787, the legislature passed an act providing that the governor, with the consent of council, could commission a surrogate for each county with the power over probate and administration, and providing that appeals could be brought from the surrogates to the Court of Probates. Act of Feb. 20, 1787 ch. 38, 2 LAWS OF N.Y. (1886). *See generally Brick's Estate*, 15 Abb. Pr. at 12; *Goodrich*, 4 Johns. Ch. at 549. In the post-colonial era, the practice of appointing surrogates

development of surrogates' courts in both of those states, with New Jersey also creating a separate orphans' court and New York a separate court of probate. Maryland[233] established a system of separate orphans' courts. Virginia[234] and North Carolina[235] vested their county courts with jurisdiction over probate. South Carolina[236] created separate courts of ordinary and vested them with probate jurisdiction; eventually, Georgia[237] did as well, although not until 1799. Rhode Island,[238] however, maintained

was replaced in most places with popular elections in each county. Simes & Basye, *Probate Court I*, *supra* note 119, at 980.

232. The 1776 state constitution constituted the governor as the Ordinary or Surrogate-general. N.J. CONST. of 1776, ¶ VIII; ALFRED C. CLAPP & DOROTHY G. BLACK, 7A NEW JERSEY PRACTICE, WILLS AND ADMINISTRATION § 1915 (Rev. 3d ed. 1984) [hereinafter CLAPP] who continued to appoint deputies or surrogates until 1784, when an act was passed directing the governor as ordinary to appoint one surrogate in each county, and limiting the authority of the surrogate to the county in which the surrogate was appointed to serve. Act of Dec. 15, 1784, ch. 19, § 15, Patt. Laws 135, 139; CLAPP, *supra* note 232, §1915. The 1784 Act also created the separate Orphan's courts and limited the surrogates to granting probate of wills and administering estates where there was no dispute; once a dispute arose, only the Orphans' courts adjudicated the dispute. Act of Dec. 15, 1784, ch. 19, § 15, Patt. Laws 135, 139; *In re* Whitehead's Estate, 94 A. 796, 797–98 (N.J.Prerog. Ct. 1915); *In re* Coursen's Will, 4 N.J. Eq. 408, 412–15 (N.J. Prerog. Ct. 1843). The Orphan's court was vested with both chancery and prerogative jurisdiction, and was created to remedy defects in the power of the Prerogative court with respect to the accountability of executors, administrators, and guardians. Wood v. Tallman's Ex'rs, 1 N.J.L. 153 (N.J. 1793). The Orphan's court had jurisdiction over all disputes relating to wills, administration, accounting. *Id.*; Act of Dec. 15, 1784, ch. 19 § 15, Patt. Laws 135, 139. Appeal from the Orphan's court was to the governor as ordinary with respect to errors of fact; judicial review was available, however, as to questions of law. *Wood*, 1 N.J.L. at 153.

233. Act. of Feb., 1777, ch. 8, 1 LAWS OF MARYLAND (1799); Simes & Basye, *Probate Court I*, *supra* note 119, at 979. Initially, the Orphan's court had the power to direct any disputed issue to be tried in a plenary proceeding and to call a jury to assist it in determining any issue. *See* Act of Feb., 1777, ch.8, § 9, 1 LAWS OF MARYLAND (1799). In 1798 the law was revised to require that, at the request of any party before the Orphans' court, an issue be tried in a court of common law. *See* Act of 1798, ch. 101, 2 LAWS OF MARYLAND (William Kilty ed., 1800).

234. Act of 1661, Act 64, 2 LAWS OF VIRGINIA 90 (William Waller Hening ed. 1823); Act of 1645, Act 9, 1 LAWS OF VIRGINIA 302–03 (William Waller Hening ed. 1823); Act of 1711, ch. 2, 4 LAWS OF VIRGINIA 12, 12–13 (William Waller Hening ed. 1814).

235. Act of 1789, ch. 308, § 1, 1 LAWS OF THE STATE OF NORTH CAROLINA 611, 611–12 (Hen. Potter, J.L. Taylor, & Burt Yancey eds., 1821); Williams v. Baker, 4 N.C. 401 (N.C. 1817). While the superior courts for a brief period of time had original jurisdiction over probate, Simes & Basye, *Probate Court I*, *supra* note 119, at 981, by the end of the colonial period its jurisdiction over probate was strictly appellate. Act of 1777, ch. 2, §§ 62, 63.

236. Zylstra v. Corp. of Charleston, 1 S.C.L. (1 Bay) 382 (S.C. Ct. Com. Pl. Gen. Sess. 1794). In 1721, before vesting the probate power in the Courts of Ordinary, South Carolina conferred probate jurisdiction upon it county and precinct courts. Simes & Basye, *Probate Court I*, *supra* note 119, at 981. Although the probate of wills as to personalty was exclusively in the courts of ordinary, while validity as to lands was in the common law courts, the parties could agree to have both questions tried in a common law court. Heyward v. Hazard, 1 S.C.L. (1 Bay) 335 (S.C. Ct. Com. Pl. Gen. Sess. 1794).

237. *See* GA. CONST. of 1798, art. III, § 6; Harrell v. Hamilton, 6 Ga. 37, 38 (Ga. 1849). In 1778 Georgia conferred this jurisdiction on its superior courts, although probate powers were also vested in a register of probate for each county in 1777. Simes & Basye, *Probate Court I*, *supra* note 119, at 981.

probate jurisdiction in its town councils, a practice that continues to the present.[239]

The influence of England and the ecclesiastical courts on colonial practice is evident. The very names of the various colonial courts responsible for probate—prerogative, surrogate, and ordinary—show the influence of the Church of England.[240] Indeed, many of these courts regarded themselves as ecclesiastical courts,[241] and they generally applied ecclesiastical law and followed ecclesiastical procedural rules.[242] Moreover, at least in the early stages of colonial development, the colonial courts of probate were merely given the power to probate wills and grant administration, following the English practice with respect to the ecclesiastical courts. Resort had to be made to the equity or common law courts to sell land to pay debts, to partition land in connection with distribution, to contest or to consture wills, or to adjudicate contested claims against an estate.[243]

Yet, while the English model influenced the early development of U.S. probate courts, mixed with these influences were attempts to establish single courts that possessed the combined powers of the English ecclesiastical, common law, and chancery courts.[244] One such example is the Confederate Congress' enactment of The Northwest Ordinance of 1787, which allowed for wills of real estate located in the Northwest Territory,[245]

238. *See* Act of Mar. 5, 1663, ACTS AND LAWS OF RHODE ISLAND 5 (James Franklin ed., 1730); Act of June, 1768, ACTS AND LAWS OF RHODE ISLAND 8 (Solomon Southwick ed., 1772). They also had the power to appoint guardians. *See* Tillinghast v. Holbrook, 7 R.I. 230, 248–50 (1862) (discussing the 1742 act).

239. Today the town councils have the option of appointing a lawyer to serve as a judge of probate. R.I. GEN. LAWS, §§ 8–9–2. 8–9–4 (1956); Simes & Basye, *Probate Court I*, *supra* note 119, at 980.

240. *See, e.g.*, *In re* Roth's Estate, 52 A.2d 811, 815 (N.J. Pregrog. Ct. 1947) (noting the term "Prerogative Court" was the title of one of the courts of the Archbishop of Canterbury, and that "ordinary" refers to one who exercised ecclesiastical jurisdiction in the Church of England); BLACKSTONE, *supra* note 135, at 1076; REMBAR, *supra* note 121, at 71; WALNE, *supra* note 147, at 19; Simes & Basye, *Probate Court I*, *supra* note 119, at 968.

241. *See* Kao v. Hsia, 524 A.2d 70, 73 n.7 (Md. 1987); *In re* Roth's Estate 52 A.2d at 815. *See also* THE FEDERALIST NO. 83 (Alexander Hamilton) (describing the probate court in New York as "analogous in certain matters to the spiritual courts in England").

242. *E.g.*, Finch v. Finch, 14 Ga. 362, 366–68 (Ga. 1853); Lewis v. Maris, 1 Dall. 278, 279–80 (Pa. 1788).

243. Simes & Basye, *Probate Court I*, *supra* note 119, at 978–79. *See, e.g.*, Act of Oct. 1785, ch. 61, § 11, 12 LAWS OF VIRGINIA 140, 142 (William Waller Hening ed., 1823) (providing the validity of a will admitted to probate could be challenged in chancery up to seven years later).

244. Simes & Basye, *Probate Court I*, *supra* note 119, at 977.

245. The "Northwest Territory" referred to the area directly northwest of the Ohio River. *See* ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT, preamble (July 13, 1787).

with the caveat that "such wills be duly proved,"[246] a rejection of the English distinction between personal and real property with respect to the requirement of probate. Indeed, the practice growing out of the Northwest Ordinance gave much more weight to the probate process with respect to devises of land;[247] and today, virtually all states provide that wills of land, as well as personal property, must be admitted to probate, with the probate courts now having jurisdiction over both the decedent's land and personal estate.[248]

3. Summary

If one accepts the historical gloss on Congress' statutory grant of diversity jurisdiction to the federal courts, then anything that fell within the exclusive jurisdiction of England's ecclesiastical courts in 1789 falls outside the federal courts' grant of diversity jurisdiction. Because the probate of wills of personal estate and actions to set aside the same, as well as the appointment and removal of a decedent's personal representative, fell within the exclusive jurisdiction of the British ecclesiastical courts in 1789, the refusal of federal courts to undertake either of these activities is consistent with the historical interpretation of Congress' statutory grant of diversity jurisdiction. Similarly, the fact that chancery, and at times the courts of common law, exercised jurisdiction over suits for legacies and debts in eighteenth-century England is consistent with the modern practice, endorsed in *Markham*, of allowing federal courts to "entertain suits 'in favor of creditors, legatees, and heirs' and other claimants against a decedent's estate."[249]

Fidelity to the historical interpretation of Congress' statutory grant of subject matter jurisdiction to the federal courts, however, compels the conclusion that the federal courts have jurisdiction to entertain challenges to the validity of wills of real property, since those fell within the exclusive jurisdiction of England's common law courts in 1789. Likewise, federal courts should possess jurisdiction over suits involving trusts, as those fell within the exclusive jurisdiction of chancery in eighteenth-century England. Moreover, suits involving allegations of extrinsic fraud in obtaining probate of a will should be actionable in federal court proceedings. Finally, federal courts should be able to administer estates,

246. *Id.* § 2.

247. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 249 (2d. ed. 1985).

248. 4 POMEROY, *supra* note 138, § 1158 at 471 n.16; Simes & Basye, *Probate Court II*, *supra* note 120, at 122–23.

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

given that chancery exercised concurrent jurisdiction over administration in England in 1789. Thus, even if one accepts the use of historical English practice as a guide, the scope of the probate exception is much narrower than many courts and commentators have assumed.

B. CONSTITUTIONAL LIMITATIONS ON SUBJECT MATTER JURISDICTION

The Supreme Court has not directly addressed the question whether the probate exception is merely a gloss on Congress' statutory grants of subject matter jurisdiction to the federal courts or if it is constitutionally mandated by Article III. The Court's decisions with respect to both the domestic relations exception to federal court jurisdiction—the only other implied exception to federal court jurisdiction[250]—as well as the now-defunct Act of March 2, 1867 ("1867 Act"),[251] however, provide strong support for the conclusion that the probate exception is merely a statutory gloss and is not constitutionally mandated.

1. Domestic Relations Exception

In *Ankenbrandt v. Richards*, a mother brought suit on behalf of her children against her ex-husband and his girlfriend, seeking monetary damages for alleged sexual and physical abuse of the children.[252] The district court concluded that it lacked subject matter jurisdiction over the suit based on the domestic relations exception to diversity jurisdiction, and the court of appeals affirmed.[253]

The Supreme Court rejected the argument that the domestic relations exception was constitutionally mandated.[254] In so holding, the Court relied on the plain language of Article III, § 2 of the Constitution, which "contains no limitation on subjects of a domestic relations nature,"[255] and concluded that the "domestic relations exception exists as a matter of statutory construction."[256] Since the domestic relations exception to federal

250. Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824, 1840 (1983).

251. Act of March 2, 1867, ch. 196, 14 Stat. 558.

252. 504 U.S. 689, 691 (1992).

253. *Id.* at 692.

254. *Id.* at 699–700.

255. *Id.* at 695. Moreover, it reasoned that since it had previously found that it had jurisdiction over appeals from territorial courts involving divorce, and that it had upheld the exercise of original jurisdiction by federal courts in the District of Columbia over divorce actions, the power to hear such cases must be within Article III's grant of subject matter jurisdiction. *Id.* at 696–97.

256. *Id.* at 699–700. In his concurring opinion, Justice Blackmun expressed skepticism about the majority's conclusion, writing that:

court jurisdiction, like the probate exception, is based on the understanding that historically such matters were vested exclusively in the ecclesiastical courts, it would seem to follow that the probate exception is likewise not constitutionally mandated.[257]

2. Act of 1867

Section 11 of the Judiciary Act of 1789 provided the federal circuit courts[258] with original jurisdiction over "suits of a civil nature at common law or in equity" between a citizen of the state in which the suit is brought and a citizen of another state, if the amount in controversy exceeded five hundred dollars.[259] Parallel to this was Section 12, which provided that if a plaintiff from one state filed suit against a defendant from another state in a state court located in the plaintiff's home state, and the amount in controversy exceeded $500, the defendant could remove the action to federal court provided he filed a petition for removal upon his first appearance in state court.[260] This system of giving the plaintiff the option

> 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 . . . on the federal courts in any matters involving divorces, alimony, and child custody.

Id. at 715 n.8 (Blackmun, J., concurring).

257. *See Ankenbrandt*, 504 U.S. at 699–700; Ohio *ex rel* Popovici v. Agler, 280 U.S. 379, 383–84 (1930); Barber v. Barber, 62 U.S. (21 How.) 582, 591–93 (1859).

258. Historically, the federal circuit courts were very different from the modern federal circuit courts of appeals. Under the Judiciary Act of 1789 there were two levels of trial courts: the district courts (one for each state or a portion thereof), each with its own district judge, and the circuit courts (one for each region of the country), which lacked judges of their own and sat twice each year in each district within the circuit, with panels consisting of two Justices of the Supreme Court (who would "ride circuit") and a district court judge from within the circuit. In addition to having appellate jurisdiction over certain cases tried in the district courts, the circuit courts had concurrent jurisdiction with the state courts over diversity actions where the amount in controversy exceeded $500. *See* POUND, *supra* note 129, at 103–06. While a panel of the circuit court officially consisted of three members, only two were required to hear a case, so it would not be unusual for a circuit court to be equally divided. *See id.* at 104.

259. *See* Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 73 (1789).

> [T]he circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . the sum or value of five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought, and a citizen of another State.

Id.

260. *See id.* § 12.

> [I]f a suit be commenced in any state court . . . by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars . . . and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court . . . the cause shall there proceed in the same manner as if it had been brought there by original process.

of choosing at the outset whether to bring suit in state or federal court and then giving the out-of-state defendant a similar option if suit was initially filed in state court was long believed to be adequate to protect out-of-state plaintiffs and defendants from local state prejudices.[261] But bitter cross-state animosity engendered by the Civil War led Congress to believe the existing scheme did not adequately protect out-of-state litigants.[262] Accordingly, Congress passed the 1867 Act which provided that if at *any* time prior to the final hearing or trial of a suit, the out-of-state party had reason to believe that, due to prejudice or local influence, justice could not be obtained in state court, the out-of-state party could remove the action to federal court.[263]

In *Gaines v. Fuentes* the Supreme Court considered the impact of the 1867 Act on probate matters.[264] Citizens of Louisiana filed a petition in a Louisiana state probate court seeking revocation of a decree of probate of a will on the ground that the testimony upon which it was admitted was false and insufficient.[265] One of the decedent's heirs, a citizen of New York, was served the petition and subsequently sought to remove the action to federal circuit court pursuant to both Section 12 of the 1789 Act as well as to the 1867 Act, but the state court denied the applications and subsequently revoked the probate of the will.[266] The decision was affirmed by the Louisiana Supreme Court.[267]

The U.S. Supreme Court reversed.[268] The dissent reasoned that although Section 12, the removal provision of the 1789 Act, referred only

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Id.

261. *See* Chicago & N.W. R. Co. v. Whitton, 80 U.S. (13 Wall.) 270, 289 (1871).

262. *See* Gaines v. Fuentes, 92 U.S. 10, 19 (1875).

263. Act of March 2, 1867, ch. 196, 14 Stat. 558. The statute declared:

> That where a suit is now pending, or may hereafter be brought in any State court, in which there is controversy between a citizen of the State in which the suit is brought and a citizen of another State, and the matter in dispute exceeds the sum of five hundred dollars, exclusive of costs, such citizen of another State, whether he be plaintiff or defendant, if he will make and file, in such State court, an affidavit stating that he has reason to and does believe that, from prejudice or local influence, he will not be able to obtain justice in such State court, may, at any time before final hearing or trial of the suit, file a petition in such State court for the removal of the suit into the next circuit court of the United States to be held in the district where the suit is pending, and offer good and sufficient surety for his entering in such court . . . the suit shall there proceed in the same manner as if it had been brought there by original process.

Id.

264. 92 U.S. 10 (1875).

265. *Id.* at 11.

266. *Id.* at 11–12.

267. *Id.* As to both applications, the state court reasoned that the federal court would lack jurisdiction over the subject matter of the dispute. *See id.*

268. *Id.* at 22.

to "a *suit* . . . by a citizen of the State in which the suit is brought against a citizen of another State," it had to be read *in pari materia* with Section 11, the provision vesting the circuit courts with original jurisdiction over "all *suits of a civil nature, at common law or in equity* . . . between a citizen of the State where the suit is brought and a citizen of another State."[269] When read in conjunction with the provision of Section 12 providing that a removed action would 'proceed [in the circuit court] in the same manner as if it had been brought there by original process," the dissent concluded only those actions that could have been originally brought in the circuit court could be removed from the state court.[270] Since the probate of wills did not fall within the jurisdiction of the courts of law or equity in England, the dissent reasoned such an action could not be removed to federal court, since it could not be brought in federal court as an original matter.[271]

The majority appeared to accept this interpretation of Section 12, but ruled that removal would nonetheless be appropriate under the 1867 Act.[272] The majority noted that the scope of the federal judicial power under Article III is broader than the scope of jurisdiction in Section 12 of the 1789 Act, extending to "*controversies* between citizens of different States."[273] The majority—in apparent reliance on the broader language of the 1867 Act providing for removal of any "suit . . . in which there is a *controversy* between a citizen of the State in which the suit is brought and a citizen of another State"[274]—reasoned that the "act covered every possible case involving controversies between citizens of the State where the suit was brought and citizens of other States." The Court concluded the scope of cases that could be *removed* to federal court under the 1867 Act was broader than the scope of cases that could have been initially brought in federal court pursuant to Section 11 of the 1789 Act.[275] Accordingly, even if a suit was not one at law or in equity, such as an action to revoke probate, it could nonetheless be removed to federal court under the 1867 Act. The dissent, while disagreeing with the construction of the 1867 Act nonetheless conceded that Congress had the power under Article III to provide for jurisdiction over such suits.[276]

269. *Id.* at 22–23 (Bradley, J., dissenting).
270. *Id.* at 23–24.
271. *Id.* at 24–25.
272. *Id.* at 18.
273. *Id.* at 17 (quoting U.S. CONST. art. III, § 2).
274. 1867 Act, *supra* note 263.
275. *Gaines*, 92 U.S. at 19–20.
276. *Id.* at 26 (Bradley, J., dissenting).

Thus, both the majority and the dissent agreed Congress had the constitutional authority to vest the federal courts with subject matter jurisdiction over probate-related matters, and indeed the majority thought that Congress had done so in the 1867 Act. Therefore, while the 1867 Act was seldom invoked and has since been repealed,[277] its scope as interpreted and approved by the Court in *Gaines* provides strong support for the conclusion that the exception is only a statutory limitation rather than a constitutional one.

IV. DOCTRINE OF *CUSTODIA LEGIS*

Courts have held generally that the probate exception does not apply to inter vivos trusts and possibly not to testamentary trusts either. This means that a federal court not only may adjudicate the validity of a trust where the requirements of diversity jurisdiction are satisfied, but may also administer the trust, including ordering an accounting, removing and appointing trustees, and demanding that funds be distributed.[278] Yet because this is an exercise of diversity jurisdiction, state courts, whether courts of probate or courts of general jurisdiction, will have concurrent jurisdiction over such actions, raising the possibility that two courts—one state and one federal—will simultaneously attempt to administer the same trust.

The Supreme Court addressed this situation in *Princess Lida of Thurn & Taxis v. Thompson*.[279] The case dealt with a trust created in 1906 for the benefit of Princess Lida and her children by her ex-husband.[280] In 1910, the ex-husband repudiated the agreement.[281] Princess Lida, her children,

277. In 1875, Congress enacted a comprehensive removal statute, *see* Act of March 3, 1875, 18 Stat. 470, but the statute was subsequently held not to rescind the Act of March 2, 1867. *See* Hess v. Reynolds, 113 U.S. 73, 79–80 (1885). In 1887, Congress passed yet another comprehensive removal statute, *see* Act of March 3, 1887, 24 Stat. 553, and while not intending to repeal the Act of March 2, 1867, *see* 18 CONG. REC. (1887) (reporting statement of Representative David Culberson that "[t]he bill does not propose to repeal the act of 1867"), the 1887 act did have the effect of limiting removal to actions that could originally be brought in federal court. *See* Cochran & the Fid. & Deposit Co. v. Montgomery County, 199 U.S. 260, 269 (1905).

> [U]nder the judiciary act of 1789 such cases were only liable to removal from a state to the Circuit Court 'as might . . . have been brought before the Circuit Court by original process' [and] it was ruled that this was otherwise under the act of March 2, 1867.
>
> But the act of 1887 restored the rule of 1789, and, as we have heretofore decided, those suits only can be removed of which the Circuit Courts are given original jurisdiction.

Id. Nonetheless, it was not until 1948 that the right to remove a case due to prejudice or local influence was eliminated. *See* 28 U.S.C. § 1441 (1948).

278. *See supra* Part II.B.2.a.

279. 305 U.S. 456 (1939).

280. *Id.* at 457–58.

281. *Id.* at 58.

and one of the trustees brought suit in the state Court of Common Pleas in Pennsylvania to enforce the trust.[282] After a hearing, the state court entered a decree sustaining the agreement and ordering the ex-husband to perform accordingly.[283] The court approved a modification of the agreement in 1915, and in 1925 ultimately entered in the record that the decree had been satisfied.[284]

On July 7, 1930, the trustees filed a partial account of the trust in the same court.[285] The following day, Princess Lida and one of her children filed a suit in equity in federal district court against the two living trustees and the administrator of the deceased trustee, alleging mismanagement of trust funds and requesting that the trustees be removed and that all defendants be made to account for and repay the losses of the estate.[286] The defendants asked the state court to enjoin the plaintiffs from pursuing their claim in federal court.[287] While that request was pending, the federal court temporarily enjoined the defendants from further prosecuting the state court action.[288] Nonetheless, the Pennsylvania Supreme Court affirmed an order of the state court enjoining the plaintiffs from further pursuing their federal court action.[289]

Thus, the U.S. Supreme Court was "confronted with a situation where each of the courts claiming jurisdiction has restrained the parties before it from proceeding in the other."[290] The Court held that although the trust *res* was unquestionably within the state court's jurisdiction when the action was brought to compel the ex-husband's compliance with the agreement, jurisdiction terminated once the decree in equity had been satisfied by the ex-husband.[291] It then addressed whether the subsequent filing of the trustees' account gave the state court jurisdiction over the trust, and if so, the nature and extent of that jurisdiction.[292] The Court noted that as a matter of state law, the state Court of Common Pleas for the county in which any trustee is located is vested with jurisdiction over any matter that concerns the integrity of the trust *res*.[293] Additionally, the Court stated that

282. *Id.*
283. *Id.*
284. *Id.* at 459.
285. *Id.*
286. *Id.*
287. *Id.*
288. *Id.* at 460.
289. *Id.*
290. *Id.* at 461.
291. *Id.*
292. *Id.* at 462.
293. *Id.* at 462–63.

jurisdiction is invoked either by a petition by a trustee or upon application of an interested person,[294] and that the state court cannot effectively exercise such jurisdiction without having a substantial measure of control over the trust funds.[295]

The Court concluded that if the federal court action had been one in which the plaintiffs merely sought adjudication of their right to participate in the *res* or as to the quantum of their interest in it, the federal action could proceed.[296] "[W]here the judgment sought is strictly in personam, both the state court and the federal court, having concurrent jurisdiction, may proceed with the litigation at least until judgment is obtained in one of them which may be set up as res judicata in the other."[297] Yet, "if the two suits are in rem, or quasi in rem, so that the court, or its officer, has possession or must have control of the property which is the subject of the litigation in order to proceed with the cause and grant the relief sought the jurisdiction of the one court must yield to that of the other."[298] According to the Court, where both proceedings are in rem, the first one assuming jurisdiction had jurisdiction over the *res*.[299] Because the federal action related solely to administration and restoration of the corpus, it was a proceeding in rem and thus had to yield to the pre-existing state court proceedings with respect to the same *res*.[300]

This doctrine, known as *custodia legis*, or the doctrine of prior exclusive jurisdiction,[301] is "nothing more than a practical 'first come, first serve' method of resolving jurisdictional disputes between two courts with concurrent jurisdiction"[302] that prevents the problems that could arise from inconsistent orders with respect to the same property. In considering the application of the doctrine, lower courts have identified several elements that must be present before the doctrine can be invoked to divest the federal court of jurisdiction.

294. *Id.* at 463.
295. *Id.* at 467.
296. *Id.* at 466–67.
297. *Id.*
298. *Id.* (citing Penn. Gen. Cas. Co. v. Pennsylvania, 294 U.S. 189, 195 (1935)).
299. *Id.*
300. *Id.* at 467.
301. *E.g.*, Espat v. Espat, 56 F. Supp.2d 1377, 1381 (M.D. Fla. 1999).
302. BLACK'S LAW DICTIONARY, *supra* note 11, at 384 (citing Coastal Prod. Credit Ass'n v. Oil Screw "Santee," 51 B.R. 1018, 1020 (S.D. Ga. 1985)).

First, the state court action must have been filed before the federal court action,[303] whether by virtue of a specific action filed in the state court with regard to the administration of the trust that is pending[304] at the time the federal suit is filed, such as an accounting,[305] or because as a matter of state law the state court exercised continuing jurisdiction over the corpus of a trust once its jurisdiction has been initially invoked.[306] Second, the doctrine only applies if both actions are in rem or quasi in rem.[307] Thus, even if the state court exercises continuing jurisdiction over the administration of the trust, the doctrine of *custodia legis* poses no bar to the federal court entertaining, say, a suit for damages by the trust beneficiaries against the trustees personally.[308] Third, the state court must have the power to adjudicate all of the claims effectively.[309] This means that if one of the claims raised in the federal proceeding falls outside the jurisdiction of the state court in which the pre-existing action is pending, the doctrine would not bar the federal court from exercising jurisdiction over the claim.[310] A few courts have held the doctrine applies only if, as a matter of state law, the specialized state court in which the prior action was filed had

303. *See* Reichman v. Pittsburgh Nat'l Bank, 465 F.2d 16, 18 (3d Cir. 1972); Schonland v. Schonland, No. Civ. 397CV558 (AHN), 1997 WL 695517, at *2 (D. Conn. Oct. 23, 1997); Lancaster v. Merchants Nat'l Bank, 752 F. Supp. 886, 888 (W.D. Ark. 1990), *rev'd*, 961 F.2d 713 (8th Cir. 1992); Barnes v. Brandrup, 506 F. Supp. 396, 399–400 (S.D.N.Y. 1981). Even if the state court action is filed subsequent to the federal court action, however, it has been suggested that the federal court may have discretion to dismiss the action in favor of the state court. *See* Holt v. Werbe, 198 F.2d 910, 915 (8th Cir. 1952).

304. Thus, the mere fact that accountings have previously been filed and approved in state court proceedings does not mean that those proceedings have been first filed, as those proceedings terminate once the court approves the accountings. *See Barnes*, 506 F. Supp. at 401. *See also Holt*, 198 F.2d at 915–16 (stating that doctrine does not apply if the prior state court action was dismissed without prejudice before the federal action was filed).

305. *See* Weingarten v. Warren, 753 F. Supp. 491, 495 (S.D.N.Y. 1990).

306. *See id.*; *Barnes*, 506 F. Supp. at 400–01; Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447, 458 (S.D.N.Y. 1976).

307. *See* Starr v. Rupp, 421 F.2d 999, 1004–06 (6th Cir. 1970).

308. *See* Martz v. Braun, 266 F.Supp. 134, 138 (E.D. Pa. 1967). *See also Holt*, 198 F.2d at 915.

> The rule is otherwise in actions strictly in personam . . . . Nor does the rule . . . apply where the purpose of the action in the second court is merely to establish the right or interest of the plaintiff in property within the possession or control of the first court, so long as the second court does not interfere with the proceedings in the first court or with the control of the property in its custody.

Id.

309. *See* Schonland v. Schonland, No. Civ. 397CV558(AHN), 1997 WL 695517, at *2 (D. Conn. Oct. 23, 1997); *Barnes*, 506 F. Supp. at 399–400.

310. *See* Akrotirianakis v. Burroughs, , 262 F. Supp. 918, 921–25 (D. Md. 1967) (holding that doctrine does not apply where the state probate court with jurisdiction over the ongoing administration of the trust would not have jurisdiction over an action, as such an action is committed to the state courts of equity).

jurisdiction exclusive of the state courts of general jurisdiction.[311] Other courts have held this has no effect on the doctrine's applicability.[312] Finally, while the doctrine would not appear to bar a party from removing such a proceeding from state court to federal court,[313] one court has denied jurisdiction over a removed case where the state court had already issued a temporary restraining order on the property at issue before the timely notice of removal had been filed.[314]

V. PRUDENTIAL ABSTENTION

While the probate exception excludes most probate and probate-related matters from federal court, some arguably probate-related matters, such as those involving trusts or arising under federal statutes, would still seem to fall within the federal courts' subject matter jurisdiction. Yet even if a claim survives the probate exception proper, it is far from certain that the federal court will adjudicate the claim. For "[e]ven where a particular probate-like case is found to be outside the scope of the probate exception, the district court may, in its discretion, decline to exercise its jurisdiction,"[315] particularly for matters that are "on the verge" of the probate exception.[316] This is because the federal courts have at their disposal a variety of abstention doctrines including *Pullman*,[317] *Burford*,[318] *Thibodaux*,[319] *Younger*,[320] *Colorado River*,[321] *Brillhart-Wilton*,[322] as well

311. *See Schonland*, 1997 WL 695517 at *2 (holding that the doctrine is inapplicable because under state law the probate courts have concurrent (rather than exclusive) jurisdiction over trusts with the ordinary courts of equity); *Barnes*, 506 F. Supp. at 401–02 (distinguishing *Princess Lida* from the instant case because in Princess Lida the state probate court jurisdiction was exclusive, whereas the state probate court jurisdiction in the instant case is concurrent with the state courts of general jurisdiction).

312. *See* Beach v. Rome Trust Co., 269 F.2d 367, 371–72 (2d Cir. 1959); Rousseau v. United States Trust Co. of N.Y., 422 F. Supp. 447, 458 (S.D.N.Y. 1976).

313. *E.g.*, *Schonland*, 1997 WL 695517 at *1–*2.

314. *See In re* Thomas & Agnes Carvel Found., 36 F. Supp.2d 144, 149–51 (S.D.N.Y. 1991).

315. Rice v. Rice Found., 610 F.2d 471, 477 (7th Cir. 1979) (stating that "the scope of the probate exception does not necessarily define the area in which the exercise of federal judicial power is appropriate").

316. Phillips, Nizer, Benjamin, Krim & Ballon v. Rosenstiel, 490 F.2d 509, 516 (2d Cir. 1973) (asserting that "there is particularly strong reason for abstention in cases which, though not within the exceptions for matters of probate and administration or matrimony and custody actions, are on the verge, since like those within the exception, they raise issues 'in which the states have an especially strong interest and a well-developed competence for dealing with them'"). *Accord* Celentano v. Furer, 602 F. Supp. 777, 781–82 (S.D.N.Y. 1985).

317. R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 498–501 (1941).

318. Burford v. Sun Oil Co., 319 U.S. 315, 316–34 (1943).

319. Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25, 29–31 (1959).

320. Younger v. Harris, 401 U.S. 37 (1971).

321. Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 813–19 (1976).

as the *Rooker-Feldman*[323] doctrine and the principle that equity can only "do justice completely" and not "by halves."[324] Each of these doctrines has directly or indirectly been addressed, and in some cases applied, by the federal courts in considering probate-related claims falling outside of the probate exception. This Section briefly describes each of these doctrines, and examines the manner and extent to which the federal courts have applied them to probate-related claims.

A. *PULLMAN* ABSTENTION

Pullman abstention provides that where a suit presents an unsettled question of state law and a given interpretation of that state law would allow the court to avoid reaching a federal constitutional question raised in the suit, the federal district court should suspend the federal court action and allow the parties to resolve the unsettled question of state law in state court.[325] Thus, where the validity of a state statute is challenged on federal constitutional grounds and the meaning of the statute is sufficiently uncertain that a narrow interpretation of it by the state courts could avoid reaching the constitutional question, *Pullman* abstention is warranted.[326] It is likewise warranted if a suit alleges that the defendant's conduct violated the U.S. constitution as well as a provision of state law.[327] Moreover, *Pullman* abstention applies even when suit is brought pursuant to § 1983.[328] But where the state law being challenged is sufficiently clear, or the plaintiff opts to challenge the defendant's conduct only on federal constitutional grounds (leaving out state law claims), *Pullman* abstention does not apply.[329] *Pullman* abstention is likewise inapplicable where only non-constitutional federal issues, such as the interpretation of a federal statute, can be avoided.[330] Although typically invoked in suits for

322. Wilton v. Seven Falls Co., 515 U.S. 277, 282–288 (1995); Brillhart v. Excess Ins. Co. of Am., 316 U.S. 491, 494–97 (1942).

323. District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482–87 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 414–16 (1923).

324. *See* Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 117–18 (D. Or. 1957) (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 46 (1909)).

325. *See* R.R. Comm'n of Texas v. Pullman Co., 312 U.S. 496, 498–501 (1941).

326. *See* Fornaris v. Ridge Tool Co., 400 U.S. 41, 44 (1970).

327. *See Pullman*, 312 U.S. at 498. *See also* Siler v. Louisvillle & Nashville R.R. Co., 213 U.S. 175 (1909).

328. *See* Askew v. Hargrave, 401 U.S. 476, 477–78 (1971).

329. *Compare* Wisconsin v. Constantineau, 400 U.S. 433, 439 (1971), *with id.* at 440–43 (Burger, C.J., dissenting).

330. *See* Propper v. Clark, 337 U.S. 472, 490 (1949).

injunctive relief, it can also be raised in suits where money damages are sought.[331]

Under *Pullman* abstention, the federal court does not usually[332] dismiss the proceedings, but rather stays them pending the outcome of the proceedings in state court.[333] While the federal court plaintiff is required to inform the state court of the federal constitutional challenges pending in the federal court proceedings so that the state court can interpret the state law at issue in light of the constitutional challenge,[334] the plaintiff has the right to return to federal court after the state court has resolved the state law question to have the constitutional questions resolved in federal court, unless the plaintiff voluntarily submits the constitutional claims to the state court.[335]

Although courts have considered *Pullman* abstention in the context of probate-related proceedings, they have been reluctant to apply it in the probate context. Usually this is because such claims do not typically involve unsettled questions of state law coupled with the possibility of avoiding a federal constitutional question.[336]

B. *THIBODAUX* AND *BURFORD* ABSTENTION

Thibodaux abstention is applicable where the suit raises difficult questions of state law bearing on substantial public policy matters that are more important than the result of the case before the court.[337] Thus, for example, a suit challenging a municipality's authority to exercise eminent domain as a matter of state law raises a question of sufficient public import to justify *Thibodaux* abstention,[338] but abstention appears to be justified only where the issue of state law is unclear.[339] Courts that have considered

331. *E.g.*, *Fornaris*, 400 U.S. at 41–44; United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134, 135–36 (1962).

332. In some instances, a state court will refuse to decide the issue of state law so long as the federal action is pending. In those circumstances, the federal district court must dismiss the case, but without prejudice, and the plaintiff is free to return to federal court after the state court proceedings have concluded. *See* Harris County Comm'rs v. Moore, 420 U.S. 77, 78 (1975).

333. *See Pullman*, 312 U.S. at 501–02.

334. *See* Gov't & Civic Employees Org. Comm. v. Windsor, 353 U.S. 364, 366 (1957).

335. *See* England v. Louisiana State Bd. of Med. Exam'rs, 375 U.S. 411, 435 (1964) (Douglas, J., concurring).

336. Bergeron v. Loeb, 777 F.2d 792, 798 n.7 (1st Cir. 1985); Celentano v. Furer, 602 F. Supp. 777, 781 (S.D.N.Y. 1985); Martz v. Braun, 266 F. Supp. 134, 139 (E.D. Pa. 1967).

337. *See* Colorado River Water Conservation Dist. v. United States, 424 U.S. 800, 814 (1976) (citing Louisiana Power & Light Co. v. Thibodaux, 360 U.S. 25 (1959)).

338. *See Thibodaux*, 360 U.S. at 42–44 (Brennan, J., dissenting).

339. *See* Allegheny County v. Frank Mashuda Co., 360 U.S. 185, 188–90 (1959).

Thibodaux abstention in probate-related proceedings have found it inapplicable, either because there is no difficult question of state law,[340] or because no issue transcends the importance of the case.[341] Indeed, one court has held that any case raising difficult issues of state law bearing on policy problems of substantial public import would likely invoke the probate exception and if it did not, it probably would not qualify for *Thibodaux* abstention.[342]

Burford abstention is related to but distinct from *Thibodaux* abstention. Unlike *Thibodaux* abstention, for *Burford* abstention to apply the question of state law need not itself be determinative of state policy (like a determination of the scope of a city's eminent domain powers), and thus the resolution of the specific question before the court need not transcend the result in the case before the court.[343] Rather, the question is whether the very act of a federal court adjudicating a case would itself in some way be "disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern."[344]

Burford v. Sun Oil Co. was a challenge to the granting of four permits by a state regulatory commission to drill oil wells.[345] Because the state believed that the regulation of natural resources such as oil could not effectively be accomplished piecemeal but had to be centralized to be effective, it had vested a single state district court with authority to review the commission's decisions for "reasonableness," which was itself subject to review by a single court of appeals and ultimately the state supreme court. Thus the state avoided the problem of having conflicting determinations by individual district and appellate courts across the state.[346] While the determination of whether it was reasonable to issue any given permit would not likely have a transcendent effect on the state, the very fact of federal courts determining the reasonableness of the issuance of permits "where the State had established its own elaborate review system for dealing with the geological complexities of oil and gas fields, would have had an impermissibly disruptive effect on state policy for the management of those fields."[347] Unlike *Pullman* abstention, the *Burford*

340. *See* Beach v. Rome Trust Co., 269 F.2d 367, 374 (2d Cir. 1959); *Martz*, 266 F. Supp. at 139.

341. *Martz*, 266 F. Supp. at 139.

342. *See* Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *7 (N.D. Ill. Sept. 18, 1995) (describing *Thibodaux* abstention without directly citing *Thibodaux*).

343. *See Colorado River Water Conservation Dist.*, 424 U.S. at 814–15.

344. *See id.* at 814.

345. 319 U.S. 315, 317 (1943).

346. *Id.* at 326–27.

347. *Colorado River Water Conservation Dist*, 424 U.S. at 815.

abstention plaintiff has no right to return to federal district court to have her federal claims adjudicated, but is instead entitled only to review in a federal court by way of a writ of certiorari by the U.S. Supreme Court.[348]

There are a number of limitations on the use of *Burford* abstention. First, while not an explicit limitation, the Supreme Court has considered the doctrine only in the context of state-regulated industries.[349] Second, *Burford* abstention can be used only when there is a difficult, uncertain question of state law.[350] Finally, *Burford* abstention is available only where plaintiffs seek injunctive or declaratory relief.[351]

Courts that have considered *Burford* directly have rejected its application in the context of probate-related matters, usually finding either no difficult question of state law, no overarching state policy with respect to settling such claims, or both.[352] One court has found that few cases would likely present such a question without also invoking the probate exception to federal subject matter jurisdiction.[353]

In *Ankenbrandt v. Richards* the Court considered the applicability of *Burford* abstention in the analogous context of the domestic relations exception.[354] The Court stated, in dicta, that *Burford* abstention *might* be relevant in cases outside the domestic relations exception where, say, the federal case was filed prior to effectuation of a divorce, alimony, or child custody decree, and the suit depended on a determination of the *status* of the parties.[355] Yet even in such cases, the Court reasoned that the federal court should retain jurisdiction, rather than abstain permanently, to ensure prompt and just disposition of the matter upon the determination by the

348. *See Burford*, 319 U.S. at 334.

349. *See* New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) (reviewing utility rate regulation); Alabama Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341 (1951) (considering local train service regulation); *Burford*, 319 U.S. 315 (1943) (evaluating regulation of oil drilling rights).

350. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 726–27 (1996); *Colorado River Water Conservation Dist*, 424 U.S. at 814; *Burford*, 319 U.S. at 327–28; Johnson v. Rodrigues, 226 F.3d 1103, 1112 (10th Cir. 2000).

351. *Quackenbush*, 517 U.S. at 731. The Supreme Court has, however, left open the possibility that *Burford* might support a federal court's decision to postpone adjudication of a damages claim pending resolution by the state courts of an unsettled question of state law. *See Quackenbush*, 517 U.S. at 730–31.

352. *See* Bergeron v. Loeb, 777 F.2d 792, 800 (1st Cir. 1985); Cmty. Ins. Co. v. Rowe, 85 F. Supp. 2d 800, 807 n.10 (S.D. Ohio 1999); Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *7 (N.D.Ill. Sept. 18, 1995); Celentano v. Furer, 602 F. Supp. 777, 781 (S.D.N.Y. 1985).

353. *See Seay*, 1995 WL 557361, at *7.

354. *Ankenbrandt*, 504 U.S. 689 (1992).

355. *Id.* at 705–06.

state court of the relevant issue,[356] making it more akin to *Pullman* abstention. Thus, where a federal court is adjudicating a probate-related matter, *Ankenbrandt* might suggest that if a suit is filed on behalf of or against an estate, and the proper adjudication of such suit depends upon the state probate court appointing a personal representative for the estate with the capacity to sue and be sued on behalf of the estate, the federal court should retain jurisdiction of the suit pending the state court's action.[357]

C. *YOUNGER* ABSTENTION

The *Younger* abstention doctrine initially was directed only at suits that might interfere with ongoing state criminal proceedings. It provided that the federal courts would not, absent special circumstances,[358] entertain jurisdiction over suits seeking either an injunction against pending[359] state criminal proceedings[360] or a declaratory judgment against a state criminal statute under which prosecutions are pending.[361] The rationales behind this form of abstention are that equity need not act in such instances since an adequate remedy exists by way of a defense in the state criminal proceedings,[362] as well as respect for the distinct sovereignty of the states.[363] An exception to *Younger* abstention exists where the state tribunal cannot or will not entertain the federal constitutional claims.[364]

356. *Id.* at 706 n.6. *See also Quackenbush*, 517 U.S. at 730–31 (noting that although a dismissal under *Burford* is not appropriate in a damages action, a stay pending a determination by the state court on a disputed question of state law might be warranted).

357. *Cf. Seay*, 1995 WL 557361 at *7–*8.

358. These special circumstances were limited to cases where the prosecution was in bad faith or done to harass the defendant, or where the statute was "flagrantly and patently violative of express constitutional prohibitions in every clause, sentence and paragraph, and in whatever manner and against whomever an effort might be made to apply it." Younger v. Harris, 401 U.S. 37, 52–54 (1971) (quoting Watson v. Buck, 313 U.S. 387, 402 (1941)).

359. The Supreme Court subsequently expanded the doctrine to cover not only pending criminal proceedings, but also those that are commenced against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court. *See* Hicks v. Miranda, 422 U.S. 332, 349 (1975).

360. *See Younger*, 401 U.S. at 53.

361. *See* Samuels v. Mackell, 401 U.S. 66, 73 (1971). The Supreme Court has reserved the question whether *Younger* applies in suits for money damages, although the Court has held that such suits should be stayed pending the resolution of the state prosecutions. *See* Deakins v. Monaghan, 484 U.S. 193, 202 (1988).

362. *See Younger*, 401 U.S. at 43–44; Douglas v. City of Jeannette, 319 U.S. 157, 163 (1943).

363. *See Younger*, 401 U.S. at 43–44.

364. *See* Moore v. Sims, 442 U.S. 415, 425–26 (1979).

Subsequent decisions have expanded *Younger* to cover civil enforcement proceedings brought by the state,[365] including those prosecuted in administrative tribunals that are judicial in nature.[366] In a few instances, *Younger* abstention has been applied in suits involving purely private parties where the "State's interests in the proceeding are so important that exercise of the federal judicial power would disregard the comity between the States and the National Government."[367] While such cases had the potential to expand greatly the reach of *Younger* abstention, the Supreme Court has subsequently limited the application of *Younger* where only private persons are parties to "civil proceedings involving certain orders that are uniquely in furtherance of the state courts' ability to perform their judicial functions."[368]

Almost all[369] courts that have considered *Younger* abstention in the context of probate-related matters have held it to be inapplicable.[370]

D. *COLORADO RIVER* ABSTENTION

In *Colorado River Water Conservation District v. United States*,[371] the Supreme Court set forth the general principle that "[a]bstention from the

365. *See id.* at 417 (holding that the court should abstain from hearing state custody claim for children allegedly abused by parents); Trainor v. Hernandez, 431 U.S. 434, 493 (1977) (holding that the court should abstain from state claim to recover welfare payments obtained by fraud); Huffman v. Pursue, Ltd., 420 U.S. 592, 595, 607 (1975) (directing the court to apply *Younger* abstention principles in a state action to declare an obscene movie a nuisance).

366. Ohio Civil Rights Comm'n v. Dayton Christian Sch., Inc., 477 U.S. 619 (1986) (holding that district court should have abstained from reviewing an administrative complaint for employment discrimination); Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S. 423, 432–44 (1982) (holding that federal court should abstain from reviewing an attorney disciplinary proceeding).

367. Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 11 (1987) (refusing to enjoin successful plaintiff in state court proceeding from exercising its right to demand that the defendant post a bond as a condition of prosecuting an appeal where the state court defendant was claiming that it could not afford a bond and that the rule denied it due process). *See also* Juidice v. Vail, 430 U.S. 327, 337–39 (1977) (refusing to enjoin state court judges from using their statutory contempt procedures on the ground that they denied due process).

368. New Orleans Pub. Serv. Inc. v. Council of New Orleans, 491 U.S. 350, 367 (1989).

369. One court has applied it in the context of a purely private probate-related dispute, yet the court seemed completely to misunderstand the *Younger* doctrine. *See* Williams v. Adkinson, 792 F.Supp. 755, 766 (M.D. Ala. 1992) (reasoning that *Younger* applied because such suits involve the "important state interest in the 'orderly and just distribution of a decedent's property at death.'").

370. *See* Reinhardt v. Kelly, 164 F.3d 1296, 1302 (10th Cir. 1999); Celentano v. Furer, 602 F. Supp. 777, 781–82 (S.D.N.Y. 1985). In the related area of domestic relations matters, the Supreme Court in *Ankenbrandt v. Richards* held *Younger* abstention would not apply unless there were pending state proceedings and a valid assertion that there were important state interests at stake. 504 U.S. 689, 705 (1992).

371. 424 U.S. 800 (1976).

exercise of federal jurisdiction is the exception, not the rule,"[372] and that the federal courts have a "virtually unflagging obligation . . . to exercise the jurisdiction given them."[373] The court, however, found abstention is in some instances appropriate where there are parallel federal and state proceedings involving substantially the same parties and the same issues.[374]

The Court in *Colorado River* identified four factors that counsel in favor of a federal court abstaining in favor of a state forum: (1) where maintaining both actions would require the state and federal courts to exercise simultaneous jurisdiction over a single *res*; (2) if the state court forum is more convenient for the parties; (3) where the concurrent state proceedings were initiated before the federal proceedings; and (4) where doing so would avoid piecemeal litigation.[375] The Court has since added two factors weighing *against* abstention: (1) where federal law provides the rule of decision on the merits[376]; and (2) where the state court proceedings will probably be inadequate to protect the plaintiff's rights.[377]

In probate related matters, avoiding piecemeal litigation tends to be the focal point, and is most easily rejected if there are no pending state court proceedings,[378] if the plaintiff in the federal action is not party to the state probate proceedings,[379] or if the issues in the probate proceeding are different from those raised in the federal action.[380] In addition, since state probate courts often have jurisdiction only over the probate of the will and the administration of the estate, common law and statutory claims among parties will often need to be filed in some other court, such as a state court of general jurisdiction, and thus, declining jurisdiction will not avoid piecemeal litigation.[381] Moreover, in such circumstances, it seems the

372. *Id.* at 813.
373. *Id.* at 817.
374. *See id.* at 818.
375. *See id.* at 818–19.
376. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23, 26 (1983).
377. *Id.* at 26.
378. *See Bergeron*, 777 F.2d at 799.
379. *See* Celentano v. Furer, 602 F. Supp. 777, 782 (S.D.N.Y. 1985).
380. *See* Seay v. Dodge, No. 95 C 3643, 1995 WL 557361, at *8, *9 (N.D.Ill. Sept. 18, 1995). There is, however, authority suggesting that the federal and state actions need not be precisely identical: it is enough that "substantially the same parties are contemporaneously litigating substantially the same issues in another forum." Caminiti & Iatarola, Ltd. v. Behnke Warehousing, Inc., 962 F.2d 698, 700 (7th Cir. 1992).
381. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 20 (holding that under such circumstances, "a decision to allow [such claims] to be decided in federal rather than state court does not *cause* piecemeal resolution of the parties' underlying disputes," making abstention unwarranted) (emphasis added); Giardina v. Fontana, 733 F.2d 1047, 1053 (2d Cir. 1984). *See also Caminiti*, 962 F.2d at 703 (noting that where the probate court lacks jurisdiction over a particular claim as against a particular party, it

federal forum is, strictly speaking, the first concurrent forum in which jurisdiction was obtained, since the only other forum with concurrent jurisdiction would be a state court of general jurisdiction, in which a new action would have to be filed.[382] Where the issues raised in the federal action are the same as those raised in the state court action, however, the desire to avoid piecemeal litigation weighs in favor of abstention.[383]

E. *BRILLHART-WILTON* ABSTENTION

Under the Federal Declaratory Judgments Act ("FDJA"),[384] where an actual controversy exists, the federal courts have the authority to declare the rights of the parties vis-à-vis one another or vis-à-vis a piece of property. Such a declaration has the effect of a final judgment[385] and may have a preclusive effect in subsequent proceedings where the declaratory judgment involved a question of federal law.[386] Where suit is brought pursuant to the FDJA, federal courts have substantially greater discretion to abstain in favor of pending state court proceedings than is permitted under the *Colorado River* standard[387] because of the permissive wording of the FDJA.[388] Unlike *Colorado River* abstention, the Court has neither enumerated comprehensive factors for guiding the district court's abstention discretion with respect to suits brought pursuant to the FDJA, nor has it set forth the outer boundaries of the abstention discretion.[389] Rather, the Court has suggested only that the decision be guided by "considerations of practicality and wise judicial administration,"[390] and that

weighs against abstaining under *Colorado River*); United States v. Pikna, 880 F.2d 1578, 1582 (2d Cir. 1989) (holding a dismissal of a suit over which the state probate court would likely lack jurisdiction an abuse of discretion).

382. *Giardina*, 733 F.2d at 1053.

383. *Caminiti*, 962 F.2d at 701–02; Estate of Groper by Groper v. County of Santa Cruz, No. C-93-20925 RPA, 1994 WL 680041, at *4–*5 (N.D.Cal. Dec. 1, 1994).

384. 28 U.S.C. § 2201 (1994).

385. *See id.*

> In a case of actual controversy within its jurisdiction . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

Id.

386. Steffel v. Thompson, 415 U.S. 452, 476–78 (1974) (White, J., concurring); David L. Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW.U. L. REV. 759, 764, 769 (1979).

387. Wilton v. Seven Falls Co., 515 U.S. 277, 286–88 (1995).

388. *Id.* at 286 (quoting 28 U.S.C. § 2201(a) (1988 ed. Supp. V) providing the court "*may* declare the rights and other legal relations of any interested party seeking such declaration" (emphasis added)).

389. *See id.* at 290; Brillhart v. Excess Ins. Co., 316 U.S. 491, 495 (1942).

390. *Wilton*, 515 U.S. at 288.

the district court examine the scope of the pending state court proceeding, the nature of the available defenses, and whether the claims of all interested parties could satisfactorily be adjudicated.[391] All of these considerations are subject to review only for abuse of discretion.[392] As with *Pullman* abstention, the appropriate course is to stay the proceedings rather than dismiss them outright to protect against the possibility that the state court case might fail to resolve the controversy.[393]

While probate proceedings are pending, a party will sometimes file suit under the FDJA, based on the diversity of the parties, seeking a declaration as to the validity of a trust or other similar instrument, even though the validity of the instrument can or is being litigated in the probate proceedings.[394] In such instances, federal courts generally exercise their broad, unbounded discretion to decline jurisdiction, usually reasoning it would be vexatious and uneconomical for the federal court to proceed where a parallel state court suit is addressing the exact same question.[395]

F. ROOKER-FELDMAN DOCTRINE

The *Rooker-Feldman* doctrine holds that the federal district courts lack jurisdiction over collateral attacks on judgments rendered in state court proceedings.[396] The rationale for the doctrine is that the statutory grant of subject matter jurisdiction to the federal district courts is strictly original, and for district courts to entertain actions to reverse or modify the judgments of state courts due to errors, even constitutional errors, would be an exercise of appellate jurisdiction, and only the Supreme Court has been granted appellate jurisdiction over judgments rendered by the states' highest courts.[397] This doctrine is thus invoked if a litigant attempts directly to challenge the judgment of a state probate court in an independent federal court action.[398]

391. *Id.* at 282–83; *Brillhart*, 316 U.S. at 495.

392. *Wilton*, 515 U.S. at 289–90.

393. *Id.* at 288 n.2.

394. *E.g.*, Fay v. Fitzgerald, 478 F.2d 181 (2d Cir. 1973); *In re* Thomas & Agnes Carvel Found., 36 F. Supp.2d 144, 152 (S.D.N.Y. 1991) (requesting declaration as to the validity of a reciprocal agreement to execute mirror image wills); Davis v. Hunter, 323 F. Supp. 976, 978–80 (D. Conn. 1970) (requesting declaration that inter vivos trust is invalid).

395. *Fay*, 478 F.2d at 183. *Accord In re* Thomas & Agnes Carvel Found., 36 F. Supp.2d at 153–54; Cenker v. Cenker, 660 F. Supp. 793, 796 (E.D. MI 1987); DiTinno v. DiTinno, 554 F. Supp. 996, 1000 (D. Mass. 1983).

396. *See* District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 476 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 414–16 (1923).

397. *Rooker*, 263 U.S. at 415–16.

398. *See* Williams v. Adkinson, 792 F.Supp. 755, 761–62 (M.D. Ala. 1992).

G. EQUITY CAN ONLY "DO JUSTICE COMPLETELY"

A well-established principle dictates that "a court of equity ought to do justice completely and not by halves."[399] Thus, where an equity court has jurisdiction over only one aspect of a suit but not another, it will decline jurisdiction. Accordingly, some federal courts have declined jurisdiction over probate-related matters falling outside the probate exception when there are related matters to be decided that fall within the probate exception. Thus, where the decedent's capacity to execute a will as well as an inter vivos trust is in dispute, courts have invoked this principle to decline jurisdiction over the validity of the inter vivos trust, even though that is outside of the probate exception, since the validity of the will must be adjudicated in another forum.[400] Additionally, where there is a dispute over the validity of a testamentary instrument as well as its interpretation, federal courts have declined to construe the terms of the instrument on the ground that its validity is still being adjudicated in ongoing probate proceedings.[401]

H. "JAMBALAYA" ABSTENTION

A number of courts adjudicating probate-related matters have either abstained or suggested they could abstain on grounds other than those contained in the recognized categories of abstention. These courts frequently rely on the greater expertise of state courts in dealing with such issues based on the state courts' daily experience,[402] familiarity with the litigation,[403] and the greater interest of the states in the outcome of the litigation.[404] Abstaining courts also cite judicial economy,[405] federalism,[406] and the intertwining of federal and state court proceedings.[407] Abstaining

399. Camp v. Boyd, 229 U.S. 530, 551 (1913). *Accord* Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 117 (D. Or. 1957) (citing Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 46 (1909)).

400. Davis v. Hunter, 323 F. Supp. 976, 978–80 (D. Conn. 1970).

401. *Jackson*, 153 F. Supp. at 116–18.

402. *See* Rice v. Rice Found., 610 F.2d 471, 477 (7th Cir. 1979); Bassler v. Arrowood, 500 F.2d 138, 142–43 (8th Cir. 1974); *Cenker*, 660 F. Supp. at 795–96; Rousseau v. United States Trust Co. of NY, 422 F. Supp. 447, 459 (S.D.N.Y. 1976).

403. *See Rice*, 610 F.2d at 478; Pappas v. Travlos, 662 F. Supp. 1149, 1150 (N.D. Ill. 1987); *Cenker*, 660 F. Supp. at 795–96.

404. *See Pappas*, 662 F. Supp. at 1151–52; *Cenker*, 660 F. Supp. at 795–96.

405. *Reichman*, 465 F.2d at 18; Jones v. Harper, 55 F. Supp. 2d 530, 534 (S.D.W. Va. 1999); *Rousseau*, 422 F. Supp. at 459.

406. *Jones*, 55 F. Supp. 2d at 534.

407. *See Rice*, 610 F.2d at 478; *Pappas*, 662 F. Supp. at 1151–52; *Cenker*, 660 F. Supp. at 795–96.

courts, however, provide little basis for determining their authority to abstain under these circumstances.

I. ABSTENTION INVOLVING SPECIALIZED STATUTORY GRANTS OF JURISDICTION

In *Markham v. Allen*,[408] the Supreme Court, after holding that the suit did not fall within the probate exception, considered whether the federal court should nonetheless have abstained in light of ongoing state court proceedings, and the fact that the suit involved issues of state law.[409] The Court rejected the argument that the mere need to interpret state law was a sufficient basis for abstention,[410] and held that where a substantive federal statute specially confers jurisdiction on the district court independent of the statutes generally governing federal court jurisdiction, abstention is not appropriate.[411]

Thus, under *Markham*, abstention in a probate-related matter would not be appropriate where suit is brought under a federal substantive statute for which the federal courts have subject matter jurisdiction independent of the general grant of federal question jurisdiction contained in § 1331. Accordingly, civil rights actions brought pursuant to §§ 1983, 1985 and 1986,[412] suits brought under the RICO statute,[413] and statutory interpleader actions[414]—the provisions under which most non-diversity probate-related

408. 326 U.S 490 (1946).

409. *Id.* at 495.

410. *Id.*

411. *Id.* at 495–96.

412. *See* 28 U.S.C. § 1343(a) (1994).

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42; (2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent; (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Id.

413. *See* 18 U.S.C. § 1964(a) (1994) ("The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders."); *id.* § 1964(c) ("Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court.").

414. *See* 28 U.S.C. § 1335 (1994) ("The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader.").

suits arise[415]—would seem to present situations where abstention would not be warranted under *Markham*.

VI. PARSING THE PROBATE EXCEPTION

The various formulae established by the federal appeals courts for determining whether a suit falls within the probate exception[416] provide a rough guide for determining when the probate exception applies. As shown above, however, the formulae fail to provide courts with an accurate means of determining whether a given probate-related suit falls within the exception.

While no court has explicitly broken down the probate exception into its component parts, one can infer from the Supreme Court's precedents that the exception ought to be viewed as an amalgam of five distinct rules: the *Erie* doctrine, the limits on Congress' grant of subject matter jurisdiction to the federal courts, *custodia legis* (the doctrine of prior exclusive jurisdiction), the Case or Controversy requirement, and prudential abstention. Only by applying these five rules in tandem can one determine whether a given suit falls within the probate exception.

A. STEP 1: THE *ERIE* DOCTRINE

The Supreme Court's probate exception precedents have not directly considered the *Erie* aspect of the exception because all but one of the Court's probate exception precedents pre-date the 1938 *Erie* decision.[417] Prior to *Erie* and its progeny, the federal courts' equity jurisdiction was uniform throughout the country,[418] and thus it was unnecessary for the federal courts to consider whether a given equitable or legal remedy was provided for under state law. Consequently, the Court's probate exception precedents do not address this issue.

Yet today it goes without saying that when a federal court exercises diversity jurisdiction over a claim, it must apply the law of the state in

415. *See supra* Part II.B.2.b.

416. *See supra* Part II.B.1.

417. *Markham v. Allen* is the only post-*Erie* probate-exception precedent. Sutton v. English, 246 U.S. 199 (1918); Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33 (1909); Farrell v. O'Brien, 199 U.S. 89 (1905); Byers v. McAuley, 149 U.S. 608 (1893); Hess v. Reynolds, 113 U.S. 73 (1885); Gaines v. Fuentes, 92 U.S. 10 (1875); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503 (1874); Payne v. Hook, 74 U.S. (7 Wall.) 425 (1868); Gaines v. Chew, 43 U.S. (2 How.) 619 (1844).

418. *E.g.*, *Payne*, 74 U.S. (7 Wall.) at 430 (noting the equity power of the federal courts is uniform throughout the country and equal to that of the English high court of chancery).

which it sits as the rule of decision for that claim.[419] Accordingly, in determining whether a federal court can entertain a probate-related cause of action, reference to state law is often necessary. For example, if an heir files a diversity suit alleging an independent common law tort claim for intentional interference with an expectation of an inheritance, the first step is to determine whether state law recognizes such a cause of action.[420] If there is no such cause of action under state law, the suit is not dismissed for lack of subject matter jurisdiction, but rather for failure to state a claim for which relief can be granted.[421]

B. STEP 2: SCOPE OF THE FEDERAL COURTS' SUBJECT MATTER JURISDICTION

The mere existence of a legal or equitable remedy under state law is not enough for a federal court to exercise diversity jurisdiction over a probate-related cause of action. For there to be statutory federal court subject matter jurisdiction, the legal or equitable remedy must fall within the traditional scope of the English courts of chancery and common law in 1789.[422] Thus, if a state abolishes its probate courts and vests its courts of general jurisdiction with jurisdiction over the probate of wills, a federal court sitting in diversity would not, under the current interpretation of the statutory grant of subject matter jurisdiction, be able to exercise jurisdiction over an action to probate the will.[423]

The various formulae developed by the federal courts fail to capture this step in the probate exception analysis. Because the "route" test allows

419. *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

420. *See generally* Allen v. Hall, 139 F.3d 716 (9th Cir. 1998); Firestone v. Galbreath, 25 F.3d 323 (6th Cir. 1994); Moore v. Graybeal, 843 F.2d 706, 710 (3d Cir. 1988); DeWitt v. Duce, 675 F.2d 670 (5th Cir. 1982).

421. *Compare* FED. R. CIV. P. 12(b)(1) (action dismissed for lack of jurisdiction over the subject matter), *with* FED. R. CIV. P. 12(b)(6) (action dismissed for failure to state a claim upon which relief can be granted because no cause of action existed under federal statute). *See also* Hartford Fire Ins. Co. v. California, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting).

422. *See* Guaranty Trust Co. of N.Y. v. York, 326 U.S. 99, 105 (1945) The Court in *Guaranty Trust Co. of N.Y.* held that notwithstanding the *Erie* doctrine and its applicability to suits in equity, it is not the case:

> that whatever equitable remedy is available in a State court must be available in a diversity suit in a federal court . . . . Equitable relief in a federal court is of course subject to restrictions: the suit must be within the traditional scope of equity as historically evolved in the English Court of Chancery.

Id.

423. *Cf.* Hamilton v. Nielsen, 678 F.2d 709, 710 (7th Cir. 1982) ("This is not to say, of course, that federal courts can now probate wills in Illinois because the state has abolished its specialized probate courts. Probate remains a peculiarly local function which federal courts are ill equipped to perform.").

federal court jurisdiction where a remedy is available in a state court of general jurisdiction, it would incorrectly conclude that the federal court has subject matter jurisdiction over challenges to the validity of a will where state law provided such a legal or equitable cause of action. Under the "practical" test, where the state has eliminated its separate probate courts, federal court jurisdiction would be appropriate under the "relative expertise" prong of the test. Where the state provides for an independent action to challenge the validity of a will, federal court jurisdiction would be appropriate under the "judicial economy" prong of the test. To be sure, the "nature of claim" test would prevent the federal court from adjudicating a state-created equitable or legal action challenging the validity of a will admitted to probate, as that would go to the "validity" of the instrument. Yet it would fail to capture the various exceptions to the ecclesiastical courts' exclusive jurisdiction over such challenges in eighteenth-century England.

Since the historical limitation on federal court subject matter jurisdiction is a mere gloss on the general statutory grants of subject matter jurisdiction and is not a constitutional limitation, where Congress creates a federal legal or equitable remedy and specifically provides for federal court subject matter jurisdiction over such actions, as with the RICO statute, this step in the analytical framework of the probate exception would be inapplicable.[424]

C. STEP 3: *CUSTODIA LEGIS*

The "route" test for determining when the probate exception applies turns on whether the particular action could be heard in a state court of general jurisdiction, or if it is cognizable only in a state probate court. If the latter, federal court diversity jurisdiction does not exist.[425] To be sure, even some of the older Supreme Court cases have made reference to there being federal jurisdiction where an action can be brought in the state courts of general jurisdiction.[426]

424. *Cf*. Markham v. Allen, 326 U.S. 490, 495–96 (1946) (holding where a federal substantive statute specially confers subject matter jurisdiction on the federal district courts independently of the statutes governing generally the jurisdiction of the federal courts, prudential abstention is not appropriate); *Ashton*, 918 F.2d at 1072 (holding the probate exception inapplicable to suits brought under the federal interpleader statute).

425. *See supra* Part II.B.1.b.

426. *See* Gaines v. Fuentes, 92 U.S. 10, 20–21 (1875); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 519–20 (1874).

Yet this would fly in the face of firmly established precedent holding that the states cannot defeat the federal constitutional and statutory right of a diverse party to remove a suit to federal court (or to file it there as an original matter) by mere internal arrangement of the distribution of jurisdiction between their probate courts and their courts of general jurisdiction.[427]

What the "route" test is really trying to capture is nothing more than a short-hand approximation of the *custodia legis* doctrine, under which two courts cannot exercise concurrent jurisdiction over a proceeding in rem. As a general rule, when a controversy is relegated by state law to the state probate courts (as opposed to the state courts of general jurisdiction), it is usually because it is part of the ongoing in rem proceeding and not an independent in personam action. But since a state could choose to vest its probate courts with jurisdiction over independent in personam actions, such as wrongful death suits or actions by creditors, the "route" test works only as a close approximation of the doctrine of *custodia legis*, and cannot always be correct.

427. *See* Waterman v. Canal-Louisiana Bank & Trust Co., 215 U.S. 33, 43–44 (1909) (holding a federal court has subject matter jurisdiction to adjudicate suits by creditors, legatees, and heirs to establish their claims against an estate, notwithstanding state statutes giving state probate courts exclusive jurisdiction over such suits); Clark v. Bever, 139 U.S. 96, 102–03 (1891); Hess v. Reynolds, 113 U.S. 73, 77 (1885) ("[T]he controverted question of debt or no debt is one which, if the representative of the decedent is a citizen of a State different from that of the other party, the party properly situated has a right, given by the Constitution of the United States, to have tried originally, or by removal in a court of the United States, which cannot be defeated by State statutes enacted for the more convenient settlement of estates of decedents."); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868) (holding the constitutional and statutory right of a citizen of one state to have their suit against a citizen of another state heard in a federal tribunal would be abrogated if diversity jurisdiction were subject to the internal distribution of judicial power within a state); Greyhound Lines, Inc. v. Lexington State Bank & Trust Co., 604 F.2d 1151, 1154–55 (8th Cir. 1979) (holding the decision of state to give county courts exclusive jurisdiction over claims against the estates of decedents does not act as a restriction on federal court diversity jurisdiction); Swan v. Estate of Monette, 400 F.2d 274, 276 (8th Cir. 1968) (citing Yonley v. Lavender, 88 U.S. (21 Wall.) 276 (1874); *Beach*, 269 F.2d at 372–73 (citing McClellan v. Carland, 217 U.S. 268, 281–82 (1910)); Borer v. Chapman, 119 U.S. 587 (1887); *Hess*, 113 U.S. at 76–77; *Gaines*, 92 U.S. at 10 (holding if something is not deemed to be a "purely probate matter" the federal court's jurisdiction is not ousted by the mere internal arrangement of the state courts by way of putting a matter within the exclusive jurisdiction of the probate courts); Barnes v. Brandrup, 506 F. Supp. 396, 399 (S.D.N.Y. 1981) (citing Beach v. Rome Trust Co., 269 F.2d 367, 373 (2d Cir. 1959) for the proposition that controversies that were not regarded as probate matters in 1789 could not be kept from federal court jurisdiction based on internal arrangements of the state courts); Bryden v. Davis, 522 F. Supp. 1168, 1171 (E.D. Mo. 1981) (noting states cannot impose restraints on federal jurisdiction by creating probate courts and vesting them with exclusive jurisdiction); Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 111–12 (D. Or. 1957) (holding the states cannot limit federal court jurisdiction, and that if a right was enforceable in the English High Court of Chancery in 1789 and could be enforced in personam in some state court – any court in the state, even a probate court, then there can still be federal court jurisdiction).

Indeed, the *custodia legis* rule underlies the principle that while a federal court sitting in diversity can establish the debts against the estate, the debt established must take the place and share of the estate as administered by the probate court. The debt established cannot be enforced by process directly against the property of the decedent, since for the federal court to order the distribution of the assets of an estate that is being administered by a state probate court would mean that both courts were exercising jurisdiction over the same *res*.[428]

Accordingly, the issue is not in what court the action can be brought, but whether it is an independent *inter partes* action. The Supreme Court has explained that "action or suit *inter partes*" refers:

> only to independent controversies *inter partes*, and not to mere controversies which may arise on an application to probate a will because the state law provides for notice, or to disputes concerning the setting aside of a probate, when the remedy to set aside afforded by state law is a mere continuation of the probate proceeding.[429]

Under this step of the probate exception inquiry, the key is to examine the state's statutory scheme to determine whether the suit is a mere continuation of the proceedings to probate the will or is instead an independent *inter partes* action.[430] For example, where state law requires a suit challenging the will be brought before the same judge who is exercising jurisdiction over the probate of the will and the administration of the estate, the action will be considered to be a mere continuation of the

428. *See* Byers v. McAuley, 149 U.S. 608, 614 (1893). The Court reasoned "where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court." *Id.* Hence the statement in *Markham* that

> federal courts of equity have jurisdiction to entertain suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate 'to establish their claims' so long as the federal court does not interfere with the probate proceedings or assume general jurisdiction of the probate or control of the property in the custody of the state court.

Markham, 326 U.S. at 494.

429. Farrell v. O'Brien, 199 U.S. 89, 110 (1905) (emphasis in original). *See generally id.* at 114–16 (holding that where a proceeding to contest a will under state law can only be heard before the court that admitted the will to probate, and where the relief in that proceeding operates as against the entire world and not just the parties before the court, it is not an action *inter partes*); Sutton v. English, 246 U.S. 199, 207–08 (1918) (holding that where a suit to challenge a will must be brought in the court in which it was probated, and where the state courts of general jurisdiction have no original jurisdiction over actions to annul a will, a suit to annul a will is merely supplemental to the probate of the will, and there is thus no federal court jurisdiction); *Waterman*, 215 U.S. at 44 (noting that there is no federal court jurisdiction when the proceedings are in rem and are thus purely probate in character).

430. *See Sutton*, 246 U.S. at 205–06 (analyzing the statutory scheme for challenging a will in Texas); *Farrell*, 199 U.S. at 111–14 (analyzing the statutory scheme for challenging a will in Washington).

probate proceeding and not an independent *inter partes* action.[431] Moreover, if the result of the judgment arising from a challenge to the validity of a will were binding as against the whole world and not merely the parties to the suit, it would be a suit in rem rather than a suit *inter partes* and the federal court would lack jurisdiction over the suit. Even assuming the historical limitation on the scope of the statutory grant of subject matter jurisdiction does not bar adjudication of an independent action to challenge the validity of a will in federal court, the *custodia legis* doctrine might, depending on the state's statutory scheme. But since the *custodia legis* doctrine is basically a rule of first-come, first-served, the federal court would not be barred from exercising jurisdiction over an action challenging the validity of a will—even if such an action is deemed to be part of the ongoing probate proceedings—if the federal action is filed prior to the commencement of any state probate proceedings.

D. STEP 4: CASE OR CONTROVERSY

Some courts have questioned whether probate matters are justiciable "cases or controversies" within the meaning of Article III.[432] In *Gaines v. Fuentes*,[433] however, the Supreme Court distinguished an action to probate a will from an action challenging a will. The Court reasoned that the mere probate of a will is an action in rem, which does not necessarily, and in fact seldom does, involve any case or controversy between parties within the meaning of Article III.[434] But once a dispute arises concerning the validity or construction of a will, an Article III controversy arises.[435] Accordingly, once a will has been probated, an action by a legatee, heir or other claimant against an executor is a case or controversy within the meaning of Article III,[436] as is a suit seeking a declaration as to heirship or the construction or validity of a will.[437]

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431. *See Sutton*, 246 U.S. at 207–08; *Farrell*, 199 U.S. at 114–16.

432. *E.g.*, Allen v. Markham, 147 F.2d 136 (9th Cir. 1945), *rev'd*, 326 U.S. 490 (1946); Galleher v. Grant, 160 F. Supp. 88, 94 (N.D. Ill. 1958); Rice v. Rice Found., 610 F.2d 471, 475 & n.6 (7th Cir. 1979).

433. 92 U.S. 10 (1875).

434. *Id.* at 21–22.

435. *Id.* at 22.

> [J]urisdiction as to wills, and their probate as such, is neither included in nor excepted out of the grant of judicial power to the courts of the United States. So far as it is *ex parte* and merely administrative, it is not conferred, and it cannot be exercised by them at all until, in a case at law or in equity, 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.

Ellis v. Davis, 109 U.S. 485, 496–97 (1883).

436. Akin v. Louisiana Nat'l Bank, 322 F.2d 749, 751 (5th Cir. 1963).

437. Jackson v. U.S. Nat'l Bank, 153 F. Supp. 104, 108 (D. Or. 1957).

Thus, although the historical limitation on federal court subject matter jurisdiction is not constitutionally mandated and can easily be overruled by Congress, at least a small part of the exception has constitutional underpinnings. Yet in most probate exception cases, an Article III controversy will have arisen. The inquiry into whether a case or controversy exists, however, must be separated from the question of whether the controversy is a "civil action" within the meaning of the statutory grants of subject matter jurisdiction to the federal courts,[438] which is subject to the historical gloss discussed above.

E. STEP 5: ABSTENTION

Finally, assuming a suit involving a probate-related matter survives the four steps discussed above, the court must consider whether it should nonetheless abstain in accordance with the parameters of the prudential abstention doctrines discussed in Part V.

VII. CONCLUSION

In the fourteenth century King Edward III of England stripped the ecclesiastical courts of the power directly to administer estates because the church clergy were converting the deceaseds' estates for their own use.[439] Although the modern-day, U.S. equivalent of the ecclesiastical courts—the probate courts—are not controlled by churches, ironically enough, the scenario discussed in the introduction illustrates how our present system of relegating probate and probate-related matters to state probate courts can permit religious groups to pillage the assets of the deceased in a manner reminiscent of pre-fourteenth century ecclesiastical practice.

The validity of the historical gloss on the statutory grant of subject matter jurisdiction to the federal courts is dubious, and when coupled with the expansive use of prudential abstention, seems little more than an effort by the federal courts to dump unwanted cases from their docket. With respect to diversity, the result is to relegate out-of-state litigants to a type of state court in which the risk of prejudice against out-of-state litigants presents the paradigmatic example of a suit that ought to be heard in federal court. When courts apply the probate exception to probate-related suits filed under RICO and other federal statutes, litigants are denied important federal rights.

438. *See id.*

439. *See* HOLDSWORTH, *supra* note 129, at 627.

If the federal courts will not reconsider the historical gloss on the diversity statute, they should actually follow eighteenth-century English practice, which as demonstrated in this Article allowed the courts of equity and common law to exercise jurisdiction over a great deal of probate-related matters, including any suit related to trusts, wills of land, and even some challenges to the validity of wills. Additionally, where an action falls within the historic scope of law or equity jurisdiction, the federal courts should limit their use of prudential abstention to the existing categories of abstention rather than creating new, result-oriented ones.

Finally, this Article illustrates that if the courts will not reverse course, Congress has the authority under Article III to do so, and concludes that fidelity to the principles underlying the establishment of a federal judiciary necessitate such a change.