

FEDERAL QUESTIONS AND THE PROBATE EXCEPTION

From time to time, contests over decedents' estates arrive in the federal courts. One such case began when a hotel magnate, dividing his empire among the children of his first and second marriages, appointed an executor in his will.¹ As a daughter of the second marriage saw it, the executor administered the estate in a way that favored the children of the first marriage.² So she sued — alleging, among other things, “fraudulent interstate communications” that entitled her to recover under the Racketeer Influenced and Corrupt Organizations Act³ (RICO).⁴ To hear her claims, she chose a federal district court.⁵

Whether a federal court may hear such claims, however, turns on the “probate exception.” The exception says that federal courts lack subject matter jurisdiction to probate wills or to administer decedents' estates.⁶ But the boundaries of this principle are far from clear. Whether the probate exception can apply at all to a claim under a federal law like RICO is a question almost unexplored,⁷ a particularly hidden turn within “one of the most mysterious and esoteric branches of the law of federal jurisdiction.”⁸ Decisions often steer around the issue altogether, as the court of appeals did when it encountered the daughter's RICO claim.⁹ And when they do reach the question, answers split.¹⁰

¹ *Glassie v. Doucette*, 55 F.4th 58, 62 (1st Cir. 2022). This account reflects the case's posture. *Id.* n.1.

² *Id.* at 62.

³ 18 U.S.C. §§ 1961–1968.

⁴ *Glassie*, 55 F.4th at 62.

⁵ *Id.*; see also *Glassie v. Doucette*, Nos. NP-2019-0213 & NC-2012-0261, 2020 R.I. Super. LEXIS 98, at *2 (Nov. 6, 2020) (describing “a serpentine procedural morass”).

⁶ *Marshall v. Marshall*, 547 U.S. 293, 311–12 (2006).

⁷ See *Glassie*, 55 F.4th at 71 n.9; John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 PROB. L.J. 77, 114 & n.201, 128 (1997); Allison Elvert Graves, Commentary, *Marshall v. Marshall: The Past, Present, and Future of the Probate Exception to Federal Jurisdiction*, 59 ALA. L. REV. 1643, 1657 (2008); Bradley G. Silverman, Note, *Federal Questions and the Domestic-Relations Exception*, 125 YALE L.J. 1364, 1427 n.335 (2016); see also *infra* note 101. For a previous analysis focusing on constitutional structure, see Gillian Nagler, Note, *The Seventh Circuit Turns a Blind Eye to the Playmate: The Application of the Probate Exception After Marshall v. Marshall*, 2 SEVENTH CIR. REV. 62, 85 (2006). This Note's title draws from Silverman, *supra*.

⁸ *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1982) (Posner, J.). The American Law Institute once “abandoned an attempt to define the limits imposed by the ‘probate exception’ because of ‘the amorphous state of the law.’” Winkler, *supra* note 7, at 77 n.3 (quoting David P. Currie, *The Federal Courts and the American Law Institute* (pt. 2), 36 U. CHI. L. REV. 268, 319 (1969)).

⁹ See *Glassie*, 55 F.4th at 69, 71 n.9.

¹⁰ Compare *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1565 (11th Cir. 1988) (limiting the probate exception to diversity cases), with *Jones v. Brennan*, 465 F.3d 304, 306–07 (7th Cir. 2006) (deciding against such limits). These two leading cases both involved claims with plausible jurisdictional footing beyond 28 U.S.C. § 1331. See *infra* note 155 and accompanying text. This Note at times uses “federal questions” to refer generally to claims based on federal law rather than a particular jurisdictional basis for such claims.

In response, this Note sets off into the “misty understandings”¹¹ of the probate exception to chart its relationship to federal questions. Part I explores the development of the exception, with particular attention to the Supreme Court’s recent grounding of the exception in the rule that one court’s assertion of in rem jurisdiction can preclude another’s.¹² Part II canvasses the lower court decisions that have followed that explanation. Those decisions show uncertainty over what the “prior exclusive jurisdiction” doctrine means in general, and what it means for federal question cases in particular. To address that uncertainty, Part III draws on connections between in rem jurisdiction and judgments to conclude that the prior exclusive jurisdiction doctrine is a rule of common law about the federal judicial power. Unless displaced by legislation, then, the probate exception can properly limit federal jurisdiction even over federal questions. And, based on the available evidence, so it does.

I. INTRODUCING THE PROBATE EXCEPTION

The probate exception, along with its cousin the domestic relations exception,¹³ breaks the rule that a federal court with jurisdiction over a case has a “virtually unflagging obligation” to hear it.¹⁴ The probate exception allows that obligation to lapse when a case implicates probate of a will or administration of a decedent’s estate.¹⁵ Just how closely a case must be related to such matters, however, is a question that has received varying answers over the years, with the Supreme Court lately expressing a dim view of exemptions from the unflagging obligation.¹⁶ This Part focuses accordingly on the Supreme Court’s most recent articulation of the exception in the case *Marshall v. Marshall*.¹⁷ But first,

¹¹ *Marshall*, 547 U.S. at 299.

¹² See *id.* at 311. As will be explained, it is not always obvious what counts as in rem jurisdiction for purposes of this rule. The general principle, however, is that a court with jurisdiction over the person of a defendant can render a judgment in personam binding the defendant personally, while a court with jurisdiction over property can render a judgment in rem establishing rights in that property (or res) against the world, or a judgment quasi in rem establishing rights in the property against specific defendants. See *Shaffer v. Heitner*, 433 U.S. 186, 199 & n.17 (1977). Probate of a will to establish its validity has thus been considered a proceeding in rem against a decedent’s estate. Lewis M. Simes, *The Administration of a Decedent’s Estate as a Proceeding In Rem*, 43 MICH. L. REV. 675, 684–87 (1945). Other cases have presented quasi in rem claims to be satisfied out of estate property. *E.g.*, *Williams v. Benedict*, 49 U.S. (8 How.) 107, 111 (1850). This Note groups these together as cases in rem.

¹³ See *Struck v. Cook Cnty. Pub. Guardian*, 508 F.3d 858, 859 (7th Cir. 2007). The domestic relations exception limits federal jurisdiction over matters such as divorce and child custody. *Id.*

¹⁴ *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). *But see* David L. Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. REV. 543, 548–70 (1985) (cataloguing exceptions).

¹⁵ *Marshall*, 547 U.S. at 311–12.

¹⁶ See Stephen I. Vladeck, *The Increasingly “Unflagging Obligation”: Federal Jurisdiction After Saudi Basic and Anna Nicole*, 42 TULSA L. REV. 553, 554 (2007).

¹⁷ 547 U.S. 293.

a quick journey through this garden of forking paths reveals a few other ways the probate exception might have worked out.

One of those untaken paths involves Article III's limits on the exercise of "[t]he judicial Power."¹⁸ Article III justiciability requires "a concrete, living contest between adversaries."¹⁹ Yet proceedings in probate can be "uncontested."²⁰ For instance, a will may be admitted to probate or an administrator appointed without contest.²¹ This motivated some nineteenth-century decisions to refuse jurisdiction over probate matters.²² But the substance of those decisions is the unremarkable conclusion that such matters are beyond Article III's boundaries only if no case or controversy is presented, not that they are nonjusticiable as a matter of course.²³

Another untaken path views the probate exception as a means of enforcing federalism. In this telling, the particular state interest in decedents' estates keeps probate in state courts.²⁴ It is not obvious how.²⁵ One opinion linked such concerns to Article III, distinguishing probate proceedings in the federal courts of the District of Columbia from those in courts restrained by "those limitations implicit in the rubric 'case or controversy' that spring from the Framers' anxiety not to intrude unduly upon the general jurisdiction of state courts."²⁶ Perhaps because this theory would entail "Cases" and "Controversies" meaning different things in different settings, it has had limited purchase, although a similar account has been offered under the auspices of the Tenth Amendment.²⁷

A. Congressional Acquiescence

The canonical account instead relates the exception to language that appears in both the Federal Constitution and the Judiciary Act of 1789.²⁸ Both Article III of the Constitution²⁹ and the initial version of

¹⁸ U.S. CONST. art. III, § 2.

¹⁹ *Coleman v. Miller*, 307 U.S. 433, 460 (1939) (opinion of Frankfurter, J.).

²⁰ James E. Pfander & Michael J.T. Downey, *In Search of the Probate Exception*, 67 VAND. L. REV. 1533, 1553 (2014).

²¹ See *Struck v. Cook Cnty. Pub. Guardian*, 508 F.3d 858, 859 (7th Cir. 2007).

²² E.g., *Ellis v. Davis*, 109 U.S. 485, 497 (1883); *Gaines v. Fuentes*, 92 U.S. 10, 21 (1876).

²³ *Ellis*, 109 U.S. at 496–97; see *Gaines*, 92 U.S. at 17, 22 (interpreting the jurisdictional limit as statutory).

²⁴ See *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276, 279 (1875).

²⁵ Although not the emphasis of this Note, one possibility is abstention. See, e.g., *Harper v. Pub. Serv. Comm'n*, 396 F.3d 348, 352–53 (4th Cir. 2005). But see *Cavanaugh v. Geballe*, 28 F.4th 428, 435 (2d Cir. 2022).

²⁶ *Glidden Co. v. Zdanok*, 370 U.S. 530, 581 & n.54 (1962) (plurality opinion).

²⁷ See *McCan v. First Nat'l Bank of Portland*, 139 F. Supp. 224, 228 (D. Or. 1954), *aff'd*, 229 F.2d 859 (9th Cir. 1956).

²⁸ See Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1499–500, 1499 n.105 (2001).

²⁹ U.S. CONST. art. III, § 2, cl. 1.

the diversity statute in the Judiciary Act³⁰ provided for jurisdiction in cases of “Law” and “Equity.” Because the ecclesiastical courts in England had a separate jurisdiction from law or equity, the story goes that this phrasing must have excluded the business of the ecclesiastical courts.³¹ And within the ecclesiastical jurisdiction were such matters as marriage and its incidents — hence the domestic relations exception — and the probate of wills.³²

But that story has gaps. Exclusive ecclesiastical jurisdiction over probate was limited to personal property.³³ Real property descended without probate, so rights in such property were tried at law or established in chancery.³⁴ Chancery could also administer estates or intervene to provide its special procedures and remedies.³⁵ All this filtered unevenly into colonial rules,³⁶ so even early decisions recognized the challenges in analogizing to English practice.³⁷ Those early decisions also mostly framed the issue in terms of collateral attack on probate court judgments.³⁸ And as territorial courts were established, the Supreme Court heard appeals from their decisions in what would have been the ecclesiastical jurisdiction.³⁹

This history makes it difficult to attribute the probate exception to the exclusion of ecclesiastical jurisdiction from the language of the Constitution or the Judiciary Act. The challenges are intensified by the fact that in 1948, the key jurisdictional statutes were restated to give the

³⁰ Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78–79.

³¹ Nicolas, *supra* note 28, at 1500. Another explanation is that such matters are not Article III cases or controversies as a result. *See Rice v. Rice Found.*, 610 F.2d 471, 475 n.6 (7th Cir. 1979). In any case, a thoroughly textualist approach may be anachronistic given the weight of received English practice. *See Gaines v. Fuentes*, 92 U.S. 10, 24 (1876) (Bradley, J., dissenting). One early decision on the probate exception simply ascribed it to “the common law.” *Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169, 175 (1827) (Story, J.). *Armstrong*, incidentally, involved the estate of General Tadeusz Kościuszko, whose executor seems to have considered heading to federal court in light of a federal question — government money owing to the estate. *See* Letter of Thomas Jefferson to William H. Crawford (Jan. 5, 1818), in 12 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES 319, 319 (J. Jefferson Looney ed., 2015). (The will ended up in the Orphan’s Court of the District of Columbia, where *Armstrong* remanded it for probate. 25 U.S. (12 Wheat.) at 176.)

³² Pfander & Downey, *supra* note 20, at 1544–45.

³³ Nicolas, *supra* note 28, at 1503–04, 1509.

³⁴ *Id.* at 1504–05.

³⁵ *Id.* at 1505–06, 1509–10, 1509 n.169; Pfander & Downey, *supra* note 20, at 1568.

³⁶ *See* Winkler, *supra* note 7, at 90–91, 91 nn.63–65; LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 35, 230–31 (4th ed. 2019); *see also* Nicolas, *supra* note 28, at 1514–19.

³⁷ *See* *Tompkins v. Tompkins*, 24 F. Cas. 40, 42–43 (Story, Circuit Justice, C.C.D.R.I. 1841) (No. 14,091).

³⁸ *See, e.g.,* *Spencer v. Spencer*, 22 F. Cas. 920, 920 (Story, Circuit Justice, C.C.D.R.I. 1813) (No. 13,233); *Armstrong v. Lear*, 25 U.S. (12 Wheat.) 169, 176 (1827) (Story, J.); *Thompson v. Tolmie*, 27 U.S. (2 Pet.) 157, 167–69 (1829); *Tarver v. Tarver*, 34 U.S. (9 Pet.) 174, 180 (1835); *Tompkins*, 24 F. Cas. at 43–44; *Fouvergne v. City of New Orleans*, 59 U.S. (18 How.) 470, 473 (1856); *see also* *Vandenheuvel v. United Ins. Co.*, 2 Johns. Cas. 127, 142–44 (N.Y. Sup. Ct. 1801) (opinion of Kent, J.), *rev’d*, 2 Cai. Cas. 217 (N.Y. 1802).

³⁹ *See* *Simms v. Simms*, 175 U.S. 162, 167–68 (1899); *De la Rama v. De la Rama*, 201 U.S. 303, 308 (1906).

federal district courts jurisdiction over “all civil actions,”⁴⁰ leaving little obvious statutory basis for excluding ecclesiastical matters in any case.

Perhaps taking advantage of the fact that the precedents did not inquire too far into the foundations of the exception,⁴¹ recent cases have worked toward resolving these tensions at least as a matter of doctrine. The theory is now that Congress has acquiesced in judicial decisions applying the probate exception, putting the exception on statutory footing.⁴² In *Ankenbrandt v. Richards*,⁴³ the Court thus located the domestic relations exception in “Congress’ apparent acceptance of th[e] construction of the diversity jurisdiction provisions in the years prior to 1948.”⁴⁴ The Supreme Court’s most recent decision on the probate exception, *Marshall v. Marshall*,⁴⁵ left this theory intact as an explanation for the probate exception too.⁴⁶

B. “Jurisdiction over the Same Res”

Marshall also linked the probate exception to the doctrine of prior exclusive jurisdiction.⁴⁷ That rule says “that, when one court is exercising *in rem* jurisdiction over a *res*” such as a decedent’s estate, “a second court will not assume *in rem* jurisdiction over the same *res*.”⁴⁸ This rule seems to have been shaped by a problem particular to the federal system, although it had English antecedents.⁴⁹ The problem is that a levy requires possession.⁵⁰ If state and federal process were to result in simultaneous levies, both the sheriff and the marshal might need to possess the property at the same time. Such a result might also draw into

⁴⁰ Act of June 25, 1948, ch. 646, §§ 1331–1332, 62 Stat. 869, 930 (codified as amended at 28 U.S.C. §§ 1331–1332).

⁴¹ See, e.g., *Fouvergne*, 59 U.S. (18 How.) at 473; *Byers v. McAuley*, 149 U.S. 608, 619 (1893); *Sutton v. English*, 246 U.S. 199, 205 (1918). At least one decision implied that the exception was statutory. See *Nicolas*, *supra* note 28, at 1522–24 (citing *Gaines v. Fuentes*, 92 U.S. 10, 19–20 (1876)).

⁴² “Acquiescence” can mean that Congress has accepted an interpretation of a statute by failing to respond, rather than that it has actively adopted such an interpretation by reenacting legislation. See William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69 (1988). This Note uses the term broadly.

⁴³ 504 U.S. 689 (1992).

⁴⁴ *Id.* at 700.

⁴⁵ 547 U.S. 293 (2006).

⁴⁶ *Id.* at 305–08 (reviewing *Ankenbrandt* at length and stating that “[l]ike the domestic relations exception, the probate exception has been linked to language contained in the Judiciary Act of 1789,” *id.* at 308).

⁴⁷ *Id.* at 311–12.

⁴⁸ *Id.* at 311. Probate and estate administration, although listed separately from “dispos[ition] of property” in *Marshall*, *id.* at 312, are plausibly within the scope of this principle. Compare *Lefkowitz v. Bank of N.Y.*, 528 F.3d 102, 106 (2d Cir. 2007) (alluding to this distinction), with *Princess Lida v. Thompson*, 305 U.S. 456, 467–68 (1939) (finding administration of a trust to implicate control of the trust *res*).

⁴⁹ These concerned the effect given foreign judgments in prize cases when admiralty jurisdiction was understood as “co-ordinate throughout the world.” *Croudson v. Leonard*, 8 U.S. (4 Cranch) 434, 435 (1808) (opinion of Johnson, J.); see also *id.* at 437–41 (opinion of Washington, J.).

⁵⁰ See, e.g., *Anthony v. Wood*, 96 N.Y. 180, 187 (1884) (applying state statute).

question the title passed at sale.⁵¹ Accordingly, it was found that a marshal's levy could not displace a sheriff's⁵² and vice versa.⁵³ To explain these necessary results, the theory was advanced that a state or federal court's in rem jurisdiction would exclude a subsequent jurisdiction over the same res by the other sovereign's courts.⁵⁴

Looming in the background of these decisions was the prospect of "an unpleasant conflict between courts of separate and independent jurisdiction"⁵⁵ — a conflict which, at least initially, it was not clear the federal courts would win.⁵⁶ Accordingly, one early case allowed state court jurisdiction over estate assets to limit a federal judgment on a debt against the estate's administrator.⁵⁷ The principle was then extended to unravel a judicial sale on the basis that "it would be strange indeed if State power was not competent to regulate the mode in which the assets of a deceased person should be sold and distributed."⁵⁸ It was even reasoned that a federal court sitting in equity could not "take bodily the administration of the estate out of the hands of the state court, and transfer it to its own forum," by rendering a decree binding the administrator to a certain distribution of assets.⁵⁹

For the most part, however, conflicting control of property could have only limited relevance within equity's in personam jurisdiction.⁶⁰ Whenever state law allowed a controversy between parties to proceed in equity, federal courts could thus hear it, even if probate was implicated.⁶¹ By the twentieth century, federal courts were permitted to hear any "controversies *inter partes*" maintainable in state court,⁶² including

⁵¹ See *Voorhees v. Jackson*, 35 U.S. (10 Pet.) 449, 473–75 (1836).

⁵² See *Hagan v. Lucas*, 35 U.S. (10 Pet.) 400, 403 (1836); *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849); *Taylor v. Carryl*, 61 U.S. (20 How.) 583, 598 (1858).

⁵³ See *Freeman v. Howe*, 65 U.S. (24 How.) 450, 457 (1861); *Covell v. Heyman*, 111 U.S. 176, 179 (1884); *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825); *Harris v. Dennie*, 28 U.S. (3 Pet.) 292, 304 (1830).

⁵⁴ *Peck*, 48 U.S. (7 How.) at 624–25; *Buck v. Colbath*, 70 U.S. (3 Wall.) 334, 341–45 (1866) (stating limits); *People's Bank v. Calhoun*, 102 U.S. 256, 261–62 (1880); *Farmers' Loan & Tr. Co. v. Lake St. Elevated R.R. Co.*, 177 U.S. 51, 61 (1900); see also *Winkler*, *supra* note 7, at 100–01. The modern statement is *Princess Lida v. Thompson*, 305 U.S. 456, 466 (1939).

⁵⁵ *Williams v. Benedict*, 49 U.S. (8 How.) 107, 112 (1850); see *Covell*, 111 U.S. at 182; *Lake St. Elevated*, 177 U.S. at 61. For instance, one court might replevy property seized under judicial process from the custody of another. See *Peck*, 48 U.S. (7 How.) at 625; see also *Slocum v. Mayberry*, 15 U.S. (2 Wheat.) 1, 9–10 (1817).

⁵⁶ See *Lane v. Vick*, 44 U.S. (3 How.) 464, 482 (1845) (McKinley, J., dissenting).

⁵⁷ *Williams*, 49 U.S. (8 How.) at 111–12.

⁵⁸ *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276, 280 (1875); see *id.* at 279, 281.

⁵⁹ *Byers v. McAuley*, 149 U.S. 608, 612 (1893).

⁶⁰ *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1869); see *Borer v. Chapman*, 119 U.S. 587, 600–01 (1887).

⁶¹ See *Gaines v. Fuentes*, 92 U.S. 10, 22 (1876); cf. *In re Broderick's Will*, 88 U.S. (21 Wall.) 503, 517 (1875) (limiting federal equity jurisdiction based on state law); *Sutton v. English*, 246 U.S. 199, 208 (1918) (similar).

⁶² *Farrell v. O'Brien*, 199 U.S. 89, 110 (1905).

decrees effectively awarding a share in an estate, so long as “the prior possession of the state probate court” was not disturbed.⁶³

For several decades, the key case navigating these opposing sets of precedents after the merger of law and equity was *Markham v. Allen*.⁶⁴ The decedent devised property to German residents during the Second World War.⁶⁵ At probate, heirs moved to set aside the will, but a federal declaratory judgment action was brought by a custodian under a war-time law who maintained that the estate belonged to the government.⁶⁶ The Court held that a decree would merely establish the custodian’s rights in the estate alongside other claims, and would “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.”⁶⁷ This became the rule. Its phrasing, however, caused uncertainty about just how much “interfer[ing] with the probate proceedings” would bring the probate exception into issue.⁶⁸

It was to such uncertainty that the Supreme Court addressed its decision in *Marshall*. The petitioner Vickie Lynn Marshall, widely known as Anna Nicole Smith, was the widow of a man who had not provided for her in his will.⁶⁹ During probate, Marshall filed for bankruptcy.⁷⁰ A dispute ensued in the bankruptcy court involving a defamation claim by her stepson,⁷¹ to which Marshall responded that the stepson had tortiously interfered with an expected gift from her husband.⁷² On this basis she was awarded compensatory and punitive damages, but the Ninth Circuit reversed, reasoning that claims about tortious interference with a testamentary gift were best left for probate courts.⁷³

Not so, said the Supreme Court. The Court explained that *Markham*’s language about “interference” simply reflected “the general principle that, when one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.”⁷⁴ Accordingly, the Court said, federal courts could not probate or annul a will, administer an estate, or “dispose of property that is in the custody of a state probate court.”⁷⁵ But Marshall’s tort claim involved none of these, so she was entitled to a proper federal forum.⁷⁶

⁶³ *Waterman v. Canal-La. Bank & Tr. Co.*, 215 U.S. 33, 45 (1909).

⁶⁴ 326 U.S. 490 (1946).

⁶⁵ *Id.* at 492.

⁶⁶ *Id.*

⁶⁷ *Id.* at 494.

⁶⁸ *Nicolas*, *supra* note 28, at 1488; *Graves*, *supra* note 7, at 1645.

⁶⁹ *Marshall v. Marshall*, 547 U.S. 293, 300 (2006).

⁷⁰ *Id.*

⁷¹ *Id.* at 300–01.

⁷² *Id.* at 301.

⁷³ *Id.* at 304.

⁷⁴ *Id.* at 311.

⁷⁵ *Id.* at 312; *see also id.* at 311.

⁷⁶ *Id.* at 312.

II. THE EXCEPTION TODAY

This Part explores what *Marshall's* restatement of the probate exception has meant for the exception in general, and what it has meant for claims under federal law in particular. After *Marshall*, the lower courts have continued to struggle to discern the scope of the exception. Such ambiguity, together with a paucity of case law, has made it hard to tell how the exception relates to federal questions. Although the decisions provide some guideposts, it is not so clear where those guideposts lead.

A. Markham's Resilience

When it replaced *Markham's* interference standard with the prior exclusive jurisdiction rule, *Marshall* specified the activities “reserve[d] to state probate courts”⁷⁷: probate of a will, annulment of a will, administration of an estate, and distribution of property in a probate court's custody.⁷⁸ When the lower courts have needed to fix the boundaries of these categories, however, *Markham's* notion of interference has at times seemed to exert a tacit influence.

For instance, some decisions have characterized in personam remedies as distributions of estate property.⁷⁹ The easy cases are constructive trusts and equitable liens on specific estate assets, since, third parties aside, such equitable rights can bear a close resemblance to legal ones.⁸⁰ The harder cases involve causes of action that turn on property rights, such as conversion, and remedies that happen to diminish the probate estate. The Second Circuit thus viewed relief for conversion and unjust enrichment as “disgorgement of funds . . . under the control of the Probate Court.”⁸¹ The Third Circuit likewise considered an injunction to pay future dividends “dispos[ing] of property . . . in the custody of a state probate court.”⁸² The Eleventh Circuit even suggested that a damages remedy could trigger the probate exception simply by running against a decedent's estate.⁸³

Alternatively, courts may frame remedies involving the valuation of estate property as estate administration. This can happen when a

⁷⁷ *Id.* at 311.

⁷⁸ *Id.* at 311–12.

⁷⁹ See, e.g., *Turton v. Turton*, 644 F.2d 344, 348 (5th Cir. 1981).

⁸⁰ See, e.g., *Stuart v. Hatcher*, 757 F. App'x 807, 810 (11th Cir. 2018) (per curiam); cf. Austin Wakeman Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 271, 278 (1917) (analyzing true trusts).

⁸¹ *Lefkowitz v. Bank of N.Y.*, 528 F.3d 102, 107 (2d Cir. 2007); see also *Mercer v. Bank of N.Y. Mellon, N.A.*, 609 F. App'x 677, 678–79 (2d Cir. 2015) (applying exception to testamentary trust).

⁸² *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220, 230 (3d Cir. 2008) (quoting *Marshall*, 547 U.S. at 312); see also *id.* at 224–25.

⁸³ See *Fisher v. PNC Bank, N.A.*, 2 F.4th 1352, 1357–58 (11th Cir. 2021) (finding exception did not apply because damages ran against a third party instead of the estate).

plaintiff asks for an accounting.⁸⁴ Reviewing a fiduciary breach claim against an executor after *Marshall*, the Eleventh Circuit reaffirmed case law forbidding the “premature distribution or valuation of estate assets,” “look[ed] past the plaintiff’s theory of relief and consider[ed] the ‘effect a judgment would have on the jurisdiction of the probate court,’” and decided that an accounting would usurp the probate court’s role.⁸⁵ The Sixth Circuit framed the problem in terms of prior in rem jurisdiction⁸⁶ and stated that relief for fiduciary breach or fraud could not include damages “equal to the amount of the probate disbursements” because that “would be tantamount to setting aside the will.”⁸⁷

Finally, some courts have simply carried on with probate exception purposivism. Before *Marshall*, the Seventh Circuit had a notably open-textured approach to the probate exception.⁸⁸ After *Marshall*, it still does.⁸⁹ In one case, Judge Posner described the prior exclusive jurisdiction rule and added that “[t]he purpose of a legal doctrine frequently limits its scope,” such as “[t]he comparative advantage of state courts” “in core probate and domestic-relations matters.”⁹⁰

And yet, other decisions stick closely to *Marshall*.⁹¹ Its test has proven easier to apply to inter vivos transfers that do not involve estate assets.⁹² The fact that a claim does involve such assets is not always enough to trigger the exception either.⁹³ A few decisions have even read *Marshall* for all it might be worth. The Fifth Circuit allowed an injunction forbidding participation in probate proceedings.⁹⁴ The Eighth Circuit approved a constructive trust on estate property.⁹⁵ The Tenth

⁸⁴ Compare *Waterman v. Canal-La. Bank & Tr. Co.*, 215 U.S. 33, 45 (1909) (declining to order an accounting), with *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430–31 (1869) (allowing such relief).

⁸⁵ *Stuart*, 757 F. App’x at 809 (quoting *Turton v. Turton*, 644 F.2d 344, 347–48 (5th Cir. 1981)); see also *id.* at 810.

⁸⁶ *Wisecarver v. Moore*, 489 F.3d 747, 751 (6th Cir. 2007).

⁸⁷ *Id.* at 750 n.1.

⁸⁸ See *Nicolas*, *supra* note 28, at 1490–91.

⁸⁹ See, e.g., *Sykes v. Cook Cnty. Cir. Ct. Prob. Div.*, 837 F.3d 736, 741 (7th Cir. 2016).

⁹⁰ *Struck v. Cook Cnty. Pub. Guardian*, 508 F.3d 858, 860 (7th Cir. 2007). *Struck* involved the domestic relations exception, but the court analyzed the exceptions as coextensive. *Id.* at 859–60.

⁹¹ Even the more purposive decisions state that *Marshall* limited the exception. See, e.g., *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220, 227 (3d Cir. 2008); *Lefkowitz v. Bank of N.Y.*, 528 F.3d 102, 105–06 (2d Cir. 2007); see also *Goncalves v. Rady Child.’s Hosp. San Diego*, 865 F.3d 1237, 1252 (9th Cir. 2017).

⁹² See *Kinder Morgan, Inc. v. Crout*, 814 F. App’x 811, 816 (5th Cir. 2020); *Osborn v. Griffin*, 865 F.3d 417, 435 (6th Cir. 2017); *Curtis v. Brunsting*, 704 F.3d 406, 409–10 (5th Cir. 2013); *Gustafson v. zumBrunner*, 546 F.3d 398, 400 (7th Cir. 2008); *Lee Graham Shopping Ctr., LLC v. Est. of Kirsch*, 777 F.3d 678, 681, 683 (4th Cir. 2015). But see *Oliver v. Hines*, 943 F. Supp. 2d 634, 637 & n.10, 638 & n.11 (E.D. Va. 2013).

⁹³ See *Glassie v. Doucette*, 55 F.4th 58, 68–69 (1st Cir. 2022).

⁹⁴ *Hill v. Washburne*, 953 F.3d 296, 301, 308 n.6 (5th Cir. 2020) (per curiam).

⁹⁵ *Crain v. Crain*, 72 F.4th 269, 277 (8th Cir. 2023); see *Chevalier v. Est. of Barnhart*, 803 F.3d 789, 802 (6th Cir. 2015).

Circuit permitted jurisdiction over a claim against an estate.⁹⁶ Taken together, then, the decisions are in some degree of disarray.⁹⁷

B. Federal Questions and the Exception

With the probate exception itself so difficult to discern, it is unsurprising that there is little clarity on how the exception applies in federal question cases — even if it is often called “the probate exception to diversity jurisdiction.”⁹⁸ As a sketch of the landscape, this section describes decisions under the bankruptcy code, the civil rights laws, the Employee Retirement Income Security Act of 1974⁹⁹ (ERISA), and RICO. Grouping these cases together is appropriate in part because key cases speak generically about the probate exception’s relationship to “federal questions” even when jurisdictional provisions other than 28 U.S.C. § 1331 seem relevant.¹⁰⁰ Many of the decisions have apparently assumed that the probate exception applies in such cases, but several have reached the opposite conclusion. Rarely, however, is the question pondered in depth.¹⁰¹

1. *Bankruptcy*. — Bankruptcy and probate sometimes intersect, since both bankruptcy and probate courts work in rem to match claims to a division of property,¹⁰² deciding adversarial controversies along the way.¹⁰³ One example is *Marshall*, although in reasoning that the probate exception did not apply, the Court left open whether it could have applied to another bankruptcy claim.¹⁰⁴ *Harris v. Zion’s Savings Bank & Trust Co.*¹⁰⁵ makes for better illustration. The decedent had filed for bankruptcy, and the petitioner was her administrator.¹⁰⁶ After abatement of the bankruptcy proceedings because of the decedent’s passing, the bank foreclosed on and purchased real property of the decedent’s.¹⁰⁷ During a redemption period extending after the sale, the

⁹⁶ *Dunlap v. Nielsen*, 771 F. App’x 846, 850–51 (10th Cir. 2019).

⁹⁷ See *Silk v. Bond*, 65 F.4th 445, 455 & n.12 (9th Cir. 2023); *Glassie*, 55 F.4th at 68.

⁹⁸ *Marshall v. Marshall (In re Marshall)*, 392 F.3d 1118, 1132 (9th Cir. 2004), *rev’d on other grounds*, 547 U.S. 293 (2006); see, e.g., *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220, 226 (3d Cir. 2008); *Lefkowitz v. Bank of N.Y.*, 528 F.3d 102, 105 (2d Cir. 2007).

⁹⁹ Pub. L. No. 93-406, 88 Stat. 829 (codified as amended in scattered sections of 26 and 29 U.S.C.).

¹⁰⁰ See *infra* notes 155–56 and accompanying text.

¹⁰¹ In relevant cases, the Supreme Court has found either that federal and state rights are not in conflict, *Harris v. Zion’s Sav. Bank & Tr. Co.*, 317 U.S. 447, 451 (1943); *Pufahl v. Est. of Parks*, 299 U.S. 217, 224–27, 232 (1936), or that any such conflict falls outside the probate exception, *Marshall*, 547 U.S. at 308; *Markham v. Allen*, 326 U.S. 490, 494–95 (1946).

¹⁰² *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362 (2006) (bankruptcy); *In re Broderick’s Will*, 88 U.S. (21 Wall.) 503, 509 (1875) (probate).

¹⁰³ See *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 457 (2004) (Thomas, J., dissenting) (bankruptcy); *Simes*, *supra* note 12, at 687 (probate).

¹⁰⁴ *Marshall*, 547 U.S. at 308–09; see *Brown-Thomas v. Hynie*, 441 F. Supp. 3d 180, 213 n.13 (D.S.C. 2019).

¹⁰⁵ 317 U.S. 447.

¹⁰⁶ *Id.* at 448.

¹⁰⁷ *Id.*

administrator — without authority from Utah’s probate code, but with a then-colorable basis in the Bankruptcy Act — asked the bankruptcy court to resume proceedings.¹⁰⁸ It declined.¹⁰⁹ The question was thus whether federal bankruptcy law superseded state probate law.¹¹⁰ The Court answered:

When we reflect that the settlement and distribution of decedents’ estates, and the right to succeed to the ownership of realty and personalty are peculiarly matters of state law; that the federal courts have no probate jurisdiction and have sedulously refrained, *even in diversity cases*, from interfering with the operations of state tribunals invested with that jurisdiction, we naturally incline to a construction . . . consistent with these principles. . . . Congress has extended the benefits of the act only to administrators who can lawfully elect to avail of them. Thus conflict between federal and state power is avoided and the two are accommodated.¹¹¹

Other bankruptcy cases have steered clear of federal-state tension too.¹¹² In the case *In re Goerg*,¹¹³ considering whether an estate could be a debtor in bankruptcy, the Eleventh Circuit cited ecclesiastical jurisdiction and the Supremacy Clause to explain that the probate exception did not apply to federal question cases, and then avoided the issue by statutory interpretation anyway.¹¹⁴ After *Marshall*, claims characterized as in personam may avoid the probate exception in similar fashion.¹¹⁵

Sometimes, however, conflict is unavoidable. When that happens, *Goerg* is the primary authority for the proposition that the probate exception does not apply in bankruptcy. On the other side is the Ninth Circuit’s *Marshall* opinion, which reasoned that the probate exception could apply based in part on the fact that the Supreme Court had not foreclosed the possibility in *Harris* or *Markham*, and in part on the principle that a bankruptcy case might “interfere[] with state probate proceedings” no less than one in diversity.¹¹⁶ One post-*Marshall* decision reframed this reasoning in terms of prior in rem jurisdiction: a probate court and a bankruptcy court, it explained, are in a “race to the res.”¹¹⁷

¹⁰⁸ *Id.* at 448–49.

¹⁰⁹ *Id.* at 449.

¹¹⁰ *Id.* at 450.

¹¹¹ *Id.* at 450–51 (emphasis added).

¹¹² *E.g.*, *In re Ring*, 138 F. App’x 834, 836–37 (7th Cir. 2005); *see also* *Marshall v. Marshall*, 547 U.S. 293, 309 n.3 (2006).

¹¹³ *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562 (11th Cir. 1988).

¹¹⁴ *Id.* at 1563, 1565–66, 1565 n.8.

¹¹⁵ *See* Off. Comm. of Unsecured Creditors of Enron Corp. v. Whalen (*In re Enron Corp.*), 357 B.R. 32, 36 n.2 (Bankr. S.D.N.Y. 2006).

¹¹⁶ *Marshall v. Marshall (In re Marshall)*, 392 F.3d 1118, 1132 (9th Cir. 2004) (quoting *Hilton v. Mumaw*, 522 F.2d 588, 593 (9th Cir. 1975)), *rev’d*, 547 U.S. 293.

¹¹⁷ *In re Est. of Taplin*, 641 B.R. 236, 244 (Bankr. E.D. Cal. 2022); *see also* *Pufahl v. Est. of Parks*, 299 U.S. 217, 226 (1936) (“[O]ne having a right to go into the federal court, either by reason of

2. *Section 1983*. — The probate exception can also overlap with claims under 42 U.S.C. § 1983 to redress deprivations of federal rights by state officials. Even if this provision might lend itself to a second try at probate,¹¹⁸ one might still think that putting federal constitutional rights at stake would weigh against the probate exception. Yet the opposite has happened. The courts of appeals have instead applied the exception to shunt § 1983 claims into summary dispositions.¹¹⁹

Apart from *Goerg* and the Ninth Circuit's *Marshall* decision, this context provides two of the key opinions on whether the probate exception applies to federal claims. Both said it did. The first, *Tonti v. Petropoulos*,¹²⁰ predated *Marshall*. Slightly simplifying, the probate court determined that the decedent, and not the appellant, owned certain stock.¹²¹ Various appeals ensued in which the appellant alleged deprivation of his due process rights.¹²² When it was the Sixth Circuit's turn to review these claims, the court said, "[i]t is well settled that the federal courts have no probate jurisdiction," cited thirteen cases, and affirmed.¹²³

After *Marshall*, the Seventh Circuit considered the similar case of *Jones v. Brennan*.¹²⁴ The plaintiff alleged that the defendants, who included probate judges and county officials, "conspired to deprive her of property without due process of law," for example by the probate judges' receipt of *ex parte* communications.¹²⁵ She sought damages.¹²⁶ In considering whether the probate exception applied, Judge Posner described the origins of the exception in the diversity provisions of the Judiciary Act of 1789, explained that its logic applied equally to the federal question statute, and remanded the due process claims accordingly.¹²⁷

diversity of citizenship, or because he is a federal officer, cannot obtain a judgment or decree entitling him to interfere with the administration of the *res* by the court having its possession."). Some decisions do suggest that this principle may be subject to regulation by Congress. See *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849) ("[T]he District Court had no supervisory power over the State court, . . . unless it has been conferred by the bankrupt act." (applying Act of Aug. 19, 1841, ch. 9, 5 Stat. 440, *repealed by* Act of Mar. 3, 1843, ch. 82, 5 Stat. 614)); *Covell v. Heyman*, 111 U.S. 176, 179–80 (1884).

¹¹⁸ See, e.g., *Jones v. Brennan*, 465 F.3d 304, 305 (7th Cir. 2006) (considering such an argument). But see *Rooker v. Fid. Tr. Co.*, 263 U.S. 413, 416 (1923); *D.C. Ct. of Appeals v. Feldman*, 460 U.S. 462, 476 (1983).

¹¹⁹ See cases cited *infra* note 128.

¹²⁰ 656 F.2d 212 (6th Cir. 1981).

¹²¹ *Id.* at 213–14.

¹²² *Id.* at 215.

¹²³ *Id.*; see also *id.* at 215–16.

¹²⁴ 465 F.3d 304 (7th Cir. 2006).

¹²⁵ *Id.* at 305.

¹²⁶ *Id.*

¹²⁷ *Id.* at 306–09 (citing Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78–79).

Other § 1983 appeals have been more summarily dispatched by the probate exception.¹²⁸ In this there are hints of misgivings about what *Tonti* described as “misuse of 42 U.S.C. § 1983 in an attempt to obtain federal jurisdiction,”¹²⁹ but perhaps there is also something ironic about due process claims receiving especially abbreviated review. Either way, for the probate exception to apply to these claims sounding in constitutional rights suggests that it must be powerful indeed.

3. *ERISA and RICO*. — Other federal statutes can also implicate the probate exception. In ERISA cases, the exception can depend on whether employee benefits are part of a decedent’s estate. When money has already been paid into the estate, federal courts may decline to order its redistribution.¹³⁰ Conversely, when benefits are payable to third parties, beneficiaries may sue for their payment,¹³¹ or the plan administrator may bring an interpleader action to determine the beneficiaries,¹³² and in such cases the benefits may not be considered part of the estate.¹³³ ERISA cases can also present ambiguities about whether formally in personam remedies like equitable reimbursement are in rem in substance.¹³⁴

RICO claims present similar issues. The gravamen of RICO claims may resemble the tortious interference alleged in *Marshall*, and perhaps for that reason some courts have allowed jurisdiction over such claims.¹³⁵ Nonetheless, a court applying a broader approach to the probate exception may find that it cannot grant certain types of relief.¹³⁶ Conversely, the Eleventh Circuit, following its restrictive approach in *Goerg*, has described the exception as inapplicable in such cases.¹³⁷

These decisions suggest an “equilibrium adjustment” quality of the probate exception.¹³⁸ Wealth increasingly passes by nonprobate means

¹²⁸ *E.g.*, *Profita v. Andersen*, 771 F. App’x 414, 414 (9th Cir. 2019); *Sibley v. Sibley*, No. 11-7051, 2011 WL 4920955, at *1 (D.C. Cir. Sept. 27, 2011) (per curiam); *Huber-Happy v. Est. of Rankin*, 233 F. App’x 789, 789 (10th Cir. 2007).

¹²⁹ *Tonti v. Petropoulos*, 656 F.2d 212, 216 (6th Cir. 1981).

¹³⁰ *See In re Boisseau*, No. 16-CV-0549, 2017 U.S. Dist. LEXIS 11964, at *8 (N.D.N.Y. Jan. 30, 2017); *Carpenters’ Pension Tr. Fund v. Century Truss Co.*, No. 14-11535, 2015 U.S. Dist. LEXIS 39106, at *15 (E.D. Mich. Mar. 27, 2015).

¹³¹ 29 U.S.C. § 1132(a)(1).

¹³² *Id.* § 1132(a)(3).

¹³³ *See Kinder Morgan, Inc. v. Crout*, 814 F. App’x 811, 815–16 (5th Cir. 2020) (per curiam); *Primerica Life Ins. Co. v. Starr*, No. 22-cv-00212, 2023 U.S. Dist. LEXIS 4590, at *15–16 (C.D. Cal. Jan. 9, 2023).

¹³⁴ *See Am. Elec. Power Serv. Corp. v. Fitch*, No. 22-3005, 2022 WL 3794841, at *4–5 (6th Cir. Aug. 30, 2022) (per curiam); *id.* at *8 (Guy, J., dissenting).

¹³⁵ *See Gherini v. Lagomarsino*, 258 F. App’x 81, 83 (9th Cir. 2007); *Rothberg v. Marger*, No. 11-5497, 2013 WL 1314699, at *9 (D.N.J. Mar. 28, 2013).

¹³⁶ *Rothberg*, 2013 WL 1314699, at *8 & n.4.

¹³⁷ *Glickstein v. Sun Bank/Mia., N.A.*, 922 F.2d 666, 672 n.13 (11th Cir. 1991).

¹³⁸ *Cf.* Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 481 (2011).

such as the employee benefits governed by ERISA.¹³⁹ Claims under RICO, like those under § 1983, may sometimes be repackaged complaints about maladministration.¹⁴⁰ Dismissing such claims even when they are only incidentally connected to probate might be justified as preserving a traditional domain of the states from unwarranted erosion by new federal rights. But whether federal courts are authorized to ward off such encroachment is another question entirely.

III. MAKING SENSE OF *MARSHALL*

In navigating the conflicting and ambiguous¹⁴¹ views of the probate exception in the courts of appeals, *Marshall* suggests looking to congressional acquiescence and to the prior exclusive jurisdiction rule. Both imply that the probate exception applies to at least some federal questions. Both also imply that Congress can limit the exception. Yet it matters which of these theories one credits, given the separation of powers concerns raised when courts deny a federal forum to causes of action afforded by Congress. For its part, *Marshall* showed more enthusiasm for the prior jurisdiction rule than for its ostensible statutory basis. This Part considers accordingly whether the rule can stand on its own in federal question cases as a principle of common law.

A. Congressional Acquiescence

Marshall ambiguously endorsed *Ankenbrandt*'s acquiescence theory.¹⁴² But that theory's implications for federal questions are unclear. The problem is that *Ankenbrandt* traced the domestic relations and, by implication, the probate exceptions to congressional acquiescence in judicial construction of the Judiciary Act of 1789,¹⁴³ but there was no grant of general federal question jurisdiction in that Act.¹⁴⁴

Judge Posner addressed this problem in *Jones*. The key, he said, was the use of identical "law" and "equity" language to confer federal question jurisdiction in the Judiciary Act of 1875 — "by which time the probate and especially the domestic-relations exceptions had become established in the case law."¹⁴⁵ The most logical result, in his view, was "that the exceptions were probably intended to apply to federal-question

¹³⁹ John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1110–11 (1984).

¹⁴⁰ See, e.g., *Glassie v. Doucette*, 559 F. Supp. 3d 52, 60 n.13 (D.R.I. 2021) ("The defendants maintain that the inclusion of a RICO count in the Complaint is a transparent attempt to remove the case from the probate exception."), *rev'd*, 55 F.4th 58 (1st Cir. 2022).

¹⁴¹ See, e.g., *Kinder Morgan, Inc. v. Crout*, 814 F. App'x 811, 815 (5th Cir. 2020) (per curiam) (suggesting doubts about the application of the probate exception to federal questions).

¹⁴² See *Marshall v. Marshall*, 547 U.S. 293, 307 (2006).

¹⁴³ See *Ankenbrandt v. Richards*, 504 U.S. 689, 700–01 (1992).

¹⁴⁴ See FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 65 (1928).

¹⁴⁵ *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006).

cases too.”¹⁴⁶ Both the diversity and federal question statutes were restated in 1948 to give federal district courts jurisdiction in “all civil actions” — into which language *Ankenbrandt* interpreted congressional acquiescence — and Judge Posner found “no good reason to strain to give a different meaning to” that “identical language.”¹⁴⁷

The rebuttal argument has been advanced most fully in domestic relations cases. In fact, the probate and domestic relations exceptions may be diverging on this point.¹⁴⁸ Several courts of appeals have viewed the domestic relations exception as inapplicable in federal question cases.¹⁴⁹ One factor may be that federal constitutional rights “permeate state family law.”¹⁵⁰ The decisions also, however, cite *Ankenbrandt*’s focus on the diversity statute, suggesting that its reasoning “plainly does not apply to” the federal question statute.¹⁵¹ If they are correct, *Marshall*’s acceptance of *Ankenbrandt*’s reasoning could imply a similar result for the probate exception.

Yet *Ankenbrandt*’s reasoning seems to go just as far in federal question cases. Although *Ankenbrandt* indeed focused on diversity jurisdiction, the process of acquiescence it described included the diversity provision’s reenactment in 1875 alongside the new federal question provision.¹⁵² And the phrase “all suits of a civil nature at common law or in equity” appeared *only once* in the 1875 Act, modified first by the federal question provision and then by the diversity provision.¹⁵³ To be sure, Congress could at that point have legislated against only the limited background of a probate exception defined through diversity cases.¹⁵⁴ But for its acquiescence in the exception to extend no further would either give language in the 1875 Act two meanings at once or cut its meaning loose from the text altogether — results at odds with an interpretation of the probate exception tied to that same text.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Such a statement is necessarily tentative, given the few decisions in point on the probate exception.

¹⁴⁹ *E.g.*, *Atwood v. Fort Peck Tribal Ct. Assiniboine*, 513 F.3d 943, 947 (9th Cir. 2008); *United States v. Bailey*, 115 F.3d 1222, 1231 (5th Cir. 1997); *United States v. Johnson*, 114 F.3d 476, 481 (4th Cir. 1997); *Flood v. Braaten*, 727 F.2d 303, 308 (3d Cir. 1984); *see Deem v. DiMella-Deem*, 941 F.3d 618, 623–24 (2d Cir. 2019) (finding the exception inapplicable but supporting abstention in such cases). *But see Kowalski v. Boliker*, 893 F.3d 987, 995 (7th Cir. 2018) (taking a contrary view); Silverman, *supra* note 7, at 1382–85 (describing inconsistencies in the case law); Meredith Johnson Harbach, *Is the Family a Federal Question?*, 66 WASH. & LEE L. REV. 131, 146–48 (2009).

¹⁵⁰ *Flood*, 727 F.2d at 307 n.17. Another factor may be federal legislation in the area. *See id.* at 304–05.

¹⁵¹ *Atwood*, 513 F.3d at 947; *see Bailey*, 115 F.3d at 1231; *Johnson*, 114 F.3d at 481.

¹⁵² *See Ankenbrandt v. Richards*, 504 U.S. 689, 700 (1992). Notably, the decision referred to “interpretation of the prior statutes” to 1948. *Id.* (emphasis added).

¹⁵³ Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

¹⁵⁴ *See Winkler, supra* note 7, at 114 & n.201. *But see* Peter J. Smith, *Textualism and Jurisdiction*, 108 COLUM. L. REV. 1883, 1930 (2008) (situating “stingy interpretation of the diversity statute” within a “larger pattern” of jurisdictional narrowing).

The analysis to this point centers on 28 U.S.C. § 1331 despite the other jurisdictional provisions for claims under federal law. Key decisions have disregarded these provisions and treated “federal questions” in unison,¹⁵⁵ perhaps because only § 1331 jurisdiction has been pleaded¹⁵⁶ or perhaps because the decisions have really turned on general policy considerations. Nonetheless, *Ankenbrandt* could imply that legislative acquiescence has incorporated the probate exception into these statutes too.

For instance, *Ankenbrandt*’s reasoning could translate to bankruptcy. The Bankruptcy Act of 1898¹⁵⁷ conferred jurisdiction on the district courts “at law and in equity” before 1948,¹⁵⁸ plausibly excluding probate jurisdiction by mirroring the diversity and federal question provisions.¹⁵⁹ At least one appellate decision arguably read the exception into this language.¹⁶⁰ Although bankruptcy jurisdiction has expanded over the years,¹⁶¹ legislative history suggests that jurisdiction over claims “related to” bankruptcy may not have been intended to reach probate proceedings.¹⁶² To the extent that such an interpretation relies on presumptions, however, it must contend with the enumerated status of the bankruptcy power.¹⁶³

Other cases are closer still. The 1871 text of the Civil Rights Act referred to liability “in any action at law, suit in equity, or other proper proceeding for redress.”¹⁶⁴ The 1874 revisions preserved this broad language¹⁶⁵ but added a jurisdictional grant over “suits at law or in equity,”¹⁶⁶ followed by the usual streamlining in 1948.¹⁶⁷ RICO also

¹⁵⁵ Compare *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1565 (11th Cir. 1988) (referring to “federal question jurisdiction, the jurisdiction invoked in bankruptcy cases”), and *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006) (analyzing jurisdiction for § 1983 claim under 28 U.S.C. § 1331 but not § 1343(a)(3)), with *Marshall v. Marshall*, 547 U.S. 293, 308 (2006) (citing 28 U.S.C. § 1334), and *Markham v. Allen*, 326 U.S. 490, 493 (1946) (citing previous versions of 28 U.S.C. § 1345 and 50 U.S.C. § 4316).

¹⁵⁶ Cf. *Aldinger v. Howard*, 427 U.S. 1, 4 n.3 (1976).

¹⁵⁷ Act of July 1, 1898, ch. 541, 30 Stat. 544.

¹⁵⁸ *Id.* § 2, 30 Stat. at 545–46; see Act of June 25, 1948, ch. 646, § 1334, 62 Stat. 869, 931 (codified as amended at 28 U.S.C. § 1334) (granting jurisdiction “of all matters and proceedings in bankruptcy”).

¹⁵⁹ Cf. *United States v. Freeman*, 44 U.S. (3 How.) 556, 564–65 (1845).

¹⁶⁰ *Bank of Hamburg v. Tri-State Sav. & Loan Ass’n*, 69 F.2d 436, 438 (8th Cir. 1934); see also *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849). *Bank of Hamburg* cited a jurisdictional requirement since relaxed. See 69 F.2d at 437; *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995).

¹⁶¹ See S. REP. NO. 95-989, at 153–54 (1978).

¹⁶² H.R. REP. NO. 95-595, at 343 (1977).

¹⁶³ See U.S. CONST. art. I, § 8, cl. 4; *Goerg v. Parungao (In re Goerg)*, 844 F.2d 1562, 1565 (11th Cir. 1988); cf. *Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 362–63 (2006).

¹⁶⁴ Act of Apr. 20, 1871, ch. 22, § 1, 17 Stat. 13, 13 (codified as amended at 42 U.S.C. § 1983).

¹⁶⁵ 24 Rev. Stat. § 1979 (1874).

¹⁶⁶ 13 Rev. Stat. § 563(12) (1874) (granting district courts jurisdiction “[o]f all suits at law or in equity authorized by law”); see also *id.* § 629(16) (granting circuit courts jurisdiction “[o]f all suits authorized by law”).

¹⁶⁷ Act of June 25, 1948, ch. 646, § 1343, 62 Stat. 869, 932 (codified as amended at 28 U.S.C. § 1343).

approaches the fault lines of prior exclusive jurisdiction in a provision that authorizes jurisdiction over claims for disgorgement of unlawfully obtained assets.¹⁶⁸ Statutory interpleader has been understood to avoid the exception altogether.¹⁶⁹

In suggesting a statutory basis for the probate exception even in such close cases, *Marshall* may have inadvertently helped to secure it. The decision avoided describing the doctrine as prudential or as a rule of abstention, mitigating the constitutional questions raised by such jurisdictional limits¹⁷⁰ and guarding against reversal in the process.¹⁷¹ Moreover, statements in nineteenth-century cases abjuring any “probate jurisdiction” whatsoever¹⁷² can be read to sweep more broadly than the prior exclusive jurisdiction rule — and it seems plausible, on the theory of *Ankenbrandt*, that Congress has acquiesced in those understandings too.

At the same time, such acquiescence seems particularly unlikely when Congress has clearly intended broad extensions of federal rights, whether that is expressed in the jurisdictional provisions themselves, as with claims related to bankruptcy, or in grants of rights and remedies, as with § 1983.¹⁷³ Perhaps the probate exception is still in the background of such enactments. But at some point, such an interpretation seems to trade on legislative authority without much support in actual legislation.

B. “Jurisdiction over the Same Res”

Facing such uncertainties, this section turns to *Marshall*’s second guidepost, the prior exclusive jurisdiction rule. That rule may bring federal questions within the sweep of the probate exception, since federal jurisdiction over a res could be incompatible with prior state jurisdiction whether the federal court is deciding claims based on federal or state law.¹⁷⁴ There is authority for limiting the rule to diversity cases, but the distinction often goes unexplained.¹⁷⁵

¹⁶⁸ 18 U.S.C. § 1964(a). *But see* United States v. Sasso, 215 F.3d 283, 289–90 (2d Cir. 2000) (noting the prospective focus of this provision).

¹⁶⁹ 28 U.S.C. § 1335; *see* Ashton v. Josephine Bay Paul & C. Michael Paul Found., Inc., 918 F.2d 1065, 1072 & n.6 (2d Cir. 1990); JPMorgan Chase Bank, N.A. v. Black, No. 18-cv-03447, 2021 U.S. Dist. LEXIS 186098, at *19–23, *23 n.9 (N.D. Ill. Sept. 29, 2021); Nicolas, *supra* note 28, at 1406.

¹⁷⁰ Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 78–79, 104 (1984).

¹⁷¹ *Cf.* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 559 U.S. 393, 413–14 (2010).

¹⁷² *See, e.g.*, *Fouvergne v. City of New Orleans*, 59 U.S. (18 How.) 470, 473 (1856).

¹⁷³ *See* *Markham v. Allen*, 326 U.S. 490, 495–96 (1946).

¹⁷⁴ *See supra* notes 116–17 and accompanying text; *see also, e.g.*, *Dailey v. Nat’l Hockey League*, 987 F.2d 172, 178 (3d Cir. 1993).

¹⁷⁵ *See supra* note 117; *Covell v. Heyman*, 111 U.S. 176, 179–80 (1884) (“[T]he same principle protects the possession of property while thus held, by process issuing from State courts, against any disturbance under process of the courts of the United States; excepting, of course, those

One explanation for the narrower view could involve a choice of law issue related to the challenge of distinguishing *in rem* from *in personam* jurisdiction.¹⁷⁶ If the scope of the *res* or the types of claims barred by its custody are substantive questions under *Erie*,¹⁷⁷ then perhaps the probate exception simply reflects federal courts applying state law about the probate court's exclusive jurisdiction.¹⁷⁸ And then, the exception's rationale might run out in the federal question context. Although much of the probate exception case law predates *Erie*, the doctrine's themes were foreshadowed in a line of cases concerning the federal courts' construction of wills¹⁷⁹ and in a case that registered concerns about inequitable administration of the laws.¹⁸⁰

This explanation, however, is at odds with *Marshall's* emphasis that the probate exception was not up to the states to define through probate procedure or the law of decedents' estates.¹⁸¹ Although *Marshall* was not itself a diversity case, its concern about letting the states expand or contract federal jurisdiction implied that the exception was more than an application of substantive rules of decision under *Erie*.¹⁸² That implication lines up with the lower courts' general view that the exception can bar equitable remedies, which *Erie* doctrine leaves to federal law even in diversity cases.¹⁸³

But unmooring the scope of exclusive jurisdiction from state law, and making it a federal matter instead, leaves it without an obvious basis in positive law and raises the separation of powers questions that

cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States.”). *Covell* perhaps had in mind a state court whose assertion of jurisdiction “interfere[d] with the authority of the United States.” Cf. *Tarble's Case*, 80 U.S. (13 Wall.) 397, 404 (1872).

¹⁷⁶ See, e.g., *Three Keys Ltd. v. SR Util. Holding Co.*, 540 F.3d 220, 229 & n.9 (3d Cir. 2008) (“[T]he distinction between *in rem* and *in personam* is often as elusive as the boundary lines of the probate exception.”).

¹⁷⁷ *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

¹⁷⁸ See *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276, 279–80 (1875); *Williamson v. Berry*, 49 U.S. (8 How.) 495, 558 (1850) (Nelson, J., dissenting); *McKibben v. Chubb*, 840 F.2d 1525, 1529 (10th Cir. 1988); *Winkler*, *supra* note 7, at 131 & n.290; *Nicolas*, *supra* note 28, at 1541; see also *Pfander & Downey*, *supra* note 20, at 1558–59.

¹⁷⁹ Compare *Lane v. Vick*, 44 U.S. (3 How.) 464, 476 (1845), *Williamson*, 49 U.S. (8 How.) at 542–43, and *Daniel v. Whartenby*, 84 U.S. (17 Wall.) 639, 647 (1873), with *Lane*, 44 U.S. (3 How.) at 482 (McKinley, J., dissenting), and *De Vaughn v. Hutchinson*, 165 U.S. 566, 570, 576–77 (1897).

¹⁸⁰ *Yonley*, 88 U.S. (21 Wall.) at 280 (rejecting a rule that would apply differently “to the fortunate creditor who happens to be a citizen of another State”).

¹⁸¹ *Marshall v. Marshall*, 547 U.S. 293, 313–14 (2006) (“Texas may not reserve to its probate courts the exclusive right to adjudicate a transitory tort.”); see also *Payne v. Hook*, 74 U.S. (7 Wall.) 425, 430 (1869). As it happens, Texas no longer recognizes the cause of action in *Marshall*. *Archer v. Anderson*, 556 S.W.3d 228, 229 (Tex. 2018).

¹⁸² See *Evans v. Pearson Enters., Inc.*, 434 F.3d 839, 849 (6th Cir. 2006) (raising the prospect of “a state . . . purposefully moving whole bodies of law into its probate courts to constrict federal diversity jurisdiction”); *Beach v. Rome Tr. Co.*, 269 F.2d 367, 373 (2d Cir. 1959).

¹⁸³ See *Guar. Tr. Co. v. York*, 326 U.S. 99, 105 (1945) (citing *Payne*, 74 U.S. (7 Wall.) at 430); *Caprice L. Roberts, Remedies, Equity & Erie*, 52 AKRON L. REV. 493, 497–502 (2018).

have clouded the abstention doctrines.¹⁸⁴ It seems to let federal courts dismiss claims that, as *Marshall* pointed out, Congress has required them to hear.¹⁸⁵ Furthermore, federal rights are often in personam,¹⁸⁶ so as a practical matter this less formalistic approach may expand the probate exception in federal question cases. Steering between the Scylla of the states controlling the federal courts and the Charybdis of the courts' obligation to exercise jurisdiction, it is no wonder that even decisions faithfully applying *Marshall* for the moment have left open the option to interpret it less precisely in the future.¹⁸⁷

This tension explains why *Marshall* left intact *Ankenbrandt's* recourse to legislative imprimatur.¹⁸⁸ If Congress has truly established the probate exception by statute — incorporating it by acquiescence into Title 28 of the U.S. Code — then these problems are much diminished, since Congress may limit to some extent the jurisdiction and remedial powers of the federal courts.¹⁸⁹ Yet as described above, in this instance it is not clear that such an interpretation is a reasonable one.

One solution to this dilemma might involve justifying the probate exception as a doctrine of federal common law. Perhaps the probate exception is “procedural,” not necessarily in the *Erie* sense¹⁹⁰ but in the sense that it relates so closely to the federal judicial power that Article III licenses federal courts to formulate independent common law in the area.¹⁹¹ Instead of Congress adopting the probate exception by acquiescence, the theory would be that Congress has left this federal matter to the federal courts.¹⁹²

Although this federal valence of the probate exception stands in contrast to the interests of the states often in focus in the decisions, the early cases on prior exclusive jurisdiction lend support to this view. Even as those opinions alluded to values such as stability and comity, they also suggested a basis for decision in the connection between jurisdiction and judgments. Jurisdiction to decide a case entails the ability to render a

¹⁸⁴ See Vladeck, *supra* note 16, at 576–78; Redish, *supra* note 170, at 78–79; Richard H. Fallon, Jr., *Why Abstention Is Not Illegitimate*, 107 NW. U. L. REV. 847, 850, 855–56 (2013).

¹⁸⁵ *Marshall*, 547 U.S. at 298–99 (citing *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821)).

¹⁸⁶ Even bankruptcy has been characterized this way. See Ralph Brubaker, *On the Nature of Federal Bankruptcy Jurisdiction*, 41 WM. & MARY L. REV. 743, 850–51 (2000).

¹⁸⁷ See *Silk v. Bond*, 65 F.4th 445, 452 (9th Cir. 2023) (viewing contract claim keyed to estate's value as in personam, but taking a substantive view of the distinction between in rem and in personam claims).

¹⁸⁸ Cf. Fallon, *supra* note 184, at 850–51 (describing the tenuous statutory basis for some jurisdictional doctrines).

¹⁸⁹ *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449 (1850); *Lauf v. E.G. Shinner & Co.*, 303 U.S. 323, 330 (1938). But cf. *Silverman*, *supra* note 7, at 1402–03, 1403 n.215 (interpreting Article III to require appellate jurisdiction over federal questions in the domestic relations context).

¹⁹⁰ See *Roberts*, *supra* note 183, at 494 n.3.

¹⁹¹ See *Amy Coney Barrett*, *Procedural Common Law*, 94 VA. L. REV. 813, 820–22, 841 (2008).

¹⁹² Cf. *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716–18 (1996) (emphasizing the roots of abstention in judicial authority); see also *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447, 470–72 (1942) (Jackson, J., concurring) (describing a theory of implied legislative delegation).

judgment in the case.¹⁹³ And the defining characteristic of in rem jurisdiction is the conclusiveness of its judgments on “the world.”¹⁹⁴ But a race to a judgment in rem may cause uncertainty that precludes such conclusiveness. Whereas conflicting in personam obligations might be simpler to adjust, competing in rem cases risk vacuous judgments and hard-to-unwind title problems.¹⁹⁵ In keeping a court from giving effect to its jurisdiction with a conclusive judgment, such a result would run counter to the decisional power inherent in Article III courts.¹⁹⁶ One view might have it that in rem jurisdiction cannot exist under such circumstances at all.

The connection between jurisdiction and judgments helps to explain the metaphor of a probate court’s exclusive “custody” of an estate. The notion seems to beg the question of why such custody is exclusive in the first place. One answer could be that in rem jurisdiction requires the type of control over the res associated with possessory rights.¹⁹⁷ That need for control is at odds with the prospect for conflict introduced by concurrent proceedings in rem.¹⁹⁸ If the relevant feature of the probate court’s custody of the res is thus the power to make a conclusive disposition of rights in the res, then the way that the prior exclusive jurisdiction doctrine anticipates the conclusive effect of another court’s judgment might even classify it as a cousin of preclusion.¹⁹⁹

Whether federal in rem jurisdiction is possible may therefore turn on a relationship between state and federal judgments. And although the effect of state judgments is determined by state law under the federal full faith and credit statute,²⁰⁰ the effect of federal judgments is a matter of federal common law, unless Congress instructs otherwise.²⁰¹ That is because “it is in the nature of the judicial power to determine its own boundaries.”²⁰² When federal courts determine that they cannot give sufficient effect to their jurisdiction because of ongoing probate

¹⁹³ See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 23 (1825) (Marshall, C.J.).

¹⁹⁴ E.g., *In re Broderick’s Will*, 88 U.S. (21 Wall.) 503, 509, 519 (1875).

¹⁹⁵ See *Palmer v. Texas*, 212 U.S. 118, 129–30 (1909); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976). Contradictory injunctions can at least theoretically be modified to resolve an impasse.

¹⁹⁶ See *Muskrat v. United States*, 219 U.S. 346, 352–53 (1911).

¹⁹⁷ See Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 76, 88 (1985) (describing this association).

¹⁹⁸ See James Y. Stern, *Property, Exclusivity, and Jurisdiction*, 100 VA. L. REV. 111, 166 (2014).

¹⁹⁹ Both doctrines also reflect concern for comity and stability. See *Penn Gen. Cas. Co. v. Pennsylvania*, 294 U.S. 189, 195–96 (1935) (prior exclusive jurisdiction); *Allen v. McCurry*, 449 U.S. 90, 95–96 (1980) (preclusion).

²⁰⁰ *McCurry*, 449 U.S. at 96 (citing 28 U.S.C. § 1738); Ronan E. Degnan, *Federalized Res Judicata*, 85 YALE L.J. 741, 751 (1976). But see Stephen B. Burbank, *Interjurisdictional Preclusion and Federal Common Law: Toward a General Approach*, 70 CORNELL L. REV. 625, 639 (1985).

²⁰¹ See *Semtek Int’l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 507–08 (2001); see also Barrett, *supra* note 191, at 830–32, 830 n.50, 884 & n.208; Jay Tidmarsh & Brian J. Murray, *A Theory of Federal Common Law*, 100 NW. U. L. REV. 585, 612 (2006).

²⁰² Degnan, *supra* note 200, at 769.

proceedings, they seem to be doing just that — and thus interpreting the federal judicial power, a federal purview that is an appropriate subject for federal common law.²⁰³ This theory lets federal law determine the scope of federal judicial power, and it explains how jurisdiction can be absent when Congress has seemed to grant it.

Of course, the legitimacy of a common law of prior exclusive jurisdiction is a separate question from the content of that law. As a general matter, the analogy to preclusion suggests that federal courts might, for reasons of uniformity, look to state law as to the scope and nature of in rem probate jurisdiction, but that the “preclusive” effect of such jurisdiction on federal questions in federal courts might be a matter for those courts to decide.²⁰⁴ There might then be reasons other than *Erie* that could justify limiting the probate exception to diversity cases, such as the greater state interest in such cases (for instance, drawing from analogies to abstention²⁰⁵ or remedial discretion²⁰⁶). But those reasons seem unlikely to be keyed to the relationship between jurisdiction and effectiveness of judgments. To the extent that the probate exception is understood as a result of that relationship — and hence legitimated by it — it seems plausible for the “race to the res” to be triggered by competing state and federal in rem cases, regardless of whether the claims in those cases arise under federal or under state law.

To be sure, an important corollary to a common law theory of the probate exception is that Congress can displace it.²⁰⁷ In federal question cases, this seems particularly likely, for all the reasons noted above.²⁰⁸ Yet this is far from saying that Congress always acts to do so.²⁰⁹ After all, Congress may leave procedural common law in place as it legislates without ratifying it, and it may not be unreasonable to presume as

²⁰³ See Barrett, *supra* note 191, at 839–40.

²⁰⁴ See *Semtek*, 531 U.S. at 508–09; see also Barrett, *supra* note 191, at 831; Shapiro, *supra* note 14, at 581–83. Federal interests might be protected by ensuring that state law does not discriminate against out-of-state claimants, *Yonley v. Lavender*, 88 U.S. (21 Wall.) 276, 282 (1875), and otherwise affords due process, *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 312–13 (1950).

²⁰⁵ See cases cited *supra* note 25.

²⁰⁶ See, e.g., *Alpert v. Taylor*, No. 09-CV-1026-T-27TBM, 2009 U.S. Dist. LEXIS 137782, at *4–5 (M.D. Fla. Sept. 21, 2009); cf. Andrew Slottje, *Remand Without Vacatur in a Changing Environment*, 132 YALE L.J.F. 932, 942–43, 945 (2023) (noting instances of statutory influence on remedial discretion).

²⁰⁷ See, e.g., *Markham v. Allen*, 326 U.S. 490, 495–96 (1946); *Pufahl v. Est. of Parks*, 299 U.S. 217, 226–27, 232 (1936); *Bd. of Trs. of the W. Conf. of Teamsters Pension Tr. Fund v. H.F. Johnson, Inc.*, 830 F.2d 1009, 1017 (9th Cir. 1987); cf. *Allen v. McCurry*, 449 U.S. 90, 98–99 (1980). Possible limits to this principle, see, e.g., *Michaelson v. United States*, 266 U.S. 42, 65–67 (1924), would not seem to be at issue here.

²⁰⁸ See *supra* section III.A, pp. 1239–42.

²⁰⁹ Although *Markham* can be read to suggest that the grant of a federal right displaces the exception, the Trading with the Enemy Act provided particularly broad jurisdiction for its enforcement. See *Markham*, 326 U.S. at 495–96 (citing Act of Oct. 6, 1917, ch. 106, § 17, 40 Stat. 411, 425 (codified at 50 U.S.C. § 4316)).

much.²¹⁰ Moreover, the reasonable place to situate considerations of federalism may be this displacement inquiry, rather than analysis of the probate exception itself.²¹¹ Although probate raises its own version of the parity debates,²¹² courts have long interpreted legislation in light of the relationship between the federal separation of powers and state control of private rights,²¹³ including in *Harris*, the Supreme Court precedent closest to being in point. One interpretation of the lower court decisions may be that the probate exception in those courts already stands for this type of presumption-shifting approach.

CONCLUSION

The assault upon the citadel of probate is proceeding in these days apace.²¹⁴ Yet in many ways, *Marshall* has fortified the probate exception from attack, providing shelter for the lower courts to rebuild *Markham's* interference test. Those courts have sometimes advanced the exception even in the context of federal question jurisdiction, apparently setting to one side concerns about differences among the relevant tribunals and about the separation of powers, although perhaps shoring up the obstacles to a federal law of succession in the process.

This Note has explored whether such decisions can be squared with prevailing views of the obligations of the federal courts. It has reached a vantage point from which some aspects of the case law, such as the relationship between jurisdiction and judgments, have started to come into focus. Others remain uncharted. For now, the probate exception remains undiminished by federal questions, mysterious and esoteric still.

²¹⁰ See, e.g., *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 717 (1996); *McCurry*, 449 U.S. at 98–99; *Picquet v. Swan*, 19 F. Cas. 609, 614 (Story, Circuit Justice, C.C.D. Mass. 1828) (No. 11,134).

²¹¹ See, e.g., *Ashton v. Josephine Bay Paul & C. Michael Paul Found., Inc.*, 918 F.2d 1065, 1072 (2d Cir. 1990); see also *Shapiro*, *supra* note 14, at 583–84.

²¹² Compare *Nicolas*, *supra* note 28, at 1479–80, 1546, and *NORMAN F. DACEY, HOW TO AVOID PROBATE* 7–9 (1965), with *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006) (Posner, J.), and *John C.P. Goldberg & Robert H. Sitkoff, Torts and Estates: Remediating Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 365 (2013).

²¹³ E.g., *Vanhome's Lessee v. Dorrance*, 28 F. Cas. 1012, 1018 (Paterson, Circuit Justice, C.C.D. Pa. 1795) (No. 16,857); *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020); see *John M. Golden & Thomas H. Lee, Federalism, Private Rights, and Article III Adjudication*, 108 VA. L. REV. 1547, 1550 (2022).

²¹⁴ The phrasing is then-Chief Judge Cardozo's. See *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931).