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A Prudential Exercise: Abstention and the Probate Exception to Federal Diversity Jurisdiction

Christian J. Grostic
University of Michigan Law School

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NOTE

A Prudential Exercise: Abstention and the Probate Exception to Federal Diversity Jurisdiction

*Christian J. Grostic**

TABLE OF CONTENTS

INTRODUCTION 131
I. THE PROBATE EXCEPTION AS ABSTENTION 136
A. *Historical Roots* 137
1. *The English Courts* 137
2. *The Early American Courts* 138
B. *Modern Practice* 141
1. *The Supreme Court* 142
2. *The Circuit Courts* 142
II. THE ROUTE TEST: THE PROBATE EXCEPTION (AS ABSTENTION) IN ACTION 144
A. *Historical Background* 144
B. *The* Erie *Doctrine* 146
C. *Prudential Justifications* 147
D. *Limits* 148
CONCLUSION 150

INTRODUCTION

Ann-Marie Brege's parents established an irrevocable trust in 1985, with Ann-Marie as sole beneficiary.[1] When Merrill Lynch Trust Co. took over as trustee years later, however, the trust's principal dropped sharply, losing over half its value in just a few years.[2] Ann-Marie sued in Michigan probate court, alleging that Merrill Lynch had violated its legal duties in administering the trust.[3] Since Ann-Marie was from New York and Merrill Lynch had its headquarters in New Jersey, Merrill Lynch had an apparently easy argument for

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1. Brege v. Merrill Lynch Trust Co., No. 04-71616, slip op. at 1 (E.D. Mich. July 20, 2004).

2. *Id.*

3. *Id.* at 1–2.

diversity jurisdiction.[4] In an unremarkable turn of events, Merrill Lynch filed a notice of removal to federal district court.[5]

Ann-Marie didn't take Merrill Lynch's removal sitting down. She filed a motion to remand to state probate court, arguing, inter alia, that the federal court lacked subject matter jurisdiction because of the probate exception to federal jurisdiction.[6] Merrill Lynch was taken aback—no court, Merrill Lynch argued, had ever applied the probate exception to a case that didn't involve a will, estate, or some equivalent substitute.[7] The federal court brushed Merrill Lynch's argument aside and instead followed a line of case law that looks to the jurisdiction of probate courts under state law to determine the extent of the probate exception.[8] Finding that Michigan gave its probate courts exclusive jurisdiction over claims involving the administration of trusts, the court granted Ann-Marie's motion to remand.[9]

Even those familiar with the probate exception may be surprised at this outcome. At its core, the probate exception stands for the proposition that federal courts do not have the authority to probate wills or administer estates.[10] While the probate exception has expanded to include matters outside of pure probate,[11] the administration of a trust, established by still-living parents, is far removed from pure probate matters involving wills and estates. At first glance, it is difficult to see how this doctrine could have so much strength and flexibility to limit federal subject matter jurisdiction, a generally rigid and inflexible doctrine.[12]

The probate exception is rooted in the Judiciary Act of 1789. Among other things, the Act granted the lower federal courts jurisdiction over "all suits of a civil nature at common law or in equity, where the matter in dispute exceeds . . . five hundred dollars, and . . . the suit is between a citizen of the State where the suit is brought and a citizen of another State."[13] In early cases, the Supreme Court interpreted this language to mean that federal courts could hear cases that, in 1789, were under the jurisdiction of English courts of common law and equity.[14] But wills, the Court held, were under the

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4. *Id.* at 2.

5. *Id.*

6. *Id.* at 2–3.

7. *Id.* at 4.

8. *Id.* at 3–5.

9. *Id.* at 5; *accord* Lepard v. NBD Bank, 384 F.3d 232, 237 (6th Cir. 2004).

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

11. *See, e.g.*, O'Callaghan v. O'Brien, 199 U.S. 89, 110 (1905) (holding that federal courts should not hear a claim "ancillary to the original probate").

12. *See, e.g.*, Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 404 (1821) ("[The federal judiciary] ha[s] no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

13. 1 Stat. 73, 78 (1789).

14. *See, e.g.*, *In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 511–12 (1875); *see also Markham*, 326 U.S. at 494.

jurisdiction of English ecclesiastical courts, and thus federal courts could not hear probate matters.[15] Federal courts have held that the probate exception survived even through a change in the language of Congress's statutory grant of jurisdiction to the federal courts.[16]

Today, it is well settled that federal courts may not hear pure probate matters, i.e., questions of probating a will or administering an estate.[17] Courts have more trouble, however, determining the outer reach of the probate exception. The federal circuit courts of appeals apply three different tests to determine the boundaries of the exception: the "nature-of-the-claim" test, the "route" test, and the "practical" test.[18]

The most common test among the federal circuits is the "nature-of-the-claim" test.[19] This test focuses on the potential claim's effects on a past, current, or impending state probate proceeding. Generally, courts applying the nature-of-the-claim test will entertain claims "if their resolution will not undercut the past probate of a will or result in the federal court assuming general jurisdiction of the probate or control of the property in the custody of the state court."[20] Courts applying this test generally construe the probate exception quite narrowly.[21]

A sizable minority of circuits use the "route" test.[22] This test looks to state law to determine the extent of the probate exception. Federal courts

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15. *See, e.g.*, *Broderick's Will*, 88 U.S. (21 Wall.) at 511–12; *see also Markham*, 326 U.S. at 494.

16. *See* 28 U.S.C. § 1332(a) (2004) ("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 (1) Citizens of different States ....") (emphasis added); Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1500 & n.113 (2001).

17. *Markham*, 326 U.S. at 494 ("[A] federal court has no jurisdiction to probate a will or administer an estate ....").

18. The U.S. Court of Appeals for the District of Columbia Circuit has not considered the probate exception in any published case since the District of Columbia Court Reorganization Act of 1970.

19. For the sake of convenience, this Note adopts the labels used by Professor Peter Nicolas to designate the various tests. *See* Nicolas, *supra* note 16, at 1488–90.

Five circuits have adopted the nature-of-the-claim test. *See* Moser v. Pollin, 294 F.3d 335, 340 (2d Cir. 2002); Golden v. Golden, 382 F.3d 348, 358–59 (3d Cir. 2000) (holding also that a state may narrow the scope of the probate exception by assigning ancillary matters to state courts of general jurisdiction); Breaux v. Dilsaver, 254 F.3d 533, 536 (5th Cir. 2001); Marshall v. Marshall, 392 F.3d 1118, 1132–33 (9th Cir. 2004); Glickstein v. Sun Bank/Miami, 922 F.2d 666, 672–73 (11th Cir. 1991). Two other circuits appear to have applied the nature-of-the-claim test in their most recent probate exception decisions but did not explicitly adopt a test. *See* Mangieri v. Mangieri, 226 F.3d 1, 2–3 (1st Cir. 2000) (citing cases applying the nature-of-the-claim test and the practical test but generally applying the nature-of-the-claim test); Sianis v. Jensen, 294 F.3d 994, 998 (8th Cir. 2000) (citing cases applying the nature-of-the-claim test and the route test but generally applying the nature-of-the-claim test).

20. *Golden*, 382 F.3d at 359 (internal quotation marks omitted).

21. *See, e.g.*, *Glickstein*, 922 F.2d at 672.

22. Three circuits have adopted the route test. *See* Turja v. Turja, 118 F.3d 1006, 1009 (4th Cir. 1997); Lepard v. NBD Bank, 384 F.3d 232, 237 (6th Cir. 2004); Rienhardt v. Kelly, 164 F.3d 1296, 1300 (10th Cir. 1999).

will not hear claims that are within the exclusive jurisdiction of state probate courts under state law.[23] In certain states, therefore, courts applying the route test construe the probate exception quite expansively.[24]

The Seventh Circuit has adopted a "practical" test.[25] Using this practical test, federal courts in the Seventh Circuit determine whether a matter is ancillary to probate—and thus within the scope of the probate exception—by determining the extent to which hearing the matter would impair the exception's policy justifications.[26] These justifications include judicial economy, relative expertness, and, to a lesser extent, legal certainty.[27]

Professor Peter Nicolas has suggested a fourth test. Professor Nicolas argues that the historical justifications for the probate exception are generally inaccurate, and thus federal courts should entertain claims that establish a justiciable Article III case or controversy and do not concern property already within the exclusive jurisdiction of a state court in in rem or quasi in rem proceedings.[28] This test construes the probate exception even more narrowly than the nature-of-the-claim test.

Entirely distinct from any consideration of probate matters, federal courts have also developed a complex doctrine of abstention. In these cases, the court indisputably has jurisdiction over the suit; for prudential reasons, however, the court dismisses or stays the proceeding.[29] Courts have developed three categories of abstention doctrine, as well as a number of cases that do not fit in the three categories but rely on the same principles.[30]

Burford abstention stands for the proposition that federal courts should dismiss cases in deference to comprehensive and complex state regulatory

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23. *See, e.g.*, *Rienhardt*, 164 F.3d at 1300 ("The standard for determining whether federal jurisdiction may be exercised is whether under state law the dispute would be cognizable only by the probate court.") (quoting McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988)). The term "jurisdiction" here indicates both the power of a court to entertain a certain type of dispute and the power to order a certain type of remedy. *See id.* at 1300 (noting that application of the route test depends on the remedies available in state probate courts); *cf.* Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 90–91 (1998) (noting that it is "commonplace" for the term "jurisdiction" to encompass the remedial powers of a court).

24. *See, e.g.*, *Lepard*, 384 F.3d at 237 (holding that the district court properly declined to hear a claim involving the administration of a trust because such claims were within the exclusive jurisdiction of the probate courts under Michigan law).

25. *See* Storm v. Storm, 328 F.3d 941, 944 (7th Cir. 2003); Dragan v. Miller, 679 F.2d 712, 714–15 (7th Cir. 1982).

26. *See Dragan*, 679 F.2d at 715–16.

27. *See Storm*, 328 F.3d at 944; *Dragan*, 679 F.2d at 714–15.

28. Nicolas, *supra* note 16, at 1540–46.

29. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 761–63 (4th ed. 2003).

30. Commentators organize different abstention cases into different categories. *See* CHARLES ALAN WRIGHT ET AL., LAW OF FEDERAL COURTS § 52, at 325 n.3 (6th ed. 2002) ("[T]he Supreme court, the lower courts, and the commentators differ on how many abstention doctrines there are. Respectable support can be found for classifying the cases into two, three, four, or five categories. The number is of little significance, since the division is a mere organizational convenience."). The three categories presented here are commonly used and other commonly-cited cases are included.

programs addressing a distinctly local issue.[31] The Supreme Court has only applied *Burford* abstention in the context of state-regulated industries.[32] The doctrine applies only to claims for injunctive or declaratory relief.[33]

Younger abstention began with the principle that, absent special circumstances, federal courts should abstain in favor of ongoing state criminal proceedings when asked to find a state criminal statute or prosecution unconstitutional.[34] The Supreme Court famously based *Younger* abstention on "Our Federalism," a policy of comity, respect, and noninterference in state court proceedings.[35] The Supreme Court has expanded the doctrine to civil cases where the state government is a party or involving important state interests.[36] The Court has even applied *Younger* abstention in the absence of an ongoing state proceeding.[37]

Pullman abstention requires a federal court to abstain when there is an unclear question of state law that could be dispositive, and the court's other option is to rule on a sensitive and unsettled constitutional question.[38] The court stays the federal proceeding while the parties submit the unclear state law question to a state court.[39] If a state court refuses to rule on the issue

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31. *See, e.g.*, Burford v. Sun Oil Co., 319 U.S. 315 (1943); Ala. Pub. Serv. Comm'n v. S. Ry. Co., 341 U.S. 341 (1951); CHEMERINSKY, *supra* note 29, at 780–85. In *Burford*, for example, Sun Oil Company filed suit in federal court alleging diversity jurisdiction and attacking the validity of a Texas Railroad Commission order granting Burford a permit to drill oil wells in a certain oil field. *Burford*, 319 U.S. at 316–17. The Court found that under Texas law, the Railroad Commission had the responsibility to regulate the entire oil field as a cohesive whole, an especially difficult task with distinctly local economic and environmental effects. *Id.* at 318–20. Texas established a system of specialized judicial review of Commission orders, with initial appeals lodged in one specific district court and subsequent appeals through normal state appellate channels. *Id.* at 325. The Supreme Court held that under these circumstances, federal courts should abstain, stating:

> The State provides a unified method for the formation of policy and determination of cases by the Commission and by the state courts. The judicial review of the Commission's decisions in the state courts is expeditious and adequate. Conflicts in the interpretation of state law, dangerous to the success of state policies, are almost certain to result from the intervention of the lower federal courts. On the other hand, if the state procedure is followed from the Commission to the State Supreme Court, ultimate review of the federal questions is fully preserved here.

Id. at 333.

32. *See* Nicolas, *supra* note 16, at 1532.

33. *Id.*

34. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971). *See generally* CHEMERINSKY, *supra* note 29, at 795–836.

35. I, 401 U.S. at 44.

36. *See, e.g.*, Moore v. Sims, 442 U.S. 415 (1979) (applying *Younger* abstention to child protection proceedings); Trainor v. Hernandez, 431 U.S. 434 (1977) (applying the doctrine to a state department's suit to recover fraudulently obtained welfare benefits); Huffman v. Pursue, Ltd., 420 U.S. 592 (1975) (applying the doctrine to a nuisance suit brought by local officials against an adult theater); CHEMERINSKY, *supra* note 29, at 817.

37. *See* Rizzo v. Goode, 423 U.S. 362 (1976) (reversing a lower court's structural injunction against a local police department as an unwarranted intrusion on official discretion).

38. *See, e.g.*, R.R. Comm'n v. Pullman Co., 312 U.S. 496 (1941). *See generally* CHEMERINSKY, *supra* note 29, at 763–75.

39. *See* CHEMERINSKY, *supra* note 29, at 763–75.

because the suit is stayed in a federal court, the federal court must dismiss the suit.[40]

The Supreme Court and lower federal courts have also abstained in a number of other cases that do not fit neatly into these three categories. For example, the Supreme Court held that abstention was required in *Louisiana Power & Light Co. v. Thibodaux*,[41] a diversity case concerning the relative eminent domain powers of the state and local governments, an important and unsettled issue of state sovereignty.[42] In *Colorado River Water Conservation District v. United States*,[43] a suit involving water rights, the Court found abstention appropriate because, among other things, abstention would avoid piecemeal litigation, the state forum would be more convenient for the over one thousand named parties, the comprehensive state court proceedings were already underway, and there had been no significant proceedings in federal court.[44] Lower courts have abstained in a variety of cases, including cases involving probate matters, citing such justifications as relative expertise, judicial economy, high state interest, and federalism.[45]

This Note argues that federal courts, informed by abstention principles, should use the route test to determine the boundaries of the probate exception. Part I argues that the probate exception is best understood as a category of abstention doctrine. Part I contends that this understanding is consistent with both the probate exception's historical roots and the modern practice of federal courts. Part II argues that the route test best captures the probate exception as abstention. Part II illustrates that the route test reflects better than any other existing test the historical background, modern developments in relevant areas of law, and the prudential justifications for the probate exception as abstention. Part II also details how courts applying the route test can appropriately limit the expansion or contraction of the probate exception.

I. The Probate Exception as Abstention

This Part argues that the probate exception is best understood as a category of abstention doctrine. Section I.A demonstrates that jurisdiction over probate matters in pre-1789 English courts was a flexible doctrine akin to modern abstention doctrine, a model that early Supreme Court cases adopted and expanded. Section I.B argues that the modern practice of federal courts also mirrors abstention doctrine, with similar practices and justifications.

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40. Harris County Comm'rs Court v. Moore, 420 U.S. 77, 88–89 (1975).

41. 360 U.S. 25 (1959).

42. *Id.* at 26.

43. 424 U.S. 800 (1976).

44. *Id.* at 801. *Colorado River Water* has since been largely limited to its facts. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 19–28 (1983).

45. *See* Nicolas, *supra* note 16, at 1538.

A. *Historical Roots*

A careful look at the historical roots of the probate exception reveals that it resembles abstention doctrine more than hard and fast jurisdictional rules. Section I.A.1 demonstrates that the division of labor among English courts for probate matters most closely resembled modern abstention doctrine. Section I.A.2 maintains that the practice of early American courts also resembled abstention doctrine, building and expanding on the practices of their predecessor English courts.

1. *The English Courts*

To the extent the Judiciary Act of 1789 adopted the division of labor of the English courts for probate matters, it adopted more of a prudential abstention doctrine than clear jurisdictional lines. Though ecclesiastical courts had the power to probate wills,[46] their jurisdiction was a matter of privilege, not a matter of right. As one English court explained:

> The common law is the most ancient, general, and fundamental law of the land. And the privileges of the church derive themselves only from the indulgence and favour of princes; and they had no foundation in the ancient common law .... And although the privileges of the church are confirmed by divers acts of parliament, that hinders not but that there was an ancient common law, in which they had no bottom.[47]

Thus common law jurisdiction remained, even over matters generally heard by ecclesiastical courts.[48]

Since the jurisdiction of the ecclesiastical courts was by privilege, their jurisdiction did not prevent courts of law and equity from exercising concurrent jurisdiction or intervening in matters otherwise properly before ecclesiastical courts.[49] While courts of equity generally did not allow a suit against the executor of a will before probate, for example, the courts made exceptions in certain cases where the executor's misconduct or the protection of the property was at issue[50] or when wills created trusts.[51] Courts of equity also exercised jurisdiction to set aside the probate of a will

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46. *See, e.g.*, 2 R.S. DONNISON ROPER & HENRY HOPLEY WHITE, A TREATISE ON THE LAW OF LEGACIES 1790–91 (2d ed. 1848).

47. *Protector v. Ashfield*, 145 Eng. Rep. 381, 382 (1656).

48. *Cf.* Thomas H. Dobbs, *The Domestic Relations Exception is Narrowed After* Ankenbrandt v. Richards, 28 WAKE FOREST L. REV. 1137, 1147 (1993) ("[S]ince the jurisdiction of the ecclesiastical courts was not of right, it also was not exclusive.").

49. *Cf.* Anthony B. Ullman, Note, *The Domestic Relations Exception to Diversity Jurisdiction*, 83 COLUM. L. REV. 1824, 1834–39 (1983) (detailing similar English court practices in domestic relations cases).

50. *See* ROPER & WHITE, *supra* note 46, at 1796–98 (describing examples of such exceptions).

51. *See* 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1155, at 461 (5th ed. 1941).

in certain circumstances.[52] As for administration of estates, the ecclesiastical courts and courts of equity exercised concurrent jurisdiction, but a court of law would defer to an ecclesiastical court that was already administering the estate.[53] And even this division of labor changed over time, as courts of equity increasingly took steps to limit the jurisdiction of ecclesiastical courts over the administration of estates during the sixteenth and seventeenth centuries.[54]

This division of labor among the English courts resembled modern abstention doctrine more than rigid jurisdictional rules.[55] The English courts of law and equity deferred to ecclesiastical courts despite retaining jurisdiction,[56] just as federal courts today abstain in favor of state courts despite having proper subject matter jurisdiction.[57] The courts of law and equity looked to the scope of the ecclesiastical courts' jurisdiction and available remedies in deciding whether to defer or not,[58] just as federal courts look to the jurisdiction of and remedies obtainable in state courts in deciding whether to abstain.[59] And the English courts at least implicitly took into account such principles as relative expertise, as courts of equity deferred to the specialized ecclesiastical courts, and judicial economy, as courts generally deferred to a court that was already hearing a case.[60] These principles weigh heavily in modern abstention doctrine.[61]

2. *The Early American Courts*

The practice of early American courts also resembled abstention doctrine. From the outset, the Supreme Court interpreted the probate exception to include matters beyond those over which the English ecclesiastical courts

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52. *See* Nicolas, *supra* note 16, at 1505–08 (describing examples of such circumstances).

53. ROPER & WHITE, *supra* note 46, at 1793; Nicolas, *supra* note 16, at 1509, 1511 n.181.

54. Nicolas, *supra* note 16, at 1510.

55. *Cf. id.* at 1520 ("[E]ven 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.").

56. *See supra* notes 46–48 and accompanying text.

57. *See supra* note 29 and accompanying text.

58. *See In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 512 (1875) (stating that it was "settled law in England" that a court of equity "will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate. It will only act in cases where the latter court can furnish no adequate remedy."); *see also supra* note 53 and accompanying text.

59. *See* Gibson v. Berryhill, 411 U.S. 564, 577 (1973) (stating that a necessary prerequisite for *Younger* abstention is "the opportunity to raise and have timely decided by a competent state tribunal the federal issues involved."); Younger v. Harris, 401 U.S. 37, 43 (1971) (stating that one of the reasons for the "longstanding public policy against federal court interference with state court proceedings" is the basic doctrine that "courts of equity should not act . . . when the moving party has an adequate remedy at law . . . ."); *supra* text accompanying notes 31–44.

60. *See* ROPER & WHITE, *supra* note 46, at 1793.

61. *See, e.g., supra* notes 35, 45 and accompanying text.

exercised exclusive jurisdiction.[62] Building off of the practice of their English predecessors, American jurisdictions developed their own unique division of labor for probate matters. Most of the colonies and early states created specialized courts to handle probate matters.[63] Just as the jurisdiction of English ecclesiastical courts changed over time, however, the scope of probate court jurisdiction in the various states evolved—for example, to include exclusive jurisdiction over the administration of estates[64] and over wills involving real property.[65] The Supreme Court followed suit, holding that the probate exception extended to those matters newly within the exclusive jurisdiction of state probate courts.[66]

Some early Supreme Court cases explicitly recognized the role state courts played in determining whether federal courts could hear a matter. In In re *Broderick's Will*, the Court noted that California had expanded the jurisdiction of its probate courts to include both wills of personal estate and real estate, whereas English ecclesiastical courts exercised exclusive jurisdiction over only wills of personal estate.[67] But the Court held that a federal court could not hear a claim to set aside a will involving real estate because "that was a question entirely and exclusively within the jurisdiction of the Probate Court."[68] In *Ellis v. Davis*, the Court carefully detailed the changing jurisdiction of probate courts among the states[69] and held that a federal court could not hear the claim at issue because plaintiff had an adequate remedy at law under the existing jurisdiction of the probate court.[70] And in *Gaines v. Fuentes*, the Court declared that a state could effectively eliminate the probate exception by vesting its courts of general jurisdiction with jurisdiction over probate matters, giving concurrent jurisdiction over probate matters to the federal courts.[71]

62. As explained above, *supra* notes 46–48 and accompanying text, the jurisdiction of English ecclesiastical courts was a matter of privilege, not a matter of right. Thus when this Note states that English ecclesiastical courts "exercised exclusive jurisdiction" over a certain set of claims, it means that English ecclesiastical courts were the only courts that exercised jurisdiction over that set of claims as a matter of practice, not as a matter of right.

63. *See* Nicolas, *supra* note 16, at 1514–18.

64. *See id.*

65. *See id.* at 1519.

66. *See* Gaines v. Fuentes, 92 U.S. 10, 25 (1876) (Bradley, J., dissenting) ("This court has in repeated instances expressly said that the probate of wills and the administration of estates do not belong to the jurisdiction of the Federal courts under the grant of jurisdiction contained in the Judiciary Act . . . ."); *In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 515, 517 (1875) (holding that a federal court could not set aside a will even though it would not have been exclusively within the jurisdiction of the English ecclesiastical courts).

67. 88 U.S. (21 Wall.) at 515 (1875).

68. *Id.* at 517.

69. 109 U.S. 485, 494–97 (1883).

70. *Id.* at 503.

71. 92 U.S. at 21 ("But that [probate] jurisdiction may be vested in the State courts of equity by statute is there recognized, and that, when so vested, the Federal courts, sitting in the States

The overall thrust of early Supreme Court probate exception jurisprudence most closely resembled abstention doctrine. By expanding the scope of the exception beyond a strict reading of the English division of labor,[72] the Court shook loose of its own statutory rationale for the exception—i.e., the interaction between the Judiciary Act of 1789 and the practice of English courts. Prudential reasons remained as the only justifications for the boundaries of the probate exception.[73] Furthermore, the Supreme Court regularly looked to state court jurisdiction to help determine the scope of the exception.[74] This combination of prudential justifications and a look to state court jurisdiction is a defining characteristic of abstention doctrine.[75] Moreover, on at least one occasion, the Court explicitly affirmed the flexible, abstention-like nature of the probate exception, stating that jurisdiction over probate matters was "neither included in nor excepted out of the grant of judicial power to the courts of the United States."[76]

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where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties.").

72. *See supra* notes 63–71 and accompanying text.

73. *Cf.* Dragan v. Miller, 679 F.2d 712, 713–14 (7th Cir. 1982). In *Dragan*, Judge Posner detailed the "shoddy" historical underpinnings of the probate exception. *Id.* at 713. Rather than refuse to follow it, however, Judge Posner concluded that the probate exception would not have continued "without a better reason than that it may have been implicit in the first judiciary act" and went on to analyze the case at hand in terms of the prudential justifications for the probate exception. *Id.* at 714–15; *cf. Fuentes*, 92 U.S. at 21 ("[W]hatever the cause of the establishment of this doctrine originally, there is ample reason for its maintenance in this country, from the full jurisdiction over the subject of wills vested in the probate courts, and the revisory power over their adjudications in the appellate courts.").

74. *See supra* notes 67–71 and accompanying text. Some other early Supreme Court cases stated that state laws should have no bearing on federal court jurisdiction. *See e.g.*, Hess v. Reynolds, 113 U.S. 73, 77 (1885); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868). But abstention cases often contain similar statements. *See, e.g.*, New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989) ("[T]he federal courts' obligation to adjudicate claims within their jurisdiction" is "virtually unflagging.") (internal quotation marks omitted); Colo. River Water Conserv. Dist. v. U.S., 424 U.S. 800, 817 (1976) ("Generally, as between state and federal courts, the rule is that the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . .") (internal quotation marks omitted). Those early probate exception cases are helpful in delineating the boundaries of the exception, but not in determining whether the exception is properly considered a category of abstention doctrine or a rigid jurisdictional rule.

75. *See, e.g.*, *Colo. River Water*, 424 U.S. at 817–19 (listing prudential justifications for abstention in the case at hand and noting the concurrent jurisdiction of the state court); Younger v. Harris, 401 U.S. 37, 43–44 (1971) (describing the adequacy of state law remedies, comity, and "Our Federalism" as factors counseling federal courts to abstain from enjoining pending state proceedings); Burford v. Sun Oil Co., 319 U.S. 315, 333–34 (1943) (describing the "expeditious and adequate" nature of the state system and the threat federal court intervention posed to the success state policies as factors requiring abstention); Nicolas, *supra* note 16, at 1538–39 (listing principles courts cite in abstaining).

76. Ellis v. Davis, 109 U.S. 485, 497 (1883); *cf.* 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 102.92[3] (3d ed. 2005) ("The probate exception is not a 'hard and fast' jurisdictional rule."). The *Ellis* Court also explicitly noted that the respective powers of the various courts continued to evolve:

> It has often been decided by this court that the terms "law" and "equity," as used in the Constitution, although intended to mark and fix the distinction between the two systems of jurisprudence as known and practised at the time of its adoption, do not restrict the jurisdiction

Looking at the probate exception through the lens of abstention also harmonizes early Supreme Court precedents. Many commentators have effectively demonstrated that the early Court's probate exception jurisprudence did not reflect the stated historical justifications for the exception[77]—that is, that the Judiciary Act of 1789 did not exclude from federal jurisdiction many of the matters that the Court excluded through its probate exception jurisprudence. Most have reacted by assuming the primacy of the jurisdiction model and the historical rationale but asserting a more accurate view of history, arguing that the Court should overrule its precedents and narrow the probate exception considerably.[78] Yet the probate exception has endured for over two hundred years, a considerable time for nothing more than a historical mistake.[79] Viewing the probate exception as abstention suggests a different perspective entirely—English court probate practice resembling abstention provided the base as well as the catalyst for the proper development of a practice of federal court abstention in probate matters.[80] This perspective allows a principled approach to the probate exception without throwing aside stare decisis.

B. *Modern Practice*

The similarities between the probate exception and abstention doctrine continue to this day. Section I.B.1 maintains that the Supreme Court's most recent probate exception decision reaffirmed the parallels between the probate exception and abstention doctrine. Section I.B.2 demonstrates that the three tests adopted by the federal circuit courts of appeals bear distinctive characteristics of abstention practices.

> conferred by it to the very rights and remedies then recognized and employed, but embrace as well not only rights newly created by statutes of the States . . . but new forms of remedies to be administered in the courts of the United States, according to the nature of the case, so as to save to suitors the right of trial by jury in cases in which they are entitled to it, according to the course and analogy of the common law.

Ellis, 109 U.S. at 497.

77. *See* Nicolas, *supra* note 16, at 1499–1520; *see also supra* notes 63–71 and accompanying text; *cf.* Barbara Ann Atwood, *Domestic Relations Cases in Federal Court: Toward a Principled Exercise of Jurisdiction*, 35 HASTINGS L.J. 571, 584–89 (1984) (detailing similar historical inaccuracies in the Supreme Court's domestic relations exception jurisprudence); Dobbs, *supra* note 48, 1147–49 (same).

78. *See* Nicolas, *supra* note 16, at 1546–47; *cf.* Atwood, *supra* note 77, at 627–28 (reaching similar conclusions regarding the domestic relations exception).

79. *Cf. supra* note 73.

80. *Cf.* Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996) ("Our longstanding application of these [abstention] doctrines reflects 'the common-law background against which the statutes conferring jurisdiction were enacted.' ") (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989)).

1. *The Supreme Court*

The Supreme Court's most recent probate exception decision, *Markham v. Allen*,[81] retained the distinctions developed by early Court decisions that resembled abstention practices. While the *Markham* Court again recited that the probate exception arose out of the jurisdictional grant of the Judiciary Act of 1789, which incorporated the practice of English courts,[82] it stated without qualification that a federal court could not "probate a will or administer an estate."[83] Thus, the Court reaffirmed that federal courts could not hear a broad range of cases, extending beyond the matters barred by strict adherence to the division of labor of eighteenth-century English courts.[84]

Furthermore, the *Markham* Court acknowledged that abstention plays a role in the probate exception context. After holding that the federal district court had jurisdiction over the claims at issue, the Court next considered whether the district court should abstain.[85] Ultimately, the Court concluded that a specific Congressional statute applicable to the petitioner, the Alien Property Custodian, precluded abstention absent prudential interests beyond the mere application of state law.[86] *Markham*'s analysis nonetheless suggests that the Court recognized that the probate exception implicates abstention concerns.

2. *The Circuit Courts*

The three probate exception tests adopted by the federal circuit courts of appeals are best understood as abstention practices, as they similarly look to the jurisdiction and remedies of the state courts, rely on prudential considerations, and incorporate the distinctions developed by the Supreme Court that resemble abstention doctrine more than rigid jurisdictional rules. The narrowest test of the three, the nature-of-the-claim test, still bears elements characteristic of abstention. Like the other two tests, it accepts the abstention-like distinctions of *Markham* and the early Supreme Court decisions.

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81. 326 U.S. 490 (1946). Markham, the Alien Property Custodian, filed suit in federal court against an executor and six claimants, seeking a judgment that Markham, as the Custodian, was entitled to the entire net estate. *Id.* at 492–93. The Alien Property Custodian is a federal official "empowered to receive all money and property in the United States due or belonging to an enemy, or ally of enemy, which may be paid, conveyed, transferred, assigned, or delivered to said custodian under the provisions of [the Trading with the Enemy Act]." 50 U.S.C. app. § 6 (1990). The Supreme Court found that Markham's suit "le[ft] undisturbed the orderly administration of decedent's estate" and was "not an exercise of probate jurisdiction or an interference with property in the possession or custody of a state court." *Markham*, 326 U.S. at 495.

82. *Id.* at 494 ("It is true that 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 and § 24 (1) of the Judicial Code, which is that of the English Court of Chancery in 1789, did not extend to probate matters.").

83. *Id.*

84. *See supra* Section I.A.2.

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

86. *Id.* at 492, 496.

Moreover, the nature-of-the-claim test often requires courts to look to state court jurisdiction and remedies, much as do the traditional categories of abstention. For example, under this test, courts hold that a case falls within the probate exception if the plaintiff's claim undercuts the past probate of a will.[87] This requires courts to look to the scope of the state court proceeding and determine what claim or claims would undercut that proceeding, much as courts applying *Younger* abstention must look to the scope of ongoing state proceedings[88] and courts applying *Burford* abstention must look to the scope and complexity of state regulatory proceedings.[89]

The route test resembles abstention doctrine even more closely than does the nature-of-the-claim test. Since federal courts applying the route test will not hear claims that are within the exclusive jurisdiction of state probate courts under state law,[90] they explicitly look to state court jurisdiction—and, accordingly, to state court remedies—and at least implicitly incorporate prudential concerns such as comity, legal certainty, judicial economy, and relative expertise of courts.[91] In much the same way, courts applying *Younger* abstention explicitly defer to certain ongoing state proceedings,[92] courts applying *Burford* abstention look to the jurisdiction of complex state regulatory proceedings and the prudential concerns implicated,[93] and courts abstaining in cases that do not fit inside the three abstention categories look to the interaction of state court proceedings and similar prudential concerns.[94]

And even more so than the route test, the practical test almost completely abandons the jurisdiction model of the probate exception in favor of prudential concerns similar to those raised by traditional abstention doctrine. The practical test primarily focuses on judicial economy, relative expertness, and legal certainty,[95] concerns which require courts applying this test to look to the jurisdiction and experience of state courts as a secondary matter.[96]

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87. *See supra* notes 19–21 and accompanying text.

88. *See supra* notes 34–37 and accompanying text.

89. *See supra* notes 31–33 and accompanying text.

90. *See supra* notes 22–24 and accompanying text.

91. *See, e.g.*, Brege v. Merrill Lynch Trust Co., No. 04-71616, slip op. at 4–5 (E.D. Mich. July 20, 2004) ("The development of the exception since *Markham* reflects respect for state specialty court jurisdiction and primary regard for practical concerns such as legal certainty, judicial economy, and relative expertise of courts. The substantially similar tests the Fourth, Seventh, and Tenth Circuits have developed incorporate these concerns by looking to the jurisdiction of probate courts under state law in determining the extent of the probate exception.") (citations omitted).

92. *See supra* notes 34–37 and accompanying text.

93. *See supra* notes 31–33 and accompanying text.

94. *See supra* notes 42–45 and accompanying text.

95. *See supra* notes 25–27 and accompanying text.

96. *See* Dragan v. Miller, 679 F.2d 712, 715 (7th Cir. 1982) ("The force of the considerations will vary from state to state depending on particular judgments made by each state and incorporated in its probate laws.").

Similar prudential concerns and practices animate the entire field of abstention doctrine.[97]

II. The Route Test: The Probate Exception (as Abstention) in Action

Even accepting that the probate exception is best understood as a category of abstention doctrine, it is not readily apparent how courts should apply this understanding. This Part argues that courts should apply the route test to determine the boundaries of the probate exception. Section II.A argues that the route test best reflects the historical background out of which the probate exception developed. Section II.B contends that the route test is most consistent with the *Erie* doctrine. Section II.C argues that the route test best incorporates the prudential justifications for the probate exception. Section II.D discusses how courts applying the route test can appropriately limit expansion or contraction of the probate exception.

A. *Historical Background*

The probate exception's historical background supports applying the route test to determine the boundaries of the exception. First, the practice of English courts in the years and decades before 1789 was similar to the route test. By definition, courts of law and equity did not hear matters over which ecclesiastical courts exercised exclusive jurisdiction. But more tellingly, courts of law and equity looked to the remedies within the power of ecclesiastical courts in determining whether to hear a given matter. As one Supreme Court case summarized the practice of English courts, "where a remedy is within the power of the ecclesiastical court ... a court of equity will not interfere .... It will only act in cases where the [ecclesiastical] court can furnish no adequate remedy."[98] The route test appropriately mirrors English court practice, as the Supreme Court's "longstanding application of [abstention] doctrines reflects 'the common-law background against which the statutes conferring jurisdiction were enacted.' "[99]

Second, early Supreme Court cases reflected the Court's willingness to allow the probate exception to evolve, as the route test allows it to. The Court repeatedly affirmed the flexible nature of the probate exception in general terms.[100] More specifically, the Court itself shepherded the early evolution of the exception, expanding it to encompass administration of estates and probate of wills of both real and personal property as states gave exclu-

97. *See supra* notes 31–45 and accompanying text.

98. *In re* Broderick's Will, 88 U.S. (21 Wall.) 503, 512 (1875).

99. Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996) (quoting New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350, 359 (1989)).

100. *See supra* notes 67–71, 76 and accompanying text.

sive jurisdiction over those matters to their probate courts[101] and declaring that states could limit the scope of the exception by limiting the jurisdiction of their probate courts.[102] Professor Nicolas's test would freeze the evolution of the probate exception at 1789,[103] requiring the Supreme Court to overrule centuries of precedent. The nature-of-the-claim test would largely freeze the evolution of the exception at the mid-nineteenth century—when the Court firmly established that federal courts could not probate a will or administer an estate[104]—allowing only technical changes in probate and administration to affect the scope of the probate exception.[105] The route test allows the evolution of the probate exception to continue as states modify the jurisdiction of their probate courts.

The route test's ability to allow the probate exception to evolve is readily apparent in a recent example of the exception's evolution. Though courts applying the nature-of-the-claim test have flatly stated that "[t]he probate exception . . . does not apply to trusts,"[106] others have recognized the similarities trusts have with wills and estates and the growing use of trusts as will substitutes.[107] Apparently uniquely among the states, Michigan decided, as one court put it, "that trusts . . . are so similar to and interrelated with wills and estates as to be placed under the exclusive jurisdiction of the probate courts . . . ."[108] Courts applying the route test have respected this step in

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101. *See supra* notes 64–66 and accompanying text.

102. *See* Gaines v. Fuentes, 92 U.S. 10, 21 (1876) ("But that [probate] jurisdiction may be vested in the State courts of equity by statute is there recognized, and that, when so vested, the Federal courts, sitting in the States where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties.").

103. Nicolas, *supra* note 16, at 1547 ("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.").

104. By 1876, the Supreme Court had established that federal courts could not probate a will or administer an estate. *See, e.g.*, *Fuentes*, 92 U.S. at 25 (Bradley, J., dissenting) ("This court has in repeated instances expressly said that the probate of wills and the administration of estates do not belong to the jurisdiction of the Federal courts under the grant of jurisdiction contained in the Judiciary Act . . . .").

105. *See supra* notes 19–21, 87–89 and accompanying text.

106. Weingarten v. Warren, 753 F. Supp. 491, 494 (S.D.N.Y. 1990); *see also* Barnes v. Brandrup, 506 F. Supp. 396, 399 (S.D.N.Y. 1981).

107. *See* Georges v. Glick, 856 F.2d 971, 974 n.2 (7th Cir. 1988) ("The plaintiffs argue that the probate exception is inapplicable here because this action relates to the execution of an inter vivos trust, not to a will. We reject such a *per se* rule. The inter vivos trust is clearly a will substitute."); Brege v. Merrill Lynch Trust Co., No. 04-71616, slip op. at 5 (E.D. Mich. July 20, 2004).

108. *Brege*, No. 04-71616, at 5. Mich. Comp. Laws § 700.1302 (2004) provides:

The [probate] court has exclusive legal and equitable jurisdiction of all of the following:

. . . .

(b) A proceeding that concerns the validity, internal affairs, or settlement of a trust; the administration, distribution, modification, reformation, or termination of a trust; or the declaration of rights that involve a trust, trustee, or trust beneficiary, including, but not limited to, proceedings to do all of the following:

the evolution of probate law and the probate exception, holding that federal courts in Michigan may not hear claims involving the administration of trusts.[109] Courts applying the nature-of-the-claim test or Professor Nicolas's test would simply hold that matters involving trusts are not within the probate exception unless they affect the probate of a will or administration of an estate, with no regard for how the use and application of trusts, wills, and estates have changed over time nor for how states have responded to those changes.

Finally, despite Supreme Court language seemingly to the contrary, courts applying the route test may look to state law without running afoul of early precedents. A number of early Supreme Court probate exception cases repeated the maxim that state laws have no bearing on the limits of federal jurisdiction.[110] In other cases, however, the Court expanded the scope of the probate exception at the same time and to the same extent as states expanded the exclusive jurisdiction of their probate courts.[111] With a proper understanding of the probate exception as abstention, courts and commentators can square this conflict. Federal courts do not have subject matter jurisdiction over only a very narrow range of probate-related matters under the jurisdictional grant of the Judiciary Act of 1789,[112] but federal court abstention has given rise to a probate exception with wider boundaries.[113] Thus, courts may properly consider state law in applying the route test to decide whether to abstain under the probate exception, just as courts look to state law in deciding whether to abstain in traditional abstention contexts.[114]

B. *The* Erie *Doctrine*

The *Erie* doctrine, a relatively recent development, also supports applying the route test. The *Erie* doctrine requires that federal courts sitting in diversity apply state law[115]—but only substantive law, not state

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(i) Appoint or remove a trustee.

(ii) Review the fees of a trustee.

(iii) Require, hear, and settle interim or final accounts.

(iv) Ascertain beneficiaries. (v) Determine a question that arises in the administration or distribution of a trust, including a question of construction of a will or trust.

(vi) Instruct a trustee and determine relative to a trustee the existence or nonexistence of an immunity, power, privilege, duty, or right.

(vii) Release registration of a trust.

(viii) Determine an action or proceeding that involves settlement of an irrevocable trust.

109. Lepard v. NBD Bank, 384 F.3d 232, 237 (6th Cir. 2004); *Brege*, No. 04-71616, at 5.

110. *See, e.g.*, Hess v. Reynolds, 113 U.S. 73, 77 (1885); Payne v. Hook, 74 U.S. (7 Wall.) 425, 429–30 (1868).

111. *See supra* notes 63–71 and accompanying text.

112. *See* Nicolas, *supra* note 16, at 1547; *infra* notes 126–132 and accompanying text.

113. *See supra* notes 77–80 and accompanying text.

114. *See supra* notes 31–37, 44 and accompanying text.

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

procedure.[116] The Supreme Court has held that in characterizing a rule as substantive or procedural, courts should rely on whether the difference would be "outcome-determinative" to the point of encouraging forum shopping.[117] A state court of general jurisdiction applying state law would dismiss claims over which state probate courts have exclusive jurisdiction, and a state probate court would dismiss claims over which it does not have jurisdiction. Federal courts that do not use the route test may allow a plaintiff to bring a collection of claims to federal court that he or she could only bring in two separate state courts—a state court of general jurisdiction and a state probate court would each dismiss some of the claims in such a collection. In this situation, the federal court rule is outcome-determinative to the point of encouraging forum shopping when compared to the practice of either state court. Federal courts that apply the route test avoid this problem entirely by mimicking the practice of state courts of general jurisdiction.

Even a narrower reading of the *Erie* doctrine supports applying the route test. *Erie Railroad v. Tompkins* and its progeny rejected uniformity across the federal system in diversity suits in favor of uniformity between federal and state courts.[118] The route test strongly supports uniformity between federal and state courts. In contrast, the nature-of-the-claim test and, to a lesser extent, Professor Nicolas's test remain at least partially premised on the desire for uniformity across the federal system in probate exception diversity cases,[119] a desire which runs contrary to the main thrust of *Erie*.

C. *Prudential Justifications*

The route test also best incorporates the prudential justifications for the probate exception. Those justifications include comity, relative expertise, judicial economy, and legal certainty.[120] The route test is both consistent with

116. *See* Hanna v. Plumer, 380 U.S. 460, 465 (1965).

117. *See id.* at 468–69.

118. *See Erie*, 304 U.S. at 75 (stating that pre-*Erie* practice "rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State"); *see also* Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) ("[I]n all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court."); Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) ("Any other ruling would do violence to the principle of uniformity within a state, upon which the *Tompkins* decision is based.").

119. *See* Payne v. Hook, 74 U.S. (7 Wall.) 425, 430 (1868) ("The equity jurisdiction conferred on the Federal courts is the same that the High Court of Chancery in England possesses; is subject to neither limitation or restraint by state legislation, and is uniform throughout the different States of the Union."); Nicolas, *supra* note 16, at 1541–42.

120. *See* Brege v. Merrill Lynch Trust Co., No. 04-71616, slip op. at 4–5 (E.D. Mich. July 20, 2004) ("The development of the exception since *Markham* reflects respect for state specialty court jurisdiction and primary regard for practical concerns such as legal certainty, judicial economy, and relative expertise of courts.") (citing Turja v. Turja, 118 F.3d 1006, 1009 (4th Cir. 1997), McKibben v. Chubb, 840 F.2d 1525, 1529 (10th Cir. 1988), and Dragan v. Miller, 679 F.2d 712, 714–15 (7th Cir. 1982)).

the prudential justifications and indicates how to weigh them properly in a given case.[121] In contrast, the nature-of-the-claim test and Professor Nicolas's test eschew the prudential justifications for the probate exception in favor of their preferred historical analyses.[122] And though the practical test explicitly incorporates the prudential justifications, judges applying it are left to sort out how to weigh the justifications on their own.[123] The route test is the only test that provides a reliable and objective method for incorporating and weighing the prudential justifications for the probate exception.

D. *Limits*

Of course, the route test has the potential to greatly expand or contract the scope of the probate exception as states expand or contract the scope of their probate courts' exclusive jurisdiction. Federal courts should appropriately limit expansion of the exception, even while applying the route test. Using the route test and comity as first principles, a court should presume that a matter is appropriately within the probate exception if it falls within the exclusive jurisdiction of the state probate courts, trusting that the state has made reasoned decisions about its courts.[124] But if it is clear that a state has instead attempted to shield a matter from federal court review, for example, the federal court should not blindly follow the route test. Courts should continue to look to the scope of traditional probate jurisdiction and the prudential justifications for the exception in determining whether a matter newly within the exclusive jurisdiction of a state probate court is sufficiently probate-related to fall within the exception.[125] And understanding the probate exception as a category of abstention doctrine, federal courts retain an appropriate measure of flexibility to hear a case when the circumstances do not warrant abstention, flexibility that courts do not have in administering rigid jurisdictional rules.

Likewise, federal courts can and should reserve certain probate matters as exclusively for state courts. This is of special concern in states that have

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121. *See supra* notes 90–91 and accompanying text.

122. *See supra* notes 19–21, 28 and accompanying text.

123. *Cf.* Storm v. Storm, 328 F.3d 941, 944 (7th Cir. 2003) (identifying legal certainty as a practical justification for the probate exception, "albeit not the strongest one").

124. *Cf. Brege*, No. 04-71616, at 5 ("Michigan has decided that trusts, whether or not *inter vivos*, are so similar to and interrelated with wills and estates as to be placed under the exclusive jurisdiction of the probate courts; this Court will respect that decision and remand this matter under the probate exception to federal diversity jurisdiction.").

125. *See, e.g., Brege*, No. 04-71616, at 3–5. The *Brege* court first noted that Michigan had granted its probate courts exclusive jurisdiction over the administration of trusts and detailed the prudential justifications for the probate exception. *Id.* The court reasoned that Michigan had reasonably decided that matters involving trusts were "similar to and interrelated with" matters involving wills and estates. *Id.* at 5. The court stated that it would "respect that decision" in finding that the claims at issue fell within the probate exception. *Id.*

eliminated specialized probate courts.[126] The Supreme Court has acknowledged that a state could significantly restrict the scope of the probate exception by vesting its courts of general jurisdiction with jurisdiction over probate matters, thereby giving concurrent jurisdiction over probate matters to federal courts sitting in diversity.[127] Other principles, however, set bounds on the extent to which states can cede power over probate matters to federal courts. First, a federal court has no jurisdiction over a matter that does not constitute a case or controversy under Article III of the U.S. Constitution.[128] The actual probate of a will or administration of an estate often does not involve an Article III case or controversy.[129] Second, a federal court may not hear in rem or quasi in rem claims, such as certain matters involving trusts, wills, and estates, if in rem or quasi in rem claims concerning the same property are already pending before a competent state court.[130] Finally, a federal court may have no power to hear a claim or discretion to refuse to hear it under traditional principles of abstention[131] and equity.[132]

Furthermore, because of its statutory and prudential bases, Congress has the power to expand or contract the scope of the probate exception by statute. Presently, Congress limits the exception via statutory grants of jurisdiction to the federal courts over specific matters, superseding other statutory limits and overriding any court-created prudential concerns. For example, the *Markham* Court decided that federal courts should not abstain in the probate exception case at hand in part because a substantive Congressional statute formed the basis for federal jurisdiction.[133] Thus, the probate

126. *See, e.g.*, ILL. CONST. art VI, § 9 ("Circuit Courts shall have original jurisdiction of all justiciable matters except when the Supreme Court has original and exclusive jurisdiction relating to redistricting of the General Assembly and to the ability of the Governor to serve or resume office. Circuit Courts shall have such power to review administrative action as provided by law."); Dragan v. Miller, 679 F.2d 712, 715 (7th Cir. 1982) (noting that Illinois eliminated specialized probate courts).

127. Gaines v. Fuentes, 92 U.S. 10, 21 (1876) ("But that [probate] jurisdiction may be vested in the State courts of equity by statute is there recognized, and that, when so vested, the Federal courts, sitting in the States where such statutes exist, will also entertain concurrent jurisdiction in a case between proper parties.").

128. U.S. CONST. art. III, § 2.

129. Ellis v. Davis, 109 U.S. 485, 496–97 (1883); *Fuentes*, 92 U.S. at 21–22; Nicolas, *supra* note 16, at 1545.

130. Donovan v. City of Dallas, 377 U.S. 408, 412 (1964); Nicolas, *supra* note 16, at 1526–27. *See generally* 30 Am Jur 2d, *Executions and Enforcement of Judgments* § 191 (2005).

131. *See, e.g., supra* notes 31–45 and accompanying text.

132. *See, e.g.*, Quackenbush v. Allstate Ins. Co., 517 U.S. 706, 717 (1996) ("[A] federal court has the authority to decline to exercise its jurisdiction when it 'is asked to employ its historic powers as a court of equity' . . . .") (quoting Fair Assessment in Real Estate Ass'n., Inc. v. McNary, 454 U.S. 100, 120 (1981) (Brennan, J., concurring)).

133. Markham v. Allen, 326 U.S. 490, 492, 496 (1946); *cf.* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 23 (1983) (stating that the existence of a federal question weighs heavily against abstention).

exception properly applies only to diversity cases,[134] and Congress has the power to further alter the scope of the exception, within the limits set by the U.S. Constitution.

CONCLUSION

Despite criticism, the probate exception has endured in the U.S. federal court system for over two hundred years. Looking back, we can now see that the probate exception fits remarkably well within another widely-criticized doctrine developed by the federal courts—abstention doctrine. The two doctrines are built on similar practices and prudential justifications, practices and justifications that extend from eighteenth century England through modern America.

Federal courts should apply the route test to determine the boundaries of the probate exception. The route test best reflects the proper understanding of the probate exception as a category of abstention doctrine, as well as the historical and modern practices and justifications for the probate exception. While applying the route test, courts still have the ability to appropriately limit expansion and contraction of the probate exception without violating the underlying prudential justifications for the exception.

134. *See* 15 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 102.92[1] (3d ed. 2005) (explaining the probate exception as a limitation on federal diversity jurisdiction); Nicolas, *supra* note 16, at 1539–40. *But see* Marshall v. Marshall, 392 F.3d 1118, 1131–32 (9th Cir. 2004) (noting that courts generally refer to the probate exception as a limit on diversity jurisdiction, but holding that the exception limited the court's federal question jurisdiction).