
**THE SEVENTH CIRCUIT TURNS A BLIND EYE TO
THE PLAYMATE: THE APPLICATION
OF THE PROBATE EXCEPTION AFTER
*MARSHALL V. MARSHALL***

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INTRODUCTION

The probate exception to federal jurisdiction prohibits federal courts from hearing cases involving matters related to the probate of wills or administration of estates.¹ It is a doctrine that has been described as “one of the most mysterious and esoteric branches of the law of federal jurisdiction.”² There are two primary policy justifications underlying this exception: first, since probate proceedings are *in rem* the federal courts cannot interfere with the state court’s control over estate property; second, the state courts are presumed to have proficiency in dealing with probate matters.³ But while the probate exception has traditionally been applied in the context of diversity jurisdiction cases, its applicability to federal

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¹ *Markham v. Allen*, 326 U.S. 490, 494 (1946).

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

³ *Jones v. Brennan*, 465 F.3d 304, 307 (7th Cir. 2006); *see also* Peter Nicolas, *Fighting the Probate Mafia: A Dissection of the Probate Exception to Federal Court Jurisdiction*, 74 S. CAL. L. REV. 1479, 1482-1483 (2001) (discussing various policy justifications for the probate exception).

question cases is less certain.⁴ Given that the purpose of federal question jurisdiction is to give federal courts the power to interpret federal law,⁵ should the probate exception apply to limit that authority? The recent decision of the United States Supreme Court in *Marshall v. Marshall*⁶ took a significant step towards clarifying the scope of the probate exception as applied to federal question cases, holding that it does not necessarily bar a federal court from hearing a probate-related matter in the context of a bankruptcy proceeding.⁷ However, though *Marshall* narrowed the applicability of the probate exception in the specific context of claims arising out of a federal bankruptcy case,⁸ it still left open the issue whether it applies to other federal question cases.⁹

Not long after the Supreme Court's decision in *Marshall*, the United States Court of Appeals for the Seventh Circuit was faced with this very issue in *Jones v. Brennan*, a case which involved a claim

⁴ Compare *Jones*, 465 F.3d at 306 (holding the probate exception applicable in federal question cases), with *Goerg v. Parungao*, 844 F.2d 1562, 1565 (11th Cir. 1988) (holding that the exception only applies to diversity cases). There are also several secondary sources on the subject which refer to the exception specifically as the probate exception to diversity jurisdiction. See, e.g., Christian J. Grostic, *A Prudential Exercise: Abstention and the Probate Exception to Federal Diversity Jurisdiction*, 104 MICH. L. REV. 131 (2005); Shawn R. McCarver, Note, *The "Probate Exception" to Federal Diversity Jurisdiction: Matters Related to Probate*, 48 MO. L. REV. 564 (1983); 32A AM. JUR. 2D *Federal Courts* § 936 (2006) (section is titled "Probate exception to diversity jurisdiction"); 36 C.J.S. *Federal Courts* § 7 (2006) ("Under the probate exception to diversity jurisdiction, a federal court may not probate a will, administer an estate, or entertain an action that would interfere with pending probate proceedings in a state court").

⁵ See JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, *CIVIL PROCEDURE* § 2.3, at 15 (4th ed. 2005).

⁶ 126 S.Ct. 1735 (2006).

⁷ *Id.* at 1746.

⁸ *Id.* at 1746, 1748; see also Brian Hermann & Penny Dearborn, *Supreme Court 2006: The Supremes Expand Bankruptcy Court Jurisdiction*, 25-AUG AM. BANKR. INST. J. 48, 85 (July/Aug. 2006) (discussing how the Supreme Court expanded bankruptcy jurisdiction in *Marshall* and another recent case).

⁹ See *Jones*, 465 F.3d at 306.

under 42 U.S.C. § 1983 arising out of probate proceedings.¹⁰ In its analysis, the court cited *Marshall* as serving to clarify the scope of the exception.¹¹ But rather than following the Supreme Court's lead in interpreting the exception narrowly, the Seventh Circuit took a broader view and held it applicable to federal question cases.¹² This Comment analyzes the effect that the *Marshall* decision has on cases involving the probate exception, specifically in the Seventh Circuit, and how that precedent should be used as a basis for formulating a clearer and narrower approach to the exception's application to federal question cases. Part I provides background information on the history of the probate exception, and how it relates to federal jurisdiction. Part II discusses cases that applied the probate exception prior to *Marshall*. Part III examines the background facts and procedural history of *Marshall*. Part IV analyzes the Seventh Circuit's application of *Marshall* in *Jones v. Brennan*, and suggests that it should have followed the narrowing trend evident in Supreme Court precedent and further restricted the parameters of the probate exception.

I. THE HISTORY OF THE PROBATE EXCEPTION AND ITS RELATIONSHIP TO FEDERAL JURISDICTION

A. *The Origins of the Probate Exception*

Though the probate exception is a doctrine that is well-established in the federal courts,¹³ its origins are not entirely clear.¹⁴ It is often

¹⁰ *Id.* at 305.

¹¹ *Id.* at 306

¹² *Id.* at 306-07.

¹³ *Dragan v. Miller*, 679 F.3d 712, 713 (7th Cir. 1982); *see also* Gregory C. Luke & Daniel J. Hoffheimer, *Federal Probate Jurisdiction: Examining the Exception to the Rule*, 39 FED. B. NEWS & J. 579 (1992) ("The probate exception is alive and well in all circuits; it survives with Supreme Court support.").

¹⁴ *Jones*, 465 F.3d at 306-07; *Dragan*, 679 F.3d at 713; *see generally* John F. Winkler, *The Probate Jurisdiction of the Federal Courts*, 14 PROB. L.J. 77 (1997) (tracing the evolution of the probate exception beginning with the eighteenth century English court system).

analogized to the domestic relations exception, which prohibits federal courts from hearing claims involving matters related to divorce, alimony, and child custody decrees.¹⁵ The most common explanation grounds the probate exception in the statutory grants of jurisdiction under the Judiciary Acts of 1789 and 1875, which provided that federal courts would have jurisdiction over “all suits of a civil nature at common law or in equity.”¹⁶ This language is generally interpreted with reference to the structure of the eighteenth-century English judicial system and the types of claims that could be brought in the various courts.¹⁷ American courts have read the phrase “at common law or in equity” as granting jurisdiction to those claims that could, in 1789, have been brought in the English courts of common law and the High Court of Chancery (equity).¹⁸ Probate matters typically did not fall into the categories of law or equity, and were handled instead by the ecclesiastical courts.¹⁹ Therefore, issues involving probate were considered to be outside the scope of federal court jurisdiction.²⁰

¹⁵ For more information on the domestic relations exception, see, for example, *Ankenbrandt v. Richards*, 504 U.S. 689, 693 (1992); Michael Ashley Stein, *The Domestic Relations Exception to Federal Jurisdiction: Rethinking an Unsettled Federal Courts Doctrine*, 36 B.C. L. REV. 669 (1995); 32A AM. JUR. 2D *Federal Courts* § 948 (2006).

¹⁶ The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 73, 78. Federal question jurisdiction was granted by the Judiciary Act of 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470, 470.

¹⁷ For examples of decisions citing to the historical division of claims among the various types of English courts as the source of origin for the probate exception, see *Marshall v. Marshall*, 126 S.Ct. 1735, 1746 (2006); *Markham v. Allen*, 326 U.S. 490, 494 (1946); *Jones v. Brennan*, 465 F. 3d 304, 306-307 (7th Cir. 2006); *Golden v. Golden*, 382 F.3d 348, 357 (3d Cir. 2004); *Moser v. Pollin*, 294 F.3d 335, 340 (2d Cir. 2002); *Georges v. Glick*, 856 F.2d 971, 973 (7th Cir. 1988); *Goerg v. Parungao*, 844 F.2d 1562, 1565 n.8 (11th Cir. 1988).

¹⁸ See, e.g., *Markham*, 326 U.S. at 494; Nicolas, *supra* note 3, at 1500.

¹⁹ See, e.g., *Golden*, 382 F.3d at 357; Nicolas, *supra* note 3, at 1500. For a thorough and detailed discussion of the historical jurisdiction of the English courts, see Winkler, *supra* note 14, at 78-88. In addition to probate of wills, the ecclesiastical courts also had exclusive jurisdiction over matrimonial issues, hence the relationship between the probate and domestic relations exceptions. See James E.

The accuracy of this historical interpretation of the probate exception's origins has recently been questioned. For example, in the Seventh Circuit's decision in *Dragan v. Miller*, Judge Richard Posner pointed out two problems with the theory:

First, there is no ecclesiastical court in America, and it is not obvious why the language of the Judiciary Act of 1789 should be taken to refer exclusively to English rather than American courts. . . . Second, the scope of the exclusive jurisdiction of the ecclesiastical court is very uncertain. In particular, it appears not to have extended beyond personal property; apparently the court of chancery had extensive jurisdiction over the inheritance of land.²¹

Judge Posner's skeptical view of this justification for the probate exception is shared by other courts and legal scholars as well. The Supreme Court described the exception as arising from "misty understandings of English legal history,"²² and recognized that the federal equity courts have jurisdiction over some probate-related claims, including "suits 'in favor of creditors, legatees and heirs' and other claimants against a decedent's estate."²³ Additionally, a detailed account of the various interests involving probate matters and the relief available to enforce those interests in both English and Colonial

Pfander, *The Playmate and the Probate Exception: The Probate Exception Lay Dormant for Decades, but Anna Nicole Smith's Supreme Court Case Brought It Back to Life*, 94 ILL. B.J. 320, 320 (2006).

²⁰ See, e.g., *Markham*, 326 U.S. at 494; Winkler, *supra* note 14, at 1500-01.

²¹ *Dragan v. Miller*, 679 F.2d 712, 713 (7th Cir. 1981) (internal citations omitted).

²² *Marshall*, 126 S.Ct. at 1741. In his concurring opinion, Justice Stevens echoed this characterization, describing the statement in *Markham* that the English chancery courts lacked jurisdiction over probate matters as a "bald assertion" and a theory "only sporadically and tentatively cited as justification for the exception." *Id.* at 1751.

²³ *Markham*, 326 U.S. at 494 (internal citations omitted).

American courts reveals that the distinction among law, equity, and ecclesiastical claims may not be as clear-cut as courts have assumed.²⁴ Because of the confusion surrounding its historical origins, at least one scholar has characterized the probate exception as a “myth of federal law” which should be abandoned.²⁵ This uncertainty, however, has not stopped federal courts from regularly applying the doctrine.²⁶

*B. The Relationship Between the Probate Exception
and Federal Jurisdiction*

Modern federal court jurisdiction is defined by Article III of the United States Constitution,²⁷ and 28 U.S.C. §§ 1331 and 1332.²⁸ There is nothing in the language of these provisions that explicitly bars federal courts from hearing probate claims; rather the probate exception is an implied restriction on federal jurisdiction that has been developed through the common law.²⁹ This raises an interesting question: why allow a common law doctrine to limit an exercise of

²⁴ Winkler, *supra* note 14, at 78-101; *see also* Nicolas, *supra* note 3, at 1518-19.

²⁵ Winkler, *supra* note 14, at 78, 152.

²⁶ Luke & Hoffheimer, *supra* note 13.

²⁷ Section 1, cl. 2 reads in pertinent part: “The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States.”

²⁸ The grant of federal question jurisdiction under the Judiciary Act of 1875, 18 Stat. at 470, was later codified as 28 U.S.C. § 1331: “The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.” Diversity jurisdiction originally granted by the Judiciary Act of 1789, 1 Stat. at 78, is codified in 28 U.S.C. 1332(a):

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$ 75,000, exclusive of interest and costs, and is between (1) Citizens of different States; (2) citizens of a State and citizens or subjects of a foreign state; (3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and (4) a foreign state, defined in section 1603(a) of this title as plaintiff and citizens of a State or of different States.

²⁹ Nicolas, *supra* note 14, at 1520.

federal jurisdiction that would otherwise meet the constitutional and statutory criteria?

One way that courts have attempted to justify the restriction on federal jurisdiction is by characterizing the exception as statutory in origin.³⁰ But since this historical foundation has been called into question,³¹ the exception has also been justified based on policy considerations. Among the policies claimed to be served by the probate exception are the promotion of legal certainty and judicial economy, respect for the expertise of the state courts in dealing with probate matters, and the interest in avoiding unnecessary interference with state probate system.³² This concern with the function of the state courts has led some scholars to advocate for an application of the probate exception based on the doctrine of prudential abstention.³³ Under the various theories of abstention, federal courts have discretion to decline to exercise jurisdiction to protect an “important countervailing interest” of a state.³⁴ Therefore, it has been suggested that even if a probate-related claim appears to fall outside the parameters of the probate exception, courts should nonetheless undertake an abstention analysis to determine if it should hear the case.³⁵

³⁰ See *supra* notes 16-20 and accompanying text.

³¹ See *supra* notes 21-24 and accompanying text.

³² *Storm v. Storm*, 328 F.3d 941, 944 (7th Cir. 2003); see also Nicolas, *supra* note 3, at 1483.

³³ See, e.g., Nicolas, *supra* note 3, at 1528-40, 1546; Grostic, *supra* note 4, at 144.

³⁴ 32A AM. JUR. 2D FEDERAL COURTS § 1229 (2006). For additional information on the types of abstention, see, for example, 17A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & VIKRAM DAVID AMAR, FEDERAL PRACTICE AND PROCEDURE § 4241; Nicolas, *supra* note 3, at 1528-41.

³⁵ Nicolas, *supra* note 3, at 1546; Grostic, *supra* note 4, at 144-149.

II. THE APPLICATION OF THE PROBATE EXCEPTION PRIOR TO *MARSHALL*

A. *Markham v. Allen*

Markham v. Allen is an early decision in which the Supreme Court attempted to limit the applicability of the probate exception.³⁶ In its opinion in *Marshall*, the Court described *Markham* as its “most recent and pathmarking pronouncement on the probate exception.”³⁷ At issue in the case was whether there was federal jurisdiction over “a suit brought by the Alien Property Custodian against an executor and resident heirs to determine the Custodian’s asserted right to share in decedent’s estate which is in course of probate administration in a state court.”³⁸ In her will, California resident Alvina Wagner left property to several German citizens.³⁹ Her heirs-at-law, six California residents, filed a petition in state court for a determination of heirship, claiming that they were entitled to Wagner’s estate because under California law “the German legatees were ineligible as beneficiaries.”⁴⁰ As Custodian, Markham issued an order vesting in himself the interests of the German legatees.⁴¹ He then brought suit in federal court for a declaratory judgment that his was the sole interest in Wagner’s estate, and that the California heirs-at-law had no such interest.⁴²

³⁶ 326 U.S. 490, 494-95 (1946); see also Hermann & Dearborn, *supra* note 8, at 85.

³⁷ *Marshall v. Marshall*, 126 S.Ct. 1735, 1746 (2006).

³⁸ *Markham*, 326 U.S. at 491-492. The petitioner’s role as an Alien Property Custodian was pursuant to § 5(b)(1)(B) of the Trading with the Enemy Act, § 301, 55 Stat. 839 (as amended by the War Powers Act 1941). For more information on this statute and the authority granted to Alien Property Custodians, see Bethany Kohl Hipp, Comment, *Defending Expanded Presidential Authority to Regulate Foreign Assets and Transactions*, 17 EMORY INT’L L. REV. 1311, 1316-1335 (2003).

³⁹ *Markham*, 326 U.S. at 492.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

Though the district court entered judgment in Markham's favor,⁴³ the Ninth Circuit reversed citing lack of subject matter jurisdiction due to the applicability of the probate exception.⁴⁴ It reasoned that since the state probate court was "in possession of the property, its right to proceed to determine heirship cannot be interfered with by the federal court."⁴⁵ The Supreme Court, however, held that the probate exception did not extend to the situation at hand.⁴⁶ It articulated the following test for determining when the probate exception bars federal jurisdiction:

[W]hile a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court...it may exercise its jurisdiction to adjudicate rights in such property *where the final judgment does not undertake to interfere with the state court's possession* save to the extent that the state court is bound by the judgment to recognize the right adjudicated by the federal court.⁴⁷

In applying this test, the Court concluded that the declaration of Markham's sole interest in the estate did not qualify as an interference with the state's possession of the property because "the effect of the judgment was to leave undisturbed the orderly administration of the decedent's estate in the state probate court."⁴⁸ Since the power to administer the estate remained with the state court, the federal court was not attempting to exercise probate jurisdiction and therefore was not barred from hearing the claim.⁴⁹ The Court, however, did not stop its analysis upon concluding that federal jurisdiction was proper, and

⁴³ *Id.* at 493.

⁴⁴ *Id.*

⁴⁵ *Id.* (quoting *Allen v. Markham*, 147 F.2d 136, 137 (9th Cir. 1945)).

⁴⁶ *Markham*, 326 U.S. at 495.

⁴⁷ *Id.* at 494 (internal citations omitted) (emphasis added).

⁴⁸ *Id.* at 495.

⁴⁹ *Id.*

went on to consider whether or not the district court should have used its discretion to decline to hear the suit because it involved issues of state law.⁵⁰ It reasoned that such an exercise of discretion was unnecessary in this situation for two reasons: first because “[t]he mere fact that the district court . . . is required to interpret state law is not in itself a sufficient reason for withholding relief to petitioner”⁵¹; and second, because the district court was exercising power granted to it by a federal statute.⁵²

B. From Markham to Marshall: Confusion in the Federal Courts Regarding the Scope of the Probate Exception

Since the Supreme Court’s decision in *Markham*, the “[l]ower federal courts have puzzled over the meaning of the words ‘interfere with the probate proceedings.’”⁵³ This confusion is manifested in two ways: first, there are several different tests used by the courts to determine the parameters of the exception;⁵⁴ second there is disagreement regarding its applicability to federal question cases.⁵⁵

1. Overview of the Tests Applied in Probate Exception Analysis

In response to the Supreme Court’s definition of the exception articulated in *Markham*, three primary tests have been developed by the lower courts to determine whether there is interference with state

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.* at 495-96. Section 17 of the Trading with the Enemy Act “specially confers on the district court, independently of the statutes governing generally jurisdiction of federal courts, jurisdiction to enter ‘all such orders and decrees . . . as may be necessary and proper in the premises to enforce the provisions’ of the Act.” *Id.* (quoting the Trading with the Enemy Act, § 301, 55 Stat. 839).

⁵³ *Marshall v. Marshall*, 126 S.Ct. 1735, 1748 (quoting *Markham*, 326 U.S. at 494).

⁵⁴ See Nicolas, *supra* note 3, at 1488; Grostic, *supra* note 4, at 133.

⁵⁵ *Jones v. Brennan*, 465 F.3d 304, 306 (7th Cir. 2006).

probate proceedings.⁵⁶ The first is the *nature of the claim* test, which “examines the nature of the plaintiff’s claim, with the plaintiff’s position vis-à-vis the will being the dispositive factor. Under the ‘nature of the claim’ test, if the plaintiff’s claim rests upon an assertion that the will is invalid . . . then the case falls within the probate exception.”⁵⁷ An example of the application of this test can be seen in the Court of Appeals for the Second Circuit’s decision in *Moser v. Pollin*.⁵⁸ That case involved a dispute regarding a will that had been admitted to probate which left the decedent’s estate entirely to his sister to the exclusion of his only child.⁵⁹ The court concluded that since the plaintiff’s claim for tortious interference with inheritance was “in substance nothing more than a thinly veiled will contest,” it qualified as a “pure probate” matter over which the federal court was unable to exercise jurisdiction.⁶⁰

Another example of a test applied by courts is the *route* test. This test:

[E]xamines the route that the suit would take had it been brought in state court. . . . [I]f the dispute under state law could be adjudicated only in a probate court, then there is no federal court jurisdiction. If, however, under state law the state courts of general jurisdiction would have jurisdiction over the dispute, then federal court jurisdiction exists.⁶¹

This test was applied by the Court of Appeals for the Sixth Circuit in *Lepard v. NBD Bank*, where a claim for breach of fiduciary duty in the administration of a trust was held to be barred by the probate

⁵⁶ The various tests are laid out in detail in Nicolas, *supra* note 3, at 1488-92 and Grostic, *supra* note 4, at 133-135.

⁵⁷ Nicolas, *supra* note 3, at 1488.

⁵⁸ 294 F.3d 335, 340-341 (2d Cir. 2002).

⁵⁹ *Id.* at 335.

⁶⁰ *Id.* at 340-341.

⁶¹ Nicolas, *supra* note 3, at 1489.

exception because the state probate courts had exclusive jurisdiction over all probate matters.⁶² Though the application of the route test involves a fairly straight-forward interpretation of state law, it leads to inconsistent results since “the scope of the probate exception varies . . . according to the internal division of jurisdiction within each state between its probate courts and its courts of general jurisdiction.”

The third and final test is referred to as the *practical* test. This approach was developed by Judge Posner and is applied in the Seventh Circuit.⁶³ Under this approach, the probate exception applies when the exercise of federal jurisdiction would “impair the policies served by the probate exception.”⁶⁴ In *Dragan v. Miller*, the court concluded that there was no jurisdiction over a tortious interference with inheritance claim based on weighing such factors as an interest in judicial economy, relative expertise of the state and federal court, and the promotion of legal certainty.⁶⁵ Judge Posner focused on the fact that as a practical matter this claim was essentially a will contest, and because the procedure for will contests was governed exclusively by the Illinois Probate Code, the factors of judicial economy and relative expertise weighed heavily against an exercise of federal jurisdiction.⁶⁶

2. The Circuit Split Regarding the Applicability of the Probate Exception to Federal Question Cases

The probate exception has typically been applied in cases based on diversity of jurisdiction.⁶⁷ This is due to the fact that with probate

⁶² 384 F.3d 232, 237 (6th Cir. 2004)

⁶³ The test was first articulated in *Dragan v. Miller*, 679 F.2d 712, 715 (7th Cir. 1981). Another example of its application is *Storm v. Storm*, 328 F.3d 941, 944 (7th Cir. 2003).

⁶⁴ *Dragan*, 679 F.2d at 715. For more information on policy considerations see *supra* note 32 and accompanying text.

⁶⁵ *Dragan*, 679 F.2d at 715-16.

⁶⁶ *Id.* at 716.

⁶⁷ *Jones v. Brennan*, 465 U.S. 304, 306 (7th Cir. 2006). As further evidence of this proposition, note that all of the cases discussed in Part II.B.1, *supra*, were based on diversity of jurisdiction.

cases, “the cause of action is usually either a breach of contract claim or a garden-variety state common law claim—such as fraud, breach of fiduciary duty, negligence, or wrongful death.”⁶⁸ Its application to federal question cases, however, is not quite as certain.⁶⁹ One court—the Court of Appeals for the Eleventh Circuit—explicitly stated the inapplicability of the probate exception to federal question cases in *Goerg v. Parungao*.⁷⁰ The court pointed to Congress’ power to create bankruptcy jurisdiction and the preemption of state law in this area under the Supremacy Clause of the Constitution to reach the conclusion that the probate exception “relates only to 28 U.S.C. § 1332 and has no bearing on federal question jurisdiction, the jurisdiction invoked in bankruptcy cases.”⁷¹ The Ninth Circuit, however, came to a contrary conclusion, “specifically reject[ing] the *Goerg* pronouncement and [holding] that the probate exception is applicable in bankruptcy cases.”⁷² It found the policy rationale of avoiding federal interference with state probate proceedings to be “as relevant to federal question cases as it is to diversity cases.”⁷³

III. *MARSHALL V. MARSHALL*: THE SUPREME COURT REVISITS THE ISSUE OF THE SCOPE OF THE PROBATE EXCEPTION

When the Supreme Court decided *Marshall* in 2006, it was the first time it addressed the probate exception since *Markham* sixty years earlier.⁷⁴ In an interesting twist, this “arcane” doctrine became the subject of renewed attention because of the quasi-celebrity marriage of a Playboy model to a billionaire over three times her age,

⁶⁸ Nicolas, *supra* note 3, at 1494-95.

⁶⁹ *Jones*, 465 U.S. at 306.

⁷⁰ 844 F.2d 1562, 1565 (11th Cir. 1988).

⁷¹ *Id.*

⁷² *In re Marshall*, 392 F.3d 1118, 1132 (9th Cir. 2004) *rev’d on other grounds sub nom Marshall v. Marshall*, 126 S.Ct. 1735 (2006).

⁷³ *Id.*

⁷⁴ 126 S.Ct. 1735 (2006). The *Markham* decision, 326 U.S. 490 (1946), is discussed in more detail *supra* Part II.A.

and the resulting dispute over his estate following his death.⁷⁵ It was a battle that started in a Texas probate court, later moving to a California bankruptcy court and federal district court, to the Ninth Circuit Court of Appeals, and eventually being heard by the United States Supreme Court.⁷⁶

A. *Facts and Procedural History of Marshall*

The petitioner in *Marshall*, Vickie Lynn Marshall, is better-known as Playboy model Anna Nicole Smith.⁷⁷ In 1994, she married Texas billionaire J. Howard Marshall (“J. Howard”); he was 89 years old, she was 26.⁷⁸ Just over a year after their marriage, J. Howard died, leaving a will that provided nothing for Vickie and named his son, Pierce, as the ultimate beneficiary.⁷⁹ During the course of the proceedings in a Texas probate court regarding J. Howard’s will, Vickie filed for Chapter 11 bankruptcy in a California court.⁸⁰ Pierce then filed a proof of claim in the bankruptcy proceeding, claiming that Vickie had defamed him and the debt arising from her alleged defamation was not dischargeable.⁸¹

⁷⁵ Pfander, *supra* note 19, at 320.

⁷⁶ The procedural history of the *Marshall* case is somewhat complicated, and involves two separate, but related claims heard by the Bankruptcy and District Courts of the Central District of California. The citations for these various decisions are provided as they are addressed in the following paragraphs.

⁷⁷ For more information than one could possibly want on Vickie Lynn Marshall, a.k.a. Anna Nicole Smith, see, for example, <http://www.annanicole.com> and http://en.wikipedia.org/wiki/Anna_Nicole_Smith. As evidence of her popularity (notoriety?), a Google™ search for her name turned up 2.5 million results (as of December 2, 2006). For the remainder of this article, I will refer to her as “Vickie,” as that is the name under which the various claims at issue were brought.

⁷⁸ *Marshall*, 126 S.Ct. at 1741; Pfander, *supra* note 19, at 320.

⁷⁹ *Marshall*, 126 S.Ct. at 1741-42.

⁸⁰ *Id.* at 1742. The citation for the initial bankruptcy claim is *In re Marshall*, 253 B.R. 550 (Bankr. C.D. Cal. 2000).

⁸¹ *Marshall*, 126 S.Ct. at 1742. Pierce’s defamation claim was based on the allegation that Vickie’s lawyers told the media that he “had engaged in forgery, fraud, and overreaching to gain control of his father’s assets.” *Id.* (citing one of the

Vickie responded to Pierce's defamation allegations asserting the defense of truth.⁸² She then counterclaimed against Pierce for tortious interference with an expected inheritance.⁸³ Among the allegations made by Vickie in support of her counterclaim were that Pierce "effectively imprison[ed] J. Howard against his wishes; surround[ed] him with hired guards for the purpose of preventing contact between him and Vickie . . . and transfer[ed] property against J. Howard's expressed wishes."⁸⁴ The bankruptcy court found in Vickie's favor and awarded damages in the amount of nearly \$450 million (less whatever she received out of the Texas probate proceedings), plus punitive damages.⁸⁵ In addition, in a second, related bankruptcy court proceeding, the court held that it had the authority to enter judgment on the tortious interference counterclaim because it qualified as a "core proceeding" to a case brought under title 11.⁸⁶

two opinions entered by the District Court of the Central District of California, *In re Marshall*, 275 B.R. 5, 9 (Bankr. C.D. Cal. 2002). Pierce claimed that the debt arising from the alleged defamation would not be dischargeable because it involved "willful and malicious injury by the debtor." *Id.* (quoting 11 U.S.C. § 523(a)(6)).

⁸² *Id.*

⁸³ *Id.* For additional information on tortious interference with inheritance, see RESTATEMENT (SECOND) OF TORTS § 774B (1979) ("One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift.").

⁸⁴ *Marshall*, 126 S.Ct. at 1742.

⁸⁵ *In re Marshall*, 253 B.R. at 553, 561.

⁸⁶ *Marshall*, 126 S.Ct. at 1742-1743; *In re Marshall*, 257 B.R. 35, 39-40 (Bankr. C.D. Cal. 2000). Under 28 U.S.C. § 157(b)(1), "[b]ankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11 . . . and may enter appropriate orders and judgments[.]" A core proceeding is defined as including "counterclaims by the estate against persons filing claims against the estate[.]" 28 U.S.C. § 157(b)(2)(C), which the Bankruptcy Court believed was sufficient to bring Vickie's counterclaim against Pierce under its authority to enter a final judgment, *In re Marshall*, 257 B.R. at 39-40. If a claim is not considered to be a core proceeding, then a bankruptcy judge may still hear the case, but instead of entering a final judgment, proposed findings and conclusions are submitted to the district court for de novo review. 28 U.S.C. § 157(c)(1).

Pierce contested the judgment of the bankruptcy court on the grounds that the tortious interference claim could only be heard by the Texas probate court, and that the probate exception barred the bankruptcy court from considering it or entering a final judgment.⁸⁷ The bankruptcy court rejected Pierce's probate exception argument as not being timely raised and therefore waived as grounds for a challenge of subject matter jurisdiction.⁸⁸ It also engaged in a brief analysis of whether the exception is even applicable to federal question cases, concluding that it should be narrowly construed to permit federal courts to hear claims other than those involving "probating of a will, administering a decedent's estate, or assuming control of property in the custody of the state court."⁸⁹

Upon review, the United States District Court for the Central District of California upheld the bankruptcy court's determination that the probate exception was not a bar to federal jurisdiction over Vickie's tortious interference claim, but it applied a different analysis.⁹⁰ The district court disagreed with the determination that Pierce had waived his probate exception argument,⁹¹ but ultimately concluded that such an argument was not applicable to the issue at hand because there was no interference with the Texas probate proceeding.⁹² In addition to this holding, the district court also expressed as dictum its belief that the probate exception "likely applies to all matters in federal court, not just those premised on diversity jurisdiction."⁹³

After an intermediate bankruptcy proceeding in the Central District of California in which the original findings were modified and adopted,⁹⁴ the case was appealed to the Ninth Circuit.⁹⁵ The Ninth

⁸⁷ *Marshall*, 126 S.Ct. at 1742.

⁸⁸ *In re Marshall*, 257 B.R. at 38.

⁸⁹ *Id.* at 37-38.

⁹⁰ *In re Marshall*, 264 B.R. 609, 619-625 (C.D. Cal. 2001).

⁹¹ *Id.* at 619.

⁹² *Id.* at 621.

⁹³ *Id.* at 620.

⁹⁴ *In re Marshall*, 275 B.R. 5 (C.D. Cal. 2002).

Circuit reversed the decision of the District Court, holding that even though Vickie's claim "does not involve the administration of an estate, the probate of a will, or any other purely probate matter,"⁹⁶ the federal courts were nonetheless barred from hearing claim by the probate exception.⁹⁷ The court reached this conclusion based on its broad interpretation of the exception as reaching "not only direct challenges to a will or trust, but also questions which would ordinarily be decided by a probate court in determining the validity of the decedent's estate planning instrument. Such questions include fraud, undue influence upon a testator, and tortious interference with the testator's intent."⁹⁸ Vickie's claims, in the opinion of the Ninth Circuit, were a "disguised attack" on the disposition of J. Howard's property under a trust instrument and therefore within the scope of the probate exception.⁹⁹

B. The Supreme Court's Narrow View of the Probate Exception

After the Ninth Circuit reversed the bankruptcy court judgments entered in Vickie's favor,¹⁰⁰ she appealed to the United States Supreme Court.¹⁰¹ The Court granted certiorari "to resolve the apparent confusion among federal courts concerning the scope of the probate exception."¹⁰² The Court ultimately agreed with the district court that the probate exception was not applicable to Vickie's claims,¹⁰³ and criticized the Ninth Circuit for the "sweeping extension" of its application.¹⁰⁴

⁹⁵ In re Marshall, 392 F.3d 1118 (9th Cir. 2004)

⁹⁶ *Id.* at 1133.

⁹⁷ *Id.* at 1137.

⁹⁸ *Id.* at 1133.

⁹⁹ *Id.* at 1137.

¹⁰⁰ *Id.*

¹⁰¹ Marshall v. Marshall, 126 S.Ct. 1735 (2006).

¹⁰² *Id.* at 1744.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1741.

The Supreme Court supported its narrow interpretation of the probate exception based on a similar approach taken in *Ankenbrandt v. Richards*,¹⁰⁵ a case involving the domestic relations exception to federal jurisdiction.¹⁰⁶ In *Ankenbrandt*, the plaintiff brought suit against her ex-husband and his companion seeking damages for sexual abuse of the plaintiff's children.¹⁰⁷ The Court reversed the finding of the district court and the Fifth Circuit Court of Appeals that the plaintiff's tort claim fell within the domestic relations exception and could therefore not be heard by the federal courts.¹⁰⁸ The domestic relations exception, the Court noted, should only apply to divest federal courts of jurisdiction over such narrow issues as "divorce, alimony, and child custody decrees."¹⁰⁹ It reasoned that while state courts are proficient in dealing with such matters, "federal courts are as equally equipped to deal with complaints alleging the commission of torts."¹¹⁰ Therefore, if the domestic relations exception is to be construed narrowly, then given their similar origins, the probate exception should be as well.¹¹¹

The *Marshall* Court's attempt to limit the applicability of the probate exception builds on its earlier articulation of the exception's scope in *Markham*.¹¹² It recognized the confusion caused by the language "interfere with the probate proceedings,"¹¹³ and offered the following clarification of the phrase:

¹⁰⁵ 504 U.S. 689 (1992).

¹⁰⁶ *Marshall*, 126 S.Ct. at 1744-45. See *supra* note 15 and accompanying text for further information regarding the domestic relations exception.

¹⁰⁷ *Marshall*, 126 S.Ct. at 1744-45 (citing *Ankenbrandt*, 504 U.S. at 691).

¹⁰⁸ *Marshall*, 126 S.Ct. at 1745 (citing *Ankenbrandt*, 504 U.S. at 692, 706-707).

¹⁰⁹ *Ankenbrandt*, 504 U.S. at 703.

¹¹⁰ *Marshall*, 126 S.Ct. at 1746 (citing *Ankenbrandt*, 504 U.S. at 704).

¹¹¹ *Marshall*, 126 S.Ct. at 1746.

¹¹² *Id.* at 1747-48; see the discussion of *Markham*, 326 U.S. 490 (1946), *supra* Part II.A.

¹¹³ *Marshall*, 126 S.Ct. at 1747-48 (quoting *Markham*, 326 U.S. at 494)

[W]e comprehend the ‘interference’ language in *Markham* as essentially a reiteration of 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*. Thus, the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent’s estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction.¹¹⁴

The Court then analyzed Vickie’s claims under this standard.¹¹⁵ First, her claims did not involve a matter of pure probate, such as probating a will or administering an estate, but rather alleged the “widely recognized tort” of tortious interference with inheritance.¹¹⁶ Second, she sought in personam jurisdiction over her stepson, Pierce, and did not seek to gain control over property in the custody of the state court.¹¹⁷ Furthermore, the Court found no policy justification for applying the probate exception to this situation because “[t]rial courts, both federal and state, often address conduct of the kind Vickie alleges. State probate courts possess no ‘special proficiency...in handling [such] issues.’”¹¹⁸ Based on this analysis, the Court held that federal jurisdiction over Vickie’s claims was not barred by the probate exception.¹¹⁹

¹¹⁴ *Marshall*, 126 S.Ct. at 1748 (internal citations omitted).

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1748-49 (quoting *Ankenbrant v. Richards*, 504 U.S. 689, 704 (1992)).

¹¹⁹ *Id.* at 1746.

IV. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE PROBATE
EXCEPTION AFTER *MARSHALL*

A. *Jones v. Brennan*

In *Jones v. Brennan*, the Seventh Circuit had its first opportunity to apply the Supreme Court's decision in *Marshall*.¹²⁰ Lois Jones brought suit under 42 U.S.C. § 1983 against Cook County probate judges, the county's public guardian and two of his deputies, and four private lawyers appointed by the court as guardians ad litem, and requested compensatory and punitive damages.¹²¹ She claimed that the defendants "conspired to deprive her of property without due process of law in the course of probate proceedings involving her father's estate."¹²² In her complaint, Jones made a number of allegations, including that the probate judges communicated *ex parte* with the guardians and failed to require guardians to provide accountings of the estate, that the guardians and Jones's siblings bargained for certain estate property, that illegal searches were conducted of Jones's belongings by the guardians, and that Jones was prevented from spending time with her father before his death due to false reports made by the guardians to convince the court to enter a protective order against her.¹²³

The United States District Court for the Northern District of Illinois dismissed the suit for lack of jurisdiction based on the *Rooker-Feldman* doctrine, which prohibits federal courts other than the Supreme Court of the United States from hearing an appeal from a

¹²⁰ 465 F.3d 304, 305-06 (7th Cir. 2006).

¹²¹ *Id.* at 305.

¹²² *Id.*

¹²³ *Id.* At the time of commencement of probate proceedings, Jones's father was still alive. Since he was incapable of handling his own affairs, his estate was already in the control of the probate court. He died while the proceedings were still ongoing. *Id.*

decision made by a state court.¹²⁴ On appeal, the Seventh Circuit disagreed with the district court's dismissal based on *Rooker-Feldman*, since the federal suit was filed before the state court proceedings regarding the estate of Jones's father were completed, and matters were raised that were not included in the state court claim.¹²⁵ The Seventh Circuit was instead concerned with a different jurisdictional issue: whether or not Jones's claims would be barred from being heard in federal court by the probate exception.¹²⁶

In considering whether the probate exception applied to Jones's claims, the Seventh Circuit cited the Supreme Court's recent decision in *Marshall* as clarifying of the scope of its application.¹²⁷ As stated by the Supreme Court, and reiterated by the Seventh Circuit, the probate exception "precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court. But it does not bar federal courts from adjudicating matters outside those confines and otherwise within federal jurisdiction."¹²⁸ The court recognized, however, that this standard is not without its ambiguities. While the exception's applicability in diversity cases is well-established,¹²⁹ the Seventh Circuit pointed out that "courts are divided over its applicability to federal-question cases, such as [*Jones*]."¹³⁰ Joining the Ninth Circuit, and disagreeing with the Eleventh, the Seventh Circuit held the exception applicable to federal question cases.¹³¹

¹²⁴ *Id.* The *Rooker-Feldman* doctrine is so-named for the two cases which articulated the concept: *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923) and *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

¹²⁵ *Marshall*, 465 F.3d at 305. Matters raised in the federal suit that weren't included in the state suit included the alleged bargaining between the guardians and the siblings and the denial of access between Jones and her father. *Jones v. Brennan*, 465 F.3d 304, 305 (7th Cir. 2006);

¹²⁶ *Marshall*, 465 F.3d at 306.

¹²⁷ *Id.*

¹²⁸ *Id.* (quoting *Marshall v. Marshall*, 126 S.Ct. 1735, 1748 (2006)).

¹²⁹ See sources cited *supra* note 4.

¹³⁰ *Jones*, 465 F.3d at 306.

¹³¹ *Id.* The cases cited by the Seventh Circuit in its discussion of the circuit split are *In re Marshall*, 392 F.3d 1118, 1131-32 (9th Cir. 2004) (probate exception

The Seventh Circuit reached this conclusion as a matter of statutory interpretation.¹³² After engaging in a brief discussion of the history of the probate exception,¹³³ the court looked to the evolution of the jurisdictional statutes to support its conclusion that the probate exception is indeed applicable to federal question cases.¹³⁴ It reasoned that because Congress did not significantly alter the language of the statutes granting jurisdiction to the federal courts after the probate exception had become established, the intention was that it would apply to federal-question as well as diversity cases.¹³⁵ Furthermore, it found the two primary policy justifications behind the exception to be equally applicable in both types of cases: first, since the actions involve a res under the control of a state court, another court should not be able to interfere; and second, the state courts are believed to be more proficient at handling probate-related matters.¹³⁶ Finally, the court did not see a problem with applying the exception to federal question cases, concluding that “since state courts are authorized to decide issues of federal law unless Congress decrees otherwise, confining a class of federal-law cases to state courts does not deprive litigants of their federal rights.”¹³⁷

The court next considered each of Jones’s claims to determine if they were barred by the probate exception.¹³⁸ With regard to the claim of “maladministration of her father’s estate,” the court expressed the belief that the probate exception clearly applied because the plaintiff was essentially “asking the district court to take over the

applies to federal question cases) and *Goerg v. Parungao*, 844 F.2d 1562, 1565 (11th Cir. 1988) (probate exception only applies to diversity cases). See *supra* Part II.B.2 for a more detailed discussion of these cases.

¹³² *Jones*, 465 F.3d at 306-07.

¹³³ See *supra* Part I.A for a more detailed discussion of the historical origins of the probate exception.

¹³⁴ *Jones*, 465 F.3d at 307.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 307-08.

administration of the estate.”¹³⁹ However, the application of the probate exception was not as clear with respect to some of the other claims, such as the alleged deprivation by the court officials and guardians of the plaintiff’s property interest in her father’s estate without due process.¹⁴⁰ The court concluded: “Though we are dubious that any of the plaintiff’s federal claims are outside the probate exception, the matter is not so clear that the judgment dismissing the case on jurisdictional grounds can be sustained without further probing in the district court.”¹⁴¹

*B. Issues with the Seventh Circuit’s Application
of the Probate Exception*

In its approach to the application of the probate exception in *Jones*, the Seventh Circuit displayed some inconsistencies with its own precedent as well as that of the Supreme Court. First, in *Dragan* the court pointed out that the historical basis for interpreting the scope of the statutory grant of federal jurisdiction was severely flawed.¹⁴² But in *Jones*, it cited that very same historically-based interpretation of the statutory language as the reason the probate exception should apply to federal question cases.¹⁴³ Second, though the Seventh Circuit has developed a test to determine the applicability of the probate exception,¹⁴⁴ it did not appear to implicate that test at all in its discussion of the plaintiff’s claims. And finally, the court seems to be expanding the parameters of the probate exception in spite of attempts by the Supreme Court to limit its applicability. Taken together, the Supreme Court’s decisions in *Markham* and *Marshall* indicate a trend towards narrowing the application of the probate exception,

¹³⁹ *Id.* at 307.

¹⁴⁰ *Id.* at 308.

¹⁴¹ *Id.*

¹⁴² See *supra* Part I.A.1, specifically note 21 and accompanying text.

¹⁴³ See *supra* notes 131-134 and accompanying text.

¹⁴⁴ See *supra* notes 63-64 and accompanying text.

particularly when there is an issue of federal law involved.¹⁴⁵ In earlier cases, the Seventh Circuit itself also advocated for a narrow interpretation.¹⁴⁶ Yet in *Jones*, the court took a contrary approach and adopted an expanded view of the exception, holding it applicable to federal question cases without any further qualification or guidance to the lower courts as to application of this rule moving forward.¹⁴⁷

Such an extension of the exception is arguably unnecessary, since the concerns about avoiding interference with state law are not nearly as compelling in a federal question case as they are in cases premised on diversity.¹⁴⁸ A litigant should have the opportunity to have a legitimate federal question heard by a federal court, regardless of whether that federal issue implicates probate matters. The Seventh Circuit should therefore adopt an approach to the application of the probate exception that weighs the federal interest more strongly against the state interest when a federal question is involved. First, the court should interpret narrowly the types of claims that even trigger the probate exception analysis, limiting it to “pure probate” matters such as probating a will and administering an estate or those that seek control over property that is already in possession of a state court. If the exception is in fact implicated, then the next step would be an abstention-type analysis.¹⁴⁹ This would give precedent to the federal interest while still taking into account any compelling interest the state may have in litigating the matter.

¹⁴⁵ See *supra* Parts II.A and III.B

¹⁴⁶ The court stated that it “had cautioned that the probate exception, as a judicially created exception to the statutory grant of diversity jurisdiction, should be construed narrowly.” *Storm v. Storm*, 328 F.3d 941, 944 (7th Cir. 2003) (citing *Georges v. Glick*, 856 F.2d 971, 973 (7th Cir. 1988); *Rice v. Rice Found.*, 610 F.2d 471, 475 (7th Cir. 1979).

¹⁴⁷ 465 F.3d at 306.

¹⁴⁸ See *supra* note 68 and accompanying text.

¹⁴⁹ See *supra* notes 33-35 and accompanying text.

CONCLUSION

Despite being a source of great confusion, federal courts seem reluctant to abandon the probate exception. The Supreme Court, through its decisions in *Markham* and *Marshall*, appears to be taking steps to narrow the application of the exception, particularly when there is an issue of federal law involved. The Seventh Circuit in *Jones*, however, disregarded this narrowing trend by holding that the exception applies to federal question cases. The court instead should have adopted an approach that limits the application of the exception in the specific context of federal question cases. Such an approach would be consistent with recent Supreme Court precedent, as well as the policy concerns underlying federal question jurisdiction.